

## **A Summary of Public Act No. 07-116**

### **AN ACT CONCERNING CONSERVATORS AND APPEALS OF CONSERVATORSHIPS AND GUARDIANSHIPS**

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This Act undertakes a major overhaul of the statutory procedures regarding involuntary conservatorships. Initially, it should be noted that the act involves a change in terminology. A "respondent" is an individual for whom an application for appointment of a conservator has been filed. A "conserved person" is one for whom an involuntary conservator has been appointed. The term "ward" is no longer used.

#### ***Court Ordered Examination by Physicians, Psychiatrists or Psychologists***

Whenever an individual's capacity is at issue in a matter before it, the Probate Court may order an examination by a physician, psychiatrist or psychologist. However, the Act provides that a respondent in an application for appointment of an involuntary conservator or temporary conservator may refuse to undergo such examination notwithstanding the court order. [§45a-132a]

#### ***Probate Appeals***

The Act makes significant revisions to the procedures for appeals from probate. First, the Act extends the usual thirty-day appeal period to forty-five days for any matter involving conservatorships or guardianships of the mentally retarded. [§45a-186 (a)]

Next, the process of filing the appeal is altered. The Act provides that the appeal is commenced by the filing of a complaint in the Superior Court. The complaint is to be served on all interested parties and upon the court of probate that rendered the decree appealed from. This eliminates the requirement that a motion for appeal be filed with and allowed by the Probate Court. [§45a-186 (a),(b)]

The Act provides, in accordance with existing case law, that the filing of an appeal shall not in itself stay the decree appealed from. However, the Act goes on to provide that a motion for stay may be filed in either the Probate Court or the Superior Court. [§45a-186 (f)]

The hearing in connection with any appeal taken in certain specified types of matters must commence within ninety days after the appeal is filed, unless a stay has been imposed under subsection (f). [§45a-186 (e)]

If the matter was heard on the record in the Probate Court, the court recording must be transcribed within thirty days following service of the appeal. The cost of the transcript shall be charged to the party filing the appeal, unless waived due to their inability to pay. [§45a-186a (a)]

The Probate Court shall transmit to the Superior Court the entire record in the matter. The record shall include the Probate Court's findings of fact and conclusions of law, separately stated. [§45a-186a (b)]

With respect to matters heard on the record, the appeal shall be heard in the Superior Court without a jury and shall be confined to the record. However, if irregularities in procedure before the Probate Court are alleged but not shown in the record, the Superior Court may accept additional evidence, limited to the alleged irregularities. [§45a-186a (c)]

Where the appeal is taken from a matter heard on the record, the Superior Court shall not substitute its judgment for that of the Probate Court. The decision shall be affirmed unless the Superior Court finds that substantial rights have been prejudiced because the findings or conclusions are (1) in violation of the federal or state constitutions or the general statutes; (2) in excess of the court's statutory authority; (3) based upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous when viewed in light of the record as a whole; or (6) arbitrary, capricious or characterized by abuse of discretion. [§45a-186b]

### ***Definitions of Incapacity***

The definitions of incapacity required for the appointment of a conservator have changed significantly. Previously the definitions focused on the extent to which some physical or mental condition prevented the respondent from caring for him or herself or managing his or her affairs. The new definitions shift the focus to the impact on the respondent's ability to evaluate information and make decisions relative to their care or the management of their affairs. The revised definitions require that the court consider whether some mental, emotional or physical condition "results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance" to meet essential needs or manage their affairs. [§45a-644 (c), (d)]

The Act defines a new term: "least restrictive means of intervention." This is defined as a means of intervention, accomplished within available resources, that is sufficient to provide for personal needs or property management "while

affording the conserved person the greatest amount of independence and self-determination." [§45a-644 (k)]

### ***Recording of Proceedings***

The Act requires that the court make a recording of all conservatorship proceedings, and that the recording be part of the record of the court. The recordings are to be made and maintained in a manner approved by the Probate Court Administrator. [§45a-645a]

This requirement should be viewed in light of §45a-186a of the Act regarding appeals. As these matters will be heard on the record, any appeal will be confined to the record, and, no longer *de novo*.

### ***Jurisdiction***

Previously the statutes required the filing of an application for appointment of an involuntary conservator in the probate district where the respondent resided or was domiciled. The Act adds a third alternative, permitting the matter to be filed where the respondent is located at the time. [§45a-648 (a)]

### ***Non-domiciliaries***

Significant new provisions are added for respondents not domiciled in the state but located here. No such appointment shall be made unless (i) the respondent is presently located in the district; (ii) notice has been given to the parties required to receive notice under §45a-649 (a); (iii) efforts have been made to return the respondent to his or her domicile but the respondent has refused or the efforts have been unsuccessful; and (iv) all other usual requirements for appointment have been met.

If an appointment is made for a non-domiciliary, the court must review that appointment every sixty days thereafter. The appointment will expire at the end of such sixty day period unless the court finds that each of the requirements listed above continues to be met. If at some point the respondent becomes domiciled in the state, these provisions cease to apply. [§45a-648 (d)]

### ***Notice***

The Act requires that notice of the application be served on the respondent and necessary parties at least ten days before the hearing. This is an increase from the seven days required under previous law. In addition, personal service must be made on the respondent. *The prior provision permitting service on the attorney for the respondent under certain circumstances has been eliminated.* In

the absence of such personal service, the court shall not have jurisdiction to make the requested appointment. [§45a-649 (a)]

Notice to the respondent must include an expanded notice of rights set out in the Act. [§45a-649 (b)]

### ***Right to Counsel***

The respondent or conserved person has the right to counsel of his or her own choice at his or her cost. However, if the respondent or conserved person is indigent, he or she has the right to choose their own counsel, provided the attorney is willing to serve within the payment guidelines of the Probate Court. [§45a-649a (a)]

The court shall appoint counsel for an indigent respondent or conserved person, unless the person refuses counsel and the court finds that he or she understands the nature of that refusal. [§45a-649a (b)]

An attorney for a respondent or conserved person shall represent that person in all proceedings under §§45a-644 to 45a-663, inclusive, i.e. all matters involving conservatorship. The attorney shall also consult with the client regarding possible appeal to the Superior Court. Upon request the attorney shall assist with the filing of an appeal. However, the attorney is not obligated to appear in or prosecute the appeal. [§45a-649a (c)]

An attorney representing a respondent *shall not* accept appointment as guardian ad litem or conservator unless nominated by the respondent. [§45a-649a (f)]

### ***Hearing and Appointment***

Hearing must be held within thirty days of the filing of the application. §45a-649 (a).

The Act requires that the court must, before hearing any evidence regarding the condition of the respondent, find by clear and convincing evidence, that (i) the court has jurisdiction; (ii) the respondent has received notice; (iii) the respondent has been advised of the right to counsel; and (iv) the respondent is represented or has waived the right to counsel. [§45a-650 (a)]

The rules of evidence shall apply in any such hearing, and all testimony must be given under oath. [§45a-650 (b)]

The findings listed above having been made, the court may proceed to receive evidence concerning the respondent's condition and capacity. Medical evidence shall be introduced unless waived by the court due to the absence of or refusal of the respondent to be examined. Upon the filing of the application, the court shall

issue an order for the disclosure of the medical information to the respondent's counsel, and upon request, to the respondent. The court may order such disclosure to others, as it deems necessary. [§45a-650 (c), (d)]

Appointment of a conservator requires that the court find, by clear and convincing evidence, that the respondent's affairs cannot be adequately managed, and /or the respondent cannot be cared for adequately, without the appointment of a conservator, and that such appointment is the least restrictive means of intervention available. No conservator may be appointed if the respondent is cared for adequately, or their affairs managed, through a power of attorney or health care representative. [§45a-650 (f)]

In determining whether to appoint a conservator the court shall consider: (i) the respondent's abilities; (ii) his or her capacity to understand and articulate preferences; (iii) relevant information obtained from the respondent; (iv) evidence of past preferences; (v) respondent's cultural background; (vi) desirability of maintaining continuity in the respondent's life; (vii) previous arrangements made by the respondent; (viii) relevant information provided by the respondent's family or others; (iv) supportive services or technologies available. [§45a-650 (g)]

The respondent may nominate a conservator who shall be appointed, unless such person declines to serve or the court finds substantial evidence to disqualify that person. In considering who to appoint the court shall consider: (i) the proposed conservator's knowledge of the respondent's preferences; (ii) their ability to carry out the duties of a conservator; (iii) the costs; (iv) their commitment to promoting the respondent's welfare and independence; and (v) any conflict of interest. [§45a-650 (h)]

Absent a contrary court order, a conservator is bound by all decisions of the conserved person's health care representative. [§45a-650 (j)]

The conserved person retains all rights not specifically assigned to the conservator. The court shall assign to the conservator only those powers representing the least restrictive means of meeting the conserved person's needs. The court must make findings by clear and convincing evidence supporting each duty assigned to the conservator. [§45a-650 (l)]

Conservator proceedings shall not diminish the right of the conserved person to retain an attorney or seek redress in any court or administrative agency. [§45a-650 (m)]

### ***Contracts and Funds Pending Application***

Previous law permitted a petitioner to file a notice of the pendency of an application for appointment of conservator on the land records, thereby preventing any conveyance of the property without the approval of the court. A

similar notice could be filed with a bank or other depository, preventing any withdrawals unless approved by the court.

The Act retains these provisions, but requires that any such notice be certified by the court. The original notice must be filed with the court, and no copy may be filed as above unless certified by the court. [§45a-653]

### ***Temporary Conservators***

Upon receipt of an application for temporary conservator, the court must appoint counsel for the respondent, give notice to the respondent and hold a hearing. The hearing shall be held not later than seven days after filing, excluding weekends and legal holidays, with notice provided to the respondent at least five days prior to the hearing. [§45a-654 (c)]

A physician's report must be filed with the application, unless waived by the court due to the refusal of the respondent to be examined. [ §45a-654 (b)]

If the court determines that the delay occasioned by giving notice would result in immediate and irreparable injury to the respondent, the court may issue an ex parte appointment of a temporary conservator. The decree must include findings as to the immediate and irreparable harm that formed the basis for the ex parte determination. Notice of hearing must be given within forty-eight hours and a hearing must be held no more than three days, excluding weekends and legal holidays, following the ex parte appointment. The ex parte appointment will expire in three days, unless a hearing has been commenced and continued for good cause. [§45a-654 (c), (d)]

In appointing a temporary conservator the court must find, by clear and convincing evidence, (i) that the respondent is incapable; (ii) that immediate and irreparable harm will result to the respondent if a temporary conservator is not appointed; and (iii) the temporary conservator is the least restrictive means of intervention available. The court shall limit the duties of the temporary conservator to the circumstances giving rise to the appointment and shall set forth each duty or authority given to the conservator. [§45a-654 (a)]

Existing law provides that a temporary appointment is good for thirty days, but may be extended for up to thirty additional days if, within the initial thirty-day period, an application for appointment of an involuntary conservator is filed. The Act makes clear that no temporary conservatorship may last for more than sixty days from the initial appointment. [§45a-654 (a)]

The Act also makes clear that upon termination of a temporary conservatorship of the estate, the temporary conservator must file a final account. [§45a-654 (f)]

### ***Powers of Conservators***

Conservators of the person as well as of the estate are required to use the least restrictive means of intervention in carrying out the duties and authority. [§45a-655 (a), §45a-656 (a)]

In addition, a conservator of the person must: (i) assist in removing obstacles to the conserved person's independence; (ii) assist the conserved person in achieving self-reliance; (iii) ascertain the conserved person's views; (iv) make decisions in conformance with reasonable and informed preferences of the conserved person; (v) ascertain health care instructions and other wishes of the conserved person and make decisions in accordance therewith; (vi) afford the conserved person the opportunity to participate in decision making and delegate reasonable responsibility to the conserved person to make his or her own decisions. [§45a-656 (b)]

The conservator's annual report to the court shall include the efforts made to encourage independence and the conservator's statement that the conservatorship is the least restrictive means of intervention for managing the persons' needs. [§45a-656 (c)]

### ***Placement and Change of Residence***

A conservator may not, except as provided in §45a-656b, (i) terminate a conserved person's lease; (ii) sell or dispose of real property or household furnishings; or (iii) change the conserved person's residence, *unless* the Probate Court finds, after a hearing, that such action is necessary, or that the conserved person consents. [§45a-656b (a)]

Prior to placing a conserved person in an institution for long-term care, a conservator must file a report of the intended placement with the Probate Court. The report must include the basis of the conservator's determination, the community resources available and considered and the reasons that the conserved person's needs cannot be met in a less restrictive setting. The conservator shall mail a copy of the report to the conserved person, the conserved person's attorney, and interested parties as determined by the court. The conservator shall certify to the court that copies were so provided. [§45a-656b (b),(c)]

If the placement follows the discharge of the conserved person from a hospital, the placement may be made prior to the filing of the report, provided that the report must be filed within five days after the placement. The report must indicate that the placement followed discharge from a hospital and the circumstances

requiring the placement. However, the placement shall not continue unless approved by the Probate Court after a hearing under this section. [§45a-656b (b)]

The court shall hold a hearing on the report within five days, excluding weekends and legal holidays, after filing, and not less than seventy-two hours before the placement. After such initial hearing, the conserved person may request a hearing on placement at any time, and a hearing must be held within ten days thereafter, excluding weekends and holidays. However, the court is not required to hold more than three such hearings in a twelve month period, unless based on information not previously available to the court. If the court finds, after a hearing, that the respondent's needs could be met in a less restrictive setting, the court shall order that the conserved person be placed in such less restrictive setting. [§45a-656b (d), (f)]

For purposes of this section, an "institution for long-term care" includes a federally-certified skilled nursing facility, intermediate care facility, residential care home, extended care facility, nursing home, rest home or rehabilitation facility. [§45a-656b (h)]

### ***Conservator of Non-resident's Property***

Section 45a-659 relates to persons domiciled outside this state but owning real or tangible personal property here, and for whom a conservator has been appointed in their state of domicile. Under the existing statute, the out-of-state conservator may present an application to a Probate Court of this state, together with certified copies of their appointment in the state of domicile. The Probate Court is authorized to make such appointment without a hearing.

This Act retains this procedure, but requires that, before any such appointment of a conservator is made, an attorney for the respondent must be appointed. [§45a-659 (a)]

### ***Termination of Conservatorship***

A conserved person may request a hearing on the termination of the conservatorship at any time, and the court must hold a hearing within thirty days, unless continued for good cause. The conserved person is not required to present medical evidence at such hearing, and the court's determination shall be made upon a preponderance of the evidence. [§45a-660(a)]

### ***Triennial Reviews***

The Act now requires each conservatorship to be reviewed one year after appointment, and at least every three years thereafter. The review requires reports from the conservator and a physician to be filed with the court. Copies of



those reports must be forwarded by the court to the attorney for the conserved person. Within thirty days thereafter, the attorney must notify the court that he or she has met with the conserved person and state whether or not a hearing is requested. The attorney no longer files a report of the type required under the prior law. [§45a-660 (c)]

Upon receipt of the necessary reports, the court need not hold a hearing unless requested. The court may order the continuation or modification of the conservatorship if it finds by clear and convincing evidence that the conserved person continues to be incapable and that there are no less restrictive means of intervention available. If the court cannot make such findings, it shall order the termination of the conservatorship. [§45a-660 (d)]

### ***Writ of Habeas Corpus***

The Act provides that a respondent or conserved person may challenge the legality of an involuntary representation or guardianship under Chapter 802h by means of a writ of habeas corpus. This includes conservatorship, guardianship of the mentally retarded and guardianship of the person or estate of minors. The availability of this remedy is not dependent upon the exhaustion of other remedies, including appeal. [§45a-705a (a)]

Such action may be brought in the Superior Court or the Probate Court. If brought to the Probate Court, the Probate Court Administrator shall appoint a three-judge panel to hear the matter. The members shall be chosen from among judges of probate approved by the Chief Justice to hear such matters. The judge of probate who issued the order that is the subject of the writ shall not be a member. The judges shall designate a chief judge from among their members. The hearing shall be recorded and the recording shall be part of the record. The records shall be maintained as part of the record of the court of probate in which the guardian or conservator was appointed. [§45a-705a (d)]

Hearing shall be held within ten days after return of the writ, excluding weekends and holidays. Denial of the writ requires the vote of at least two members of the panel. [§45a-705a (d), (e)]

A determination by the panel that the appointment was not illegal may be appealed to the Superior Court. The matter shall be brought to the Judicial District in which the probate court is located, and shall be heard within thirty days of filing. [§45a-705a (h)]

A determination that the matter was not illegal shall not preclude the later filing of another such writ if it is claimed that the individual is no longer subject to the condition for which the appointment was initially made, or if different grounds are alleged. [§45a-705a (g)]

**Sec. 45a-656b. Duties of conservator re real and personal property and placement of conserved person.** (a) Except as provided in subsections (b), (c), (d), (e) and (f) of this section, a conservator may not terminate a tenancy or lease of a conserved person, as defined in section 45a-644, sell or dispose of any real property or household furnishings of the conserved person, or change the conserved person's residence unless a court of probate finds, after a hearing, that such termination, sale, disposal or change is necessary or that the conserved person agrees to such termination, sale, disposal or change.

(b) If the conservator determines it is necessary to cause the conserved person to be placed in an institution for long-term care or to change the conserved person's residence, the conservator shall file a report of the intended placement in an institution for long-term care or change of residence with the court of probate that appointed the conservator. The court shall hold a hearing to consider the report. If, after the hearing, the conservator obtains permission of the court for the intended placement or change of residence, the conservator may make such a placement or implement such a change of residence. The hearing shall be held not less than five days after the filing of the report, excluding Saturdays, Sundays and holidays, and not less than seventy-two hours before the placement in the institution for long-term care or the change of residence, except that if the placement in an institution for long-term care results from the conserved person's discharge from a hospital, the conservator may make the placement before filing the report, provided the conservator (1) files the report not later than five days after making such placement, and (2) includes in the report a statement as to the hospital discharge and related circumstances requiring the placement of the conserved person in the institution for long-term care. No such placement made before the filing of the

report of the conservator shall continue unless ordered by the Court of Probate after a hearing held pursuant to this section.

(c) A report filed under subsection (b) of this section with respect to placement in an institution for long-term care shall set forth the basis for the conservator's determination, what community resources are available and have been considered to avoid the placement, and the reasons why the conserved person's physical, mental and psychosocial needs cannot be met in a less restrictive and more integrated setting. Such community resources include, but are not limited to, resources provided by the area agencies on aging, the Department of Social Services, the Office of Protection and Advocacy for Persons with Disabilities, the Department of Mental Health and Addiction Services, the Department of Developmental Services, any center for independent living, as defined in section 17b-613, any residential care home or any congregate or subsidized housing. The conservator shall give notice of the placement of the conserved person in an institution for long-term care and a copy of such report to the conserved person, the conserved person's attorney and any interested parties as determined by the court. Service shall be by first-class mail. The conservator shall provide a certification to the court that service was made in the manner prescribed by this subsection.

(d) The conserved person may, at any time, request a hearing by the court on the person's placement in an institution for long-term care which hearing may determine the availability of a less restrictive alternative for the person's placement. On request of the conserved person made after the initial hearing held under subsection (b) of this section, the court shall hold a hearing on the placement not later than ten days, excluding Saturdays, Sundays and holidays, after receipt by the court of such request. The court shall not be required to conduct a hearing under this subsection more than three times in any twelve-month period following the hearing held under subsection (b) of this section authorizing the initial placement, except that the court shall conduct a hearing whenever information not previously available to the court is submitted with a request for a hearing.

(e) After the initial hearing held under subsection (b) of this section, the court may hold a hearing on a conservator's report and the placement of the conserved person in an institution for long-term care in any case even if no request for a hearing is made.

(f) If the court, after a hearing on the placement of the conserved person in an institution for long-term care, determines that the conserved person's physical, mental and psychosocial needs can be met in a less restrictive and more integrated setting within the resources available to the conserved person, either through the conserved person's own estate or through private or public assistance, the court shall order that the conserved person be placed and maintained in a less restrictive and more integrated setting.

(g) A conserved person may waive the right to a hearing required under this section if the conserved person's attorney has consulted with the conserved person and the attorney has filed with the court a record of the waiver. Such a waiver shall be invalid if the waiver does not represent the conserved person's own wishes.

(h) For purposes of this section, an "institution for long-term care" means a facility that has been federally certified as a skilled nursing facility, an intermediate care facility, a residential care home, an extended care facility, a nursing home, a rest home and a rehabilitation hospital or facility.