

SENATE No. 00755

The Commonwealth of Massachusetts

PRESENTED BY:

Cynthia S. Creem

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

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

An Act to establish a public guardianship commission.

PETITION OF:

NAME:

Cynthia S. Creem

DISTRICT/ADDRESS:

First Middlesex and Norfolk

SENATE No. 00755

By Ms. Creem, petition (accompanied by bill, Senate, No. 755) of Creem for legislation to establish a public guardianship commission [Joint Committee on the Judiciary].

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

The Commonwealth of Massachusetts

—————
In the Year Two Thousand Eleven
—————

An Act to establish a public guardianship commission.

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

1 SECTION 1. Chapter 10 of the General Laws, as appearing in the 2008 Official
2 Edition, is hereby amended by inserting after section 35NN the following new section: -

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

10 shall remain in said Public Guardianship Commission Fund, subject to appropriation, to meet the
11 operational costs of said commission. All monies, as determined by the comptroller, remaining
12 in the Public Guardianship Commission Fund, in excess of appropriations from the fund for the
13 fiscal year then ending, shall on June thirtieth of each year be transferred by the treasurer to the
14 General Fund unless the general court otherwise provides.

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

26 SECTION 3. Subsection (a) of section 6A of said chapter 201, as appearing in the
27 2008 Official Edition, is hereby amended by striking out the first sentence and inserting in place
28 thereof the following sentence: - A parent of a person with intellectual disabilities, two or more
29 relatives or friends of a person with intellectual disabilities, a nonprofit corporation organized
30 under the laws of the commonwealth whose corporate charter authorizes the corporation to act as
31 a guardian of a person with intellectual disabilities, the public guardianship commission or any
32 agency with which it contracts for guardianship or conservatorship services or any agency within

33 the executive offices of health and human services or educational affairs may file a petition in the
34 probate court asking to have a guardian appointed for such persons with intellectual disabilities.

35 SECTION 4. Section 7 of said chapter 201 of the General Laws, as appearing in the
36 2008 Official Edition, is hereby amended by striking out the first sentence and inserting in place
37 thereof the following sentence: - Upon such petition the court shall cause not less than seven
38 days notice of the time and place appointed for the hearing to be given to the alleged mentally ill
39 person or person with intellectual disabilities, to the public guardianship commission if it or one
40 of the agencies with which it contracts for fiduciary services is nominated, to the department of
41 mental health in the case of a petition filed pursuant to section six, or the department of
42 developmental services in the case of a petition filed pursuant to section six A, and, if the alleged
43 mentally ill person or person with intellectual disabilities is entitled to any benefit, estate or
44 income paid or payable through the United States veterans' bureau or its successor, to said
45 bureau or its successor, except that the court may, for cause shown, direct that a shorter notice be
46 given.

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

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

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

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

74 SECTION 7. Section 16B of said chapter 201 as appearing in the 2008 Official
75 Edition, is hereby amended by striking out the first sentence and inserting in place thereof the
76 following sentence: -- A parent of a person with intellectual disabilities, two or more of his
77 relatives or friends, a nonprofit corporation organized under the laws of the commonwealth

78 whose corporate charter authorizes the corporation to act as a conservator of a person with
79 intellectual disabilities, the public guardianship commission or any agency with which it
80 contracts for guardian ship or conservatorship services or any agency within the executive
81 offices of health and human services may file a petition in the probate court asking to have a
82 conservator appointed for such person with intellectual disabilities.

83 SECTION 8. Section 21 of said chapter 201, as appearing in the 2008 Official
84 Edition, is hereby amended by striking out the first sentence and inserting in place thereof the
85 following sentence: - Upon the petition of a person of mental weakness or of a friend or upon the
86 petition of the department of transitional assistance, of the public guardianship commission or
87 any agency with which it contracts for guardianship or conservatorship services or upon the
88 petition or with the written assent of a person who by reason of physical incapacity is unable to
89 properly care for property owned by the person, the probate court may, if it finds that the
90 welfare of the person of mental weakness or physical incapacity requires the immediate
91 appointment of a temporary conservator of property owned by the person,, appoint such
92 temporary conservator, with or without notice, and may in like manner remove or discharge the
93 person or terminate the trust.

94 SECTION 9. The General Laws are hereby amended by inserting after chapter 221C,
95 as appearing in the 2008 Official Edition, the following chapter: --

96 CHAPTER 221D.

97 PUBLIC GUARDIANSHIP COMMISSION

98 Section 1. (a) There is established under the general superintendence of the supreme
99 judicial court a commission to be known as the public guardianship commission, composed of

100 nine members who shall be appointed by the members of the said court. One member shall be
101 nominated by the chief judge of the probate and family court department for the purpose of
102 representing that court on the commission; at least one member shall be a person with a
103 disability; at least one member shall be a person who is more than sixty years old; at least one
104 member shall be a representative of an organization whose primary purpose is to advocate for
105 persons with disabilities; at least one member shall be a representative of an organization whose
106 primary purpose is to advocate for elderly persons; and at least one member shall be
107 representative of elderly or other human service providers.

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

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

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

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

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

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

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

138 (i) The commission shall regularly report to the joint committee on elder affairs, the
139 joint committee on mental health and substance abuse, the house and senate committees on ways
140 and means of the general court and to the justices of the supreme judicial court. The
141 commission shall make its first report one year from the date this section takes effect and
142 thereafter annually on the last day of July (except if such would be within six months of its first

143 report), detailing (1) its priorities for service delivery and the reasons therefore; (2) the actions it
144 has taken during the preceding year, including the number of persons served and the types of
145 services provided to such persons; (3) a description of all funds, including state appropriations
146 and other assistance received by the commission; (4) the names, duties and salaries of all
147 individuals in its employ; (5) the money it has disbursed and any savings to the commonwealth
148 which its services have produced; (6) a determination of the feasibility of utilizing volunteers to
149 assist the commission in the delivery of services; and (7) a detailed plan and cost estimate for
150 any recommended expansion of the service, including any savings to the commonwealth which
151 such expansion might reasonably be expected to produce.

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

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

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

163 (d) A guardian, conservator or other fiduciary shall exercise authority only as
164 necessitated by the incapacitated person's mental and adaptive limitations, and to the extent

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

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

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

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

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

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

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

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

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

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

204 Section 4. (a) Any resident of the commonwealth who is indigent (as defined in
205 section twenty-seven A of chapter two hundred and sixty-one) and who is an incapacitated
206 person for whom no other qualified person or organization is available and willing to accept

207 appointment as guardian, conservator or other fiduciary, shall be eligible for the services of the
208 commission.

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

225 Section 5. (a) The commission may, subject to appropriation, contract with non-
226 profit private agencies and individuals to serve as the guardian, conservator or other fiduciary or
227 to provide guardianship, conservatorship or other fiduciary services to any individual for whom
228 the commission has been or might be appointed such fiduciary; provided, how - ever, that no
229 such contra ct shall be entered into with a non-profit private agency unless the articles of

230 incorporation of the agency authorize it to serve in such fiduciary capacity. Any such non-profit
231 private agency or individual with which or with whom the commission so contracts shall in this
232 section and in sections 6 and 7, be referred to as a "fiduciary agency."

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

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

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

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

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

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

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

267 (i) The commission shall be eligible for and shall have the authority to accept any and
268 all donations, grants, appropriations, bequests and devises of money, property, personnel services
269 or other assistance which may be received from the commonwealth or any agency thereof, the
270 United States or any agency thereof, and other governmental agency, any institution, person,
271 firm or corporation, public or private; to be held, used or applied for any or all purposes specified
272 in this chapter. No such assistance shall in any way compromise or limit the independence and

273 autonomy of the commission or its authority to carry out the purposes of this chapter. Any
274 funds received by the commission other than by appropriation shall be deposited into the Public
275 Guardianship Commission Fund, as provided for in section 35CC of chapter 10.

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

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

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

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

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

295 Section 7. Notwithstanding any other law to the contrary, neither the commission nor
296 any fiduciary agency shall be required to file a bond in individual cases in which the commission
297 or a fiduciary agency is appointed to act in a fiduciary capacity but shall give a bond, with
298 sufficient sureties, for the joint benefit of all persons for whom the commission or fiduciary
299 agency is appointed to act in an amount not less than the value of all assets held by the
300 commission and such contracted fiduciary agencies as of the last day of the most recent fiscal
301 year, but at no time less than fifty thousand dollars. Such bond shall be filed with the chief
302 judge of the probate and family court department, and a copy thereof shall be filed with the
303 register of probate of each division of said court in which the commission or a fiduciary agency
304 has been appointed to serve in a fiduciary capacity. The state treasurer may, subject to
305 appropriation, set aside sufficient funds for the purpose of providing a surety for the
306 commission's bond pursuant to this section.

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

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

315 SECTION 11. All other sections of this Act, including the other sections of said
316 chapter 221D, shall take effect on October 1, 2012, provided, however, that, at said effective

317 date, the provisions of subsection (a) of section 4 of said chapter 221D shall apply only to
318 Suffolk county.

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