

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF DEVELOPMENTAL SERVICES

In Re: Appeal of [REDACTED]

This decision is issued pursuant to the regulations of the Department of Developmental Services 115 CMR 6.30 – 6.34 (formerly known as Department of Mental Retardation, hereinafter referred to as “DDS” or “Department”) and M.G.L. c. 30 A. A Fair Hearing was held on [REDACTED] 2009 at the [REDACTED] in [REDACTED], Massachusetts.

Those present for all or part of the hearing were:



John Cox, LICSW  
Kermit A. Brown  
Richard J. O'Meara  
Elizabeth Duffy, Esq.

Appellant  
Brother & Appellant's co-guardian  
Appellant's co-guardian  
Counsel for the Appellant  
Paralegal for the Appellant  
DMH Social Worker  
DMH Human Rights Officer  
DDS Regional Director, Southeast Region  
Counsel for DDS

The Fair Hearing proceeded under the informal rules concerning evidence with approximately four and one-quarter hours of testimony presented. The Appellant's evidence consists of eighteen exhibits along with sworn oral testimony from the Appellant, the Department of Mental Health (DMH) Social Worker, the Appellant's brother (who is also his co-guardian), and the Appellant's attorney co-guardian. The evidence presented on behalf of the Department of Developmental Services consists of twenty-eight exhibits and sworn oral testimony from the Regional Director of DDS's Southeast Region.

At the close of the fair hearing, the Parties requested additional time to submit closing arguments to the Hearing Officer. The Parties were instructed to submit closing arguments by [REDACTED], 2009; both Parties submitted within the allowed time.

**ISSUE PRESENTED:**

Whether the Appellant meets the DDS eligibility requirement of domicile as set forth in 115 CMR 6.04.

**BACKGROUND:**

The Appellant, [REDACTED], is a 43 year old male who is currently under the care of a Department of Mental Health (DMH) facility at [REDACTED]. The Appellant was born in South Carolina but raised in Georgia where he remained throughout his childhood and adult life, living with his mother until her death in 2000 and then, off and on, with relatives until, in 2002, he moved to New Hampshire to live with his brother, [REDACTED].

The Appellant has had a history of incarceration and psychiatric hospitalization while living in Georgia and New Hampshire. His involvement with the State of Massachusetts began in 2002, when, on his way to [REDACTED], the stolen car he was driving ran out of gas. The Appellant was arrested and, on [REDACTED], 2002, he was sent to [REDACTED] for a M.G.L. Chapter 123 Section 15(b) evaluation as to his competency to stand trial. The Appellant was found incompetent to stand trial on [REDACTED] 2002 and civilly committed to [REDACTED]. The Appellant was subsequently transferred to [REDACTED] where, in [REDACTED] 2004, he lit his mattress on fire. The Appellant was then charged with arson, sent to [REDACTED] for a M.G.L. Chapter 123 Section 16(b) evaluation, found incompetent to stand trial, and committed [REDACTED] under M.G.L. Chapter 123 Section 16 (b) and then 16 (c). The Appellant remained at [REDACTED] for approximately three and one-half years due to his ongoing behavioral difficulties. In [REDACTED] 2007, the Appellant was transferred to [REDACTED] where he currently resides. The Appellant has no open cases in the Massachusetts justice system and is not on probation.

The Appellant first applied for DDS services in [REDACTED] 2005. A procedural error occurred and, inconsistent with Department regulation, a determination as to the Appellant's level of cognition was made prior to a determination of domicile. Without a proper review of the domicile requirement, the Regional Eligibility Manager incorrectly notified the Appellant on [REDACTED] 2007, that he had met the Departments criteria for DDS Adult Services. The Department subsequently denied the Appellant eligibility on the basis that he did not meet the Department's criteria for domicile. The Appellant was notified of his denial of DDS eligibility by letter dated [REDACTED] 2008. An appeal of the denial of services was submitted by the Appellant on [REDACTED] 2008, and an Informal Conference was held on [REDACTED], 2008, at which time the Appellant's ineligibility ruling was upheld. An appeal of that decision was submitted and, after a number of postponements due to good and sufficient cause, a Fair Hearing was scheduled and held on [REDACTED] 2009. The Appellant was present at the hearing and was represented by [REDACTED].

**SUMMARY OF THE EVIDENCE:**

THE DOCUMENTS SUBMITTED INTO EVIDENCE ARE AS FOLLOWS:

**Appellant Exhibit #1**

Guardianship Petition for Temporary Guardian of Person of [REDACTED] with [REDACTED] named as proposed guardian, [REDACTED] 2002 (2 pages).

**Appellant Exhibit #2**

Decree of Temporary Guardianship of Person with [REDACTED] of [REDACTED], New Hampshire, named as temporary guardian, [REDACTED], 2002 (1 page).

**Appellant Exhibit #3**

Letter from Mary J. McGuire, Esq., DHHS, New Hampshire, to Bobbi Spofford, DMH, [REDACTED], 2002 re: DMH's Interstate Transfer Request (with attached memo by [REDACTED], M.D., Medical Director, [REDACTED], [REDACTED] 2002) (2 pages).

**Appellant Exhibit #4**

Copy of MassHealth card for [REDACTED], [REDACTED], dated [REDACTED]/07 (1 page).

**Appellant Exhibit #5**

Notice from MassHealth to [REDACTED] re: enrollment in Neighborhood Health Plan, [REDACTED] 2008 (5 pages).

**Appellant Exhibit #6**

An unsigned [REDACTED] Social Work Discharge Summary, by [REDACTED], LICSW, [REDACTED] 2008 (4 pages).

**Appellant Exhibit #7**

An unsigned Mandatory Forensic Review (MFR) by [REDACTED], Ph.D., Designated Forensic Psychologist, Forensic Mental Health Supervisor, [REDACTED] 2008 (22 pages).

**Appellant Exhibit #8**

[REDACTED] Social Work notes by [REDACTED], LICSW, dated [REDACTED] 2008 and [REDACTED] 2008 (1 Page).

**Appellant Exhibit #9**

DMH Application for Care and Treatment on a Conditional Voluntary Basis signed by [REDACTED], [REDACTED] 2008 (1 page).

Appellant Exhibit #10

Decree of Permanent Guardianship of the Person with Authority to Monitor the Administration of Antipsychotic Medication naming [REDACTED], Esq. and [REDACTED] as co-guardians of [REDACTED], [REDACTED], 2009 (with cover memo from Janet Ceruolo, Legal Office, DMH, [REDACTED], 2009) (3 pages).

Appellant Exhibit #11

Chronology of Guardianship of [REDACTED], prepared by Attorney John Ceruolo, DMH Assistant General Counsel, [REDACTED] 2009 (with fax cover sheet) (2 pages).

Appellant Exhibit #12

Town Clerk, [REDACTED], Massachusetts, Acknowledgement Notice re: Voter Registrations, [REDACTED], 2009 (1 page).

Appellant Exhibit #13

[REDACTED] Hospital Patient Accounts System Transaction Log, [REDACTED] 2008 through [REDACTED] 2009 (1 page).

Appellant Exhibit #14

Excerpts from M.G.L.- Chapter 201, Section 6 Mentally ill persons; appointment of guardians; commitment treatment with antipsychotic medication (text effective until July 1, 2009. Repealed by 2008, 521, Sec 21.)(2pages).

and

Excerpts from M.G.L.- Chapter 201, Section 12 Powers of guardians of mentally ill or mentally retarded person or spendthrift; bond (text effective until July 1, 2009. Repealed by 2008, 521, Sec 21.) (1page).

Appellant Exhibit #15

Excerpts from M.G.L.- Chapter 190B, Section 1-201 Definitions and inclusions (text of section added by 2008, 521, Sec 9 effective July 1, 2009) (5 pages).

Appellant Exhibit #16

Excerpts from M.G.L.- Chapter 201, Guardians and Conservators Sections 27, 28, 29, 30, 31 (text effective until July 1, 2009. Repealed by 2008, 521, Sec 21.) (5 pages).

Appellant Exhibit #17

An unsigned Neuropsychological Assessment of the Appellant conducted on [REDACTED] 2009 and [REDACTED], 2009 by [REDACTED], Ph. D., Clinical Neuropsychologist and [REDACTED], M.A., Psychology Intern (4 pages).

Appellant Exhibit #18

Proposed Findings in the matter of [REDACTED] v. DDS submitted by [REDACTED], [REDACTED], dated [REDACTED] 2009 (11 pages).

DDS Exhibit #1

A Neuropsychological Screening Assessment administered to the Appellant on [REDACTED], 2002, by [REDACTED], Ph. D. (10 pages).

DDS Exhibit #2

[REDACTED] Discharge Summary by [REDACTED], Ph. D., dated [REDACTED] 2002 (9 pages).

DDS Exhibit #3

Forensic Mental Health report by [REDACTED] Ph. D., dated [REDACTED] 2004 (4 pages).

DDS Exhibit #4

Competence to Stand Trial Evaluation by [REDACTED], Ph. D., dated [REDACTED] 2004. The fifteen page evaluation was conducted at [REDACTED] pursuant to the provisions of M.G.L., Chapter 123, section 15(b) to determine competency to stand trial and criminal responsibility for the arson event that occurred on [REDACTED] 2004 at [REDACTED].

DDS Exhibit #5

The Appellant's application for DMR eligibility, dated [REDACTED], 2005.

DDS Exhibit #6

Competence to Stand Trail Update by [REDACTED], Psy. D., dated [REDACTED], 2005. The sixteen page evaluation of the Appellant was conducted at [REDACTED] pursuant to the provisions of M.G.L., Chapter 123, section 15(b) as an update regarding criminal charges around the arson event that occurred on [REDACTED], 2004 at [REDACTED].

DDS Exhibit #7

The score results of the Appellant's ICAP evaluation conducted by the Department, dated [REDACTED] 2006.

DDS Exhibit #8

[REDACTED] Psychological Evaluation of the Appellant, conducted on [REDACTED] 2006, by [REDACTED], Ph. D.

DDS Exhibit #9

The score results of the Appellant's ABAS evaluation conducted by the Department, on [REDACTED] 2006.

DDS Exhibit #10

The score results of the Appellant's ABAS evaluation conducted by the Department, on [REDACTED], 2006.

DDS Exhibit #11

Undated eligibility notes regarding summary information about the Appellant.

DDS Exhibit #12

Eligibility report for the Appellant, by Frederick V. Johnson, Psy. D., dated [REDACTED], 2007.

DDS Exhibit #13

Notification of DDS eligibility sent to the Appellant, dated [REDACTED], 2007

DDS Exhibit #14

Computer screen print of DDS's eligibility database regarding the Appellant.

DDS Exhibit #15

Notification of ineligibility sent by Beth Moran Liuzzo, Regional Eligibility Manager, to the Appellant, dated [REDACTED], 2008.

DDS Exhibit #16

Notice of intent to appeal DDS's denial of eligibility, sent by the Appellant with assistance from his Social Worker, [REDACTED], to Richard J. O'Meara, Regional Director, dated [REDACTED] 2008.

DDS Exhibit #17

DDS's confirmation letter regarding date and time of the Informal Conference for the Appellant, sent to the Appellant's Social Worker, [REDACTED], dated [REDACTED] 2008.

DDS Exhibit #18

Attendance sheet for the Appellant's Informal Conference, held on [REDACTED] 2008.

DDS Exhibit #19

Computer screen print of DDS's eligibility program with notes regarding the results of the Appellant's Informal Conference.

DDS Exhibit #20

Letter to the Appellant, from Beth Moran Liuzzo, Regional eligibility Manager, regarding the results of the Informal Conference, dated [REDACTED] 2008.

DDS Exhibit #21

Request for a Fair Hearing, sent by the Appellant with assistance from his social worker [REDACTED], to Commissioner Elin M. Howe, dated [REDACTED], 2008.

DDS Exhibit #22

Notice of receipt of the Appellant's Fair Hearing Request sent by Elisabete Wolfgang, DDS's Hearing Administrator, to the Appellant, in care of his Social Worker [REDACTED], dated [REDACTED], 2008.

DDS Exhibit #23

Notice of Fair Hearing to the Appellant, in care of his Social Worker, [REDACTED] sent by Elisabete Wolfgang, DDS's Hearing Administrator, dated [REDACTED], 2008.

DDS Exhibit #24

Email from the Appellant's attorney, [REDACTED], requesting DDS records.

DDS Exhibit #25

DDS's Computer screen view of CM Registration Edit for Appellant.

DDS Exhibit #26

Request for production of documents regarding the Appellant's eligibility file, sent by the Appellant's attorney, [REDACTED], to DDS Assistant General Counsel, Patrick Murphy Esq., dated [REDACTED], 2009.

DDS Exhibit #27

Cover letter sent to the Appellant's attorney, [REDACTED], from Jacquelyn Berman, DDS Deputy General Counsel, providing copy of requested eligibility file, dated [REDACTED] 2009.

DDS Exhibit #28

Curriculum Vita of Richard J. O'Meara.

**FINDING OF FACTS:**

The following findings are deemed relevant to the issue under appeal and are made as a result of a careful assessment of over four hours of sworn testimony and all exhibits entered into evidence.

1. The Appellant was born on [REDACTED] 1966 in South Carolina. (Appellant Exhibit #3 & Testimony)
2. The Appellant was raised in Georgia as one of seven sibling of a now deceased, mentally ill mother. The Appellant's father, who is also deceased, reportedly

killed one of the Appellant's brothers by shooting him in the head. (Appellant Exhibit #7, page 2 & Testimony)

3. The Appellant received his education in the Georgia public schools where he attended special education classes up to the 10<sup>th</sup> grade. (Appellant Exhibit #7 page 2 & Testimony)
4. The Appellant lived with his mother in Georgia until her death in 2000, when he moved in to live with relatives off and on for a while, until in 2002, he left Georgia to live with his brother Mr. [REDACTED] and to be closer to his brother Mr. [REDACTED], both living in New Hampshire at that time. (Appellant Exhibit 7 page 5 & Testimony).
5. The Appellant's brother, Mr. [REDACTED], had been functioning as the Appellant's guardian in that he ([REDACTED]) was the Appellant's rep payee for Social Security since the death of their mother in 2000 (Appellant Exhibit #7 page 4).
6. The Appellant carries a diagnosis of Psychosis NOS, Alcohol and Cannabis Abuse, Mild MR and Anti-Social Traits. (Appellant Exhibit #7 page 2 & Testimony)
7. The Appellant is on psychiatric medications with a history of decomposition when not taking his medications. (Appellant Exhibit #7, page 12) The Appellant has experienced delusions about his brother's violent death either believing that he shot his brother or that he has been shot in the head. (Appellant Exhibit #7 page 10 & Testimony)
8. The Appellant has a history of incarceration and psychiatric hospitalizations. He has a criminal record in Georgia, North Carolina, South Carolina and New Hampshire. He has been charged with theft of a vehicle, receiving stolen property, theft by shoplifting, obstructing police, aggravated assault, trespassing, possession of marijuana, motor vehicle felony, drunk on highway, littering, and disorderly conduct. (Appellant Exhibit # 7 page 5)
9. The Appellant spent his incarcerated time on the "psychiatric service" in the Georgia prison. (Appellant Exhibit #7 page 18)
10. The Appellant was living at [REDACTED] in New Hampshire with his brother, Mr. [REDACTED], at the time he (the Appellant) stole a car and drove it across the state lines into Massachusetts where the car ran out of gas. (Appellant Exhibit #7-page 4 & page 22 & Testimony)



11. The Appellant was receiving outpatient psychiatric treatment from Dr. [REDACTED] at [REDACTED] in New Hampshire at the time of his arrest in Massachusetts. (Appellant Exhibit #7 page 5)
12. The Appellant was arrested in Massachusetts for Larceny of a Motor Vehicle, False Crime Report, and Unlicensed Operation of a Motor Vehicle, and on [REDACTED] 2002, was sent to [REDACTED] for a Mass. Gen L. Chapter 123, § 15(b) evaluation as to his competency to stand trial. (Appellant Exhibit #7 page 6) The Appellant was found incompetent to stand trial on [REDACTED], 2002 and civilly committed for up to six months [REDACTED].
13. The Appellant was transferred from [REDACTED] to [REDACTED] on [REDACTED], 2002 and was initially confined to [REDACTED] on an involuntary admission pursuant to M.G.L. Chapter 123 Section 7 and Section 8 (Appellant Exhibit #18 page 7 at #71). By [REDACTED] 2002 the charges had been dropped and at that time, after two months of consistent medication treatment, the Appellant presented with no psychotic symptoms. He reportedly was calm, pleasant, with minimal understanding of why he was in the hospital. (Appellant Exhibit #7, page 7)
14. When the Appellant was admitted to [REDACTED], the Treatment Team was allegedly told that the Appellant would stay only a short period of time because he would be an "interstate transfer" of treatment to New Hampshire and live there with his brother. (Appellant Exhibit #7, page 12)
15. The Appellant's brother, Mr. [REDACTED], was granted Temporary Guardianship of the Person on or about [REDACTED], 2002 while the Appellant was residing at [REDACTED]. (Appellant Exhibit #11, page 3) Mr. [REDACTED] was also reportedly in the process of applying for low income housing in New Hampshire so he could have the Appellant live with him when the Appellant was discharged from [REDACTED]. (Appellant Exhibit #7, page 7)
16. On [REDACTED] 2002, Massachusetts Department of Mental Health (DMH) requested that New Hampshire accept the Appellant by transfer pursuant to the Interstate Compact for Mental Health. (Appellant Exhibit #3, page 1 & Testimony)
17. On [REDACTED] 2002, the State of New Hampshire Department of Health and Human Services denied the Massachusetts request to transfer the Appellant into the New Hampshire Mental Health system based on an evaluation by Dr. [REDACTED], Medical Director, [REDACTED], which read in part as follows:

"I would recommend against accepting transfer of Mr. [REDACTED], as he no longer needs acute hospitalization but requires, instead, residential placement in a protected environment." "The fact that he has a brother who lives in New Hampshire does not seem to make New Hampshire responsible for the lifetime of inpatient care that he may well require to adequately protect society." (Appellant Exhibit #3, page 2)

18. The Appellant continued to reside at [REDACTED], and the Temporary Guardianship of the Person (with Mr. [REDACTED] named as guardian) was extended several times in 2002 and 2003. (Appellant Exhibit #11, page 2)
19. A [REDACTED] 2003 Psychosocial History note from [REDACTED] records stated:  
 "Although his brother, [REDACTED], originally expressed his intent to have pt. live with him upon discharge, it became clear to [REDACTED] and the team that patient would not be receiving the supervision and structure he needs in order to remain safe in that environment. In the past, patient has made poor use of supports including poor compliance with medication and appointments with treaters. More recently, Mr. [REDACTED] has expressed his intent to move to Georgia with pt. If he proceeds with his plan, an interstate transfer to a state hospital in Georgia will be pursued." (Appellant Exhibit #7, page 8)
20. The Appellant reportedly attempted to "elope" from [REDACTED] on several occasions and succeeded in some of those attempts, occasionally trying to steal a car. At least 10 instances were alleged where the Appellant was AWA (absent without authority) when he either "eloped from the hospital, attempted to elope from the hospital grounds, and/or hid from staff while on privileges or groups". (Appellant Exhibit #7, page 8 & Appellant Exhibit #18, page 5 & DDS Exhibit #4 page 7)
21. The Appellant's brother, [REDACTED], moved back to Georgia and reportedly continues to live there. (Appellant Exhibit #7 page 4 & Testimony)
22. The Appellant reportedly has other relatives and friends living in Georgia including an Aunt with whom he lived for a while. (Appellant Exhibit #7 page 4 & Testimony)
23. In [REDACTED] 2003 the guardian for the Appellant changed from Mr. [REDACTED] to Massachusetts Attorney [REDACTED]. (Appellant Exhibit #11, page 2)

24. Massachusetts Attorney [REDACTED] continued as guardian for the Appellant until [REDACTED] 2004 when the guardianship lapsed after Attorney [REDACTED] was suspended from the practice of law and no longer able to serve as guardian. (Appellant Exhibit #11, page 2)
25. The Appellant was not under guardianship from [REDACTED], 2004 through all of 2005, 2006, 2007, and 2008. (Appellant Exhibit #11 page 2 and #18 page 4)
26. In [REDACTED] 2004, while at [REDACTED], the Appellant bailed up some toilet paper, used it to light his mattress on fire, then shut the door of his room upon leaving. (Appellant Exhibit #7, page 3 & Testimony)
27. The Appellant stated that his fire setting behavior was a result of his frustration with restrictions. (Appellant Exhibit #7, page 3) A later report indicated that the Appellant was frustrated that his hospitalization had no "end date" (Appellant Exhibit #7, page 12) The Appellant stated that he had set the fire so that he would be sent back to the "county jail"; he had expected to be at [REDACTED] for only 10 days. (Appellant Exhibit #7, page 13)
28. The Appellant was charged with Arson, found to be incompetent to stand trial and committed to [REDACTED] under Mass. General Law Chapter 123 Section 16(b) and then 16(c). (Appellant Exhibit #7, page 3 & Testimony) The Arson charge was reduced to Malicious Destruction of Property; he was found guilty and given a two year sentence to be served at [REDACTED]. (Appellant Exhibit #7, page 13) The Appellant remained at [REDACTED] for approximately three and one-half years due to his ongoing behavioral difficulties. (Appellant Exhibit #7, page 3)
29. The Appellant made multiple attempts at elopement and escape while at [REDACTED]. (Appellant Exhibit #7, page 2)
30. On [REDACTED] 2005, the staff of [REDACTED] applied for what was then called DMR <sup>1</sup> services for the Appellant. (DDS Exhibit #5)
31. On [REDACTED], 2006, the Appellant received a Psychological evaluation at [REDACTED] for cognitive testing to determine his overall intellectual ability level in order to facilitate his referral to the Department of Mental Retardation<sup>2</sup>. (DDS Exhibit # 8 page 1)

<sup>1</sup>In February of 2005, the Department of Developmental Services (DDS) was known as the Department of Mental Retardation (DMR). The Name of the Massachusetts Department of Mental Retardation (DMR) changed to the Massachusetts Department of Developmental Services (DDS) on June 30, 2009.

<sup>2</sup> The Department of Developmental Services (DDS) was previously known as the Department of Mental Retardation (DMR). The Name of the Massachusetts Department of Mental Retardation (DMR) changed to the Massachusetts Department of Developmental Services (DDS) on June 30, 2009.

32. On [REDACTED] 2007, Dr. Frederick Johnson, the Department's psychologist, recommended that the Appellant be found eligible for Department services. (DDS Exhibit # 12)
33. On [REDACTED] 2007, Beth Moran Liuzzo, the Department's Regional Eligibility Manager, notified the Appellant that he was eligible for DMR services<sup>3</sup>. (DDS Exhibit # 13)
34. The Appellant was transferred from [REDACTED] back to [REDACTED] on [REDACTED] 2007. The reason for and circumstances surrounding the transfer are not documented in the evidence presented (Appellant Exhibit #7 page 11).
35. On [REDACTED] 2008 the Appellant's brother, Mr. [REDACTED] (a resident of New Hampshire), met with the [REDACTED] treatment team to discuss the Appellant's discharge. Mr. [REDACTED] informed the team that either he or his other brother Mr. [REDACTED] would like to take the Appellant in and would care for his needs. (Appellant Exhibit #7 page 14)
36. On [REDACTED] 2008 a Mandatory Forensic Review (MFR) referral was submitted by the Appellant's [REDACTED] treatment team. The team requested approval that would allow for incremental increases in the Appellant's level of self supervision, and, if successful, the treatment team requested discharge planning as follows:  
 "to a secure 24 hour staff residence with continued treatment of his mental illness, substance abuse and medical treatment of his [REDACTED]".  
 (Appellant Exhibit #7 page 14)
37. A Mandatory Forensic Review (MFR) was conducted by Dr. [REDACTED] on [REDACTED] 2008; the report states that the Appellant had no behavioral difficulties since his admission to [REDACTED] in [REDACTED] 2007 and that he was psychiatrically stable with no signs of psychosis since his admission in [REDACTED] 2007. (Appellant Exhibit #7 page 3) According to information obtained on [REDACTED] 2007 from a social worker familiar with the Appellant, the Appellant's treatment team had not observed any signs or symptoms of a major mental illness since the Appellant's admission to [REDACTED] in [REDACTED] 2007. The social worker further stated that the Appellant was "the least problematic" of all the patients on his unit. She reported that "he knows his routine; he goes to programs and comes back." (Appellant Exhibit #7 page 11)

<sup>3</sup> Currently DDS services. This notification of eligibility was made without proper review of domicile as required by DDS regulation. 115CMR 6.04 (2)(c) indicates that domicile is determined prior to a determination of cognition.

38. Tentative plans to discharge the Appellant to his brother, Mr. [REDACTED], are documented in the [REDACTED] 2008 MFR. The Appellant's brothers' [REDACTED], who lives in California, his brother [REDACTED], who reportedly currently lives in Georgia, and his brother [REDACTED] who lives in New Hampshire, have all been involved to some extent at one time or another in offering to care for or actually caring for the Appellant. Mr. [REDACTED], who was reportedly living with [REDACTED] in Georgia, and Mr. [REDACTED], who was living in California, were making arrangements to return to this area, and, along with Mr. [REDACTED], were planning to share responsibility for supervising the Appellant 24/7. (Appellant Exhibit #7 page 14)
39. The [REDACTED], 2008 Mandatory Forensic Review (MFR) by Dr. [REDACTED] documented the fact that the Appellant had no open cases and was not on probation in Massachusetts. The Larceny of a Motor Vehicle charge from [REDACTED] 2002 that led to the Appellant's initial hospitalization at [REDACTED] was filed. (Appellant Exhibit #7 page 13) However, in [REDACTED] 2004, Dr. [REDACTED] attending psychiatrist for the Appellant, reported that the Appellant had not understood that his charges had been dropped. (Appellant Exhibit #7 page 9) The Arson charge from [REDACTED] 2004 (the index offense) was reduced to Malicious Destruction of Property. The Appellant was found guilty and given a two year sentence, served at [REDACTED]. This case is closed. However, the Appellant believes that he will go to jail or to [REDACTED] if he goes AWA at his current residence at [REDACTED]. (Appellant Exhibit #7 page 13)
40. Dr. [REDACTED], [REDACTED] 2008 [REDACTED] concluded with his opinion that the Appellant was not ready for discharge to the care of his three brothers; the Appellant needed to first successfully participate in privileges and passes. Dr. [REDACTED] did not agree with the treatment team's assumption that the Appellant would leave any residential setting to find his brothers, stating that it was premature to think so. Dr. [REDACTED] opined that, based on history, if the Appellant did elope, the most serious danger the public would be exposed to would be drunk driving. (Appellant Exhibit #7 page 18 & 19)
41. The Department of Developmental Services became aware of a procedural error that had occurred with the Appellant's application for DDS services; the Appellant's application was not processed in accordance with Department regulations. DDS regulations require that domicile is determined prior to a determination of cognitive and adaptive abilities<sup>4</sup>. In the Appellant's case, cognitive and adaptive abilities were assessed without an assessment of domicile. (Testimony of Richard J. O'Meara, Southeast Regional Director) As a result the Appellant was incorrectly notified that he had met the Departments criteria for DDS Adult Services. (DDS Exhibit #13)

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<sup>4</sup> See 115 CMR 6.04 (2)(c)

42. The Appellant's current social worker, John Cox, testified that although the Appellant resides in a Massachusetts Department of Mental Health (DMH) facility ( ), he is not currently a DMH client. An application for DMH eligibility has been submitted on behalf of the Appellant. However, DMH will not consider an eligibility application until the resolution of the DDS eligibility matter. (Testimony of John Cox, LICSW)
43. The Appellant was notified, by letter, dated 2008, of his denial of DDS eligibility based on domicile. (DDS Exhibit #15)
44. Guardianship was once again pursued by the Department of Mental Health. On 2008, a petition was filed in the Division of the Probate Court for permanent guardianship of the person with *Rogers* authority. (Appellant Exhibit #18, page 9 at #104)
45. Social Work Progress Notes dated 2008 document the Appellant's repeated request to be allowed to leave and go to his brothers' homes. (Appellant Exhibit #8) None of the brothers live in the state of Massachusetts. (Testimony)
46. The Appellant appealed the denial of DDS eligibility (DDS Exhibit #16), and an Informal Conference was held on 2008 (DDS Exhibit #18) at which time the Appellant stated his expressed desire to live in Georgia. (Testimony of Richard J. O'Meara, Southeast Regional Director). The Appellant was not under guardianship and had not been under guardianship since 2004 when the lawyer who had been named guardian was suspended from the practice of law. (Appellant Exhibit #11, page 2)
47. The Informal Conference resulted in no change to the Department's determination of ineligibility. (Testimony)
48. The Appellant was notified that the Department had upheld the original finding of ineligibility in correspondence dated 2008 (DDS Exhibit #20). An appeal of that decision was submitted by the Appellant on 2008 (DDS Exhibit #21).
49. The Guardianship that had been sought by DMH after DMH had been notified of DDS's denial of eligibility based on domicile, became effective on 2009 with the Appellant's brother and a Massachusetts Attorney, named as Permanent Guardians of the Person. (Appellant Exhibit #11 page 2 and #18 page 4 )

50. An Acknowledgement Notice re: Voter Registration was sent to the Appellant on [REDACTED], 2009 indicating that the town of [REDACTED] had received the Appellant's affidavit of voter registration and his name had been added as a registered voter. (Appellant Exhibit # 12)
51. Guardianship Law in Massachusetts has changed as of [REDACTED] 2009. The law now requires that the guardian afford the incapacitated person with as much freedom as possible to make his own decisions. (Uniform Probate Code M.G.L. 190B section 5-309)
52. [REDACTED] is closing in [REDACTED] 2010. If the Appellant is not placed in the community by the time of [REDACTED]'s closure, he will be transferred to another DMH [REDACTED]. (Testimony of John Cox, LICSW)
53. After a number of postponements due to good and sufficient cause, a Fair Hearing was scheduled and held on [REDACTED], 2009. The Appellant was present and represented by his attorney, [REDACTED] of the [REDACTED].
54. The Appellant was present at his [REDACTED], 2009 Fair Hearing and exhibited considerable interest in all testimony given, on occasion interjecting to correct or offer further elaboration on facts that were being discussed. (Recorded testimony of Fair Hearing)

#### RELEVANT TESTIMONY:

##### Appellant's Testimony

The Appellant, who reportedly is psychiatrically stable at this time, conducted himself appropriately at the Fair Hearing. He did not appear to be experiencing any symptoms of psychosis at the time of the Fair Hearing as he appeared to be alert and aware of the purpose of the Fair Hearing, he responded appropriately when spoken to, and he answered questions that were asked of him.

The Appellant testified at the Fair Hearing regarding his current situation. The Appellant described his current living situation at [REDACTED] as being "incarcerated at [REDACTED]" but stated that he liked living there. The Appellant testified that he was not aware that the Probate Court had appointed two individuals to help him make decision and testified that he did not know his co-guardian [REDACTED]. The Appellant testified that he had a bank account at [REDACTED] and that the money that was deposited into this account came from family and from his PNA (personal needs allowance).

The Appellant also answered questions about his wishes, desires and intent. He testified that he would like to live in the community and that it would "not be scary" for him to move out of [REDACTED]. He testified that he would be ok living in the community and would not want to go to a program when living in the community; he would want to work.

When asked directly, "Are you interested in staying in Massachusetts?", the Appellant answered, "No". He then spoke of wanting to live in Georgia, testifying that he would perhaps live with his girlfriend in Georgia.

On cross exam, the Appellant was asked directly, "Where do you want to live?". He answered, "Massachusetts or Georgia or Chicago or New Hampshire, any one of them". He then spoke of his family, stating that his mother had passed away but he had a girlfriend who lives in Georgia and he would like to go to Georgia. He acknowledged that he could not have a house by himself but would like to go and stay with one of his brothers. He stated that New Hampshire would be fine; he would like to stay with [REDACTED] in New Hampshire.

#### Co-Guardian, [REDACTED]'s Testimony-

The Appellant's brother and co-guardian, [REDACTED], testified at the Fair Hearing as to his involvement with the Appellant. Mr. [REDACTED] testified that he lives in New Hampshire and that the Appellant has never lived with him; the Appellant did live in New Hampshire with another brother, [REDACTED]. Both [REDACTED] and the Appellant lived in New Hampshire in a [REDACTED] and then after leaving that home, lived together [REDACTED] in New Hampshire. [REDACTED] was the Appellant's original guardian, beginning in 2002 and served as the Appellant's guardian for a couple of years.

Mr. [REDACTED] testified that he is now co-guardian for the Appellant and that he understood his co-guardian responsibilities to mean that he is responsible to give advice about his brother's medication and to help make decisions that his brother cannot make. Mr. [REDACTED] testified that he gets information from and communicates with people regarding his brother's care at [REDACTED], and he visits the Appellant on occasion; the last visit was approximately two months ago.

When asked what type of supervision he felt the Appellant would need. Mr. [REDACTED] testified that his brother would require 24 hour supervision; 24 hour supervision would be necessary in his opinion because, without it, the Appellant was likely to take off and get a car and wind up incarcerated again. Mr. [REDACTED] stated that there are no plans at this time to have his brother live with one of his family members, testifying that [REDACTED] is currently in Georgia and that he ([REDACTED] [REDACTED]) and his wife were not able to care for the Appellant.

When Mr. [REDACTED] was asked directly, "If [REDACTED] got services (24 hour community services) in Massachusetts do you intend for him to remain there (in Massachusetts) indefinitely or for the foreseeable future?", Mr. [REDACTED] answered, "no, not indefinitely, but for now". Mr. [REDACTED] went on to speak about the family or the team possibly coming up with other plans. When



asked directly, "do you have any specific plan for him (the Appellant) to live anyplace other than in Massachusetts?", Mr. [REDACTED] answered, "NO". Mr. [REDACTED] then agreed that it would be in the Appellant's best interest to live in Massachusetts.

Co-Guardian, Attorney [REDACTED]'s Testimony-

The Appellant's co-guardian, Mr. [REDACTED] Esq., testified as a witness for the Appellant at the Fair Hearing. He testified that he has been a practicing attorney for over 20 years, that his practice is exclusively in the field of mental health, and that he serves as an attorney for about 170 people on a court appointed basis and also serves as court appointed guardian for another 80 people who are either DMH or DDS clients. Mr. [REDACTED] testified that as a court appointed guardian, he often makes a decision as to where the person will reside and what type of services they will require. Mr. [REDACTED] testified that he makes final decisions because there are people who cannot make decisions; he consults with the individual but as the guardian, he makes the decision.

Mr. [REDACTED] testified that he was appointed co-guardian for the Appellant on [REDACTED], 2009 pursuant to the earlier version of Massachusetts guardianship law, MGL Chapter 201 section 6 but is not aware of any change to his responsibilities with the promulgation of the new guardianship laws effective [REDACTED] 2009. Mr. [REDACTED] acknowledged that Massachusetts guardianship law has changed dramatically under the new code and the court is looking much more to the wishes of the incapacitated person, but qualified his response by stating that the courts determine the weight of those wishes on a case by case basis. Mr. [REDACTED] testified that he has met the Appellant four times since his appointment in [REDACTED] 2009; those meetings occurred when Mr. [REDACTED] attended one of the Appellant's psychiatric case conferences which are held on a monthly basis. Mr. [REDACTED] testified that he had not until this Hearing met or spoken to the Appellant's other co-guardian, Mr. [REDACTED] but was looking forward to working with him in the future.

Mr. [REDACTED] testified that he did not feel that the Appellant's guardianship should be limited from what it is presently. Mr. [REDACTED] was asked his opinion regarding a hypothetical scenario in which the courts allow the Appellant to retain the power of making his own decisions as to where he will reside. Mr. [REDACTED] responded that he would not be comfortable with the Appellant making his own decision as to where he would reside, and stated the following reason: "[REDACTED] is one of the nicest guys I've ever met to deal with, he is always smiling, always in a good mood, always cheerful, but he makes terrible decisions, and that is why the guardianship is in place".

When asked what he saw as an appropriate discharge plan for the Appellant, Mr. [REDACTED] stated that he could not say because he has not discussed discharge planning with the Appellant's team members as of yet, but added that he would like to see the Appellant in a 24 hour staffed residence in Massachusetts because, in his opinion, Massachusetts has a very good Department of Developmental Services. Mr. [REDACTED] acknowledged that he was not familiar with the services in all 50 states but stated that he was familiar with those in Massachusetts. Mr. [REDACTED]

also added that he wanted the Appellant to remain in Massachusetts because he very much wanted to continue as the Appellant's guardian and that would not be the case should the Appellant leave the state of Massachusetts, explaining that he was a very good guardian and not all guardians were as conscientious as he.

When asked if he thought the Appellant needed a locked hospital setting such as he currently has, Mr. [REDACTED] answered: "I'm not sure". Mr. [REDACTED] was asked if he had tried to pursue residency for the Appellant in another state; he answered that he had not. When asked why he had not pursued possible residency in another state, Mr. [REDACTED] answered as follows: "I do not believe that I've been asked to do that". When asked if he could see any reason to pursue residency in New Hampshire, Mr. [REDACTED] answered: "Not at this time". And when asked the same about pursuing residency in Georgia, Mr. [REDACTED] answered: "Not at this time". And finally when asked if his plan for the Appellant was to have him remain in Massachusetts either indefinitely or permanently, Mr. [REDACTED] stated, "I would never say permanently because things change but at this time I would say yes to remaining in Massachusetts."

On cross exam, Mr. [REDACTED] acknowledged that his appointment as co-guardian was on [REDACTED] 2009 and that date was after the Informal Hearing.

## **CONCLUSIONS and RECOMMENDED DECISION:**

### SUMMARY OF APPELLANT'S POSITION AS PRESENTED IN OPENING STATEMENT

Counsel for the Appellant points to DDS regulation 115 CMR 6.04 (2)(a) where it states that a person shall be considered to be domiciled in Massachusetts if he or she resides in Massachusetts with the intention to remain here permanently or for an indefinite period. Counsel argues that although the Appellant's original entry to Massachusetts was not planned, the Appellant has been living in the state of Massachusetts for years and has developed ties. Moreover, the Appellant's legal co-guardians have the intention for him to stay in Massachusetts, and the Appellant's [REDACTED] team has also discussed possible options and think it best for him to remain in Massachusetts.

Counsel for the Appellant points out that the three categorical exclusions regarding domicile found at CMR 115 6.04 (2)(b) are not applicable to the Appellant; he simply must show that he lives in Massachusetts and intends to remain permanently or for an indefinite period as required by CMR 115 6.04 (2)(a).

Counsel for the Appellant argues that the Appellant has given up other domiciles long ago; he left Georgia and lived in New Hampshire for only a few months. In Dane v. Registrars of Voters of Concord<sup>5</sup>, domicile is stated as the place where the person has his home; home is the place where the person dwells and which is the center of his domestic, social and civil life.

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<sup>5</sup> Dane v. Registrars of Voters of Concord, 374 Mass. 152, 161 (1978)  
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Counsel for the Appellant again referencing Dane<sup>6</sup>, argues that a person can establish domicile even though confined against his will if there is proof of intent; a place of involuntary confinement, whether prison or psychiatric institution, can be a home for the purposes of domicile. While an inmate's involuntary incarceration creates a presumption that he intends no change in domicile, an inmate is capable of electing to make the place of his incarceration his new domicile with proof of such intent. Counsel for the Appellant further argues that even if a stay is involuntary, one may rebut the presumption that a domicile is not established.<sup>7</sup> Again referencing Dane<sup>8</sup>, Counsel for the Appellant noted that in this matter the court stated that the rule that "A person does not acquire a domicile of choice by his presence in a place under physical or legal compulsion" would make it "impossible for a person to acquire a domicile in the jail in which he is incarcerated."

Counsel for the Appellant pointed out that students can establish domicile for the purpose of voting, citing Hershkoff.<sup>9</sup> And citing Coulombre v. Registrars of Voters of Worcester,<sup>10</sup> pointed to the Appeals Court finding that a patient living at the Worcester State Hospital not of his own volition, but as a condition of probation, had established domicile at the hospital, for purposes of registration to vote. The court found that the presumption was rebutted with evidence of presence and intent – such as employment and maintaining a bank account—even though the individual did not plan to remain in the location and his only basis for living in Worcester was to comply with the terms of probation and earn enough money to leave.

Counsel for the Appellant argued that domicile once established can only be changed by a clear and honest purpose to change<sup>11</sup>; a person's domicile once acquired is not lost until a new one is attained. Therefore, the tentative plans to transfer the Appellant to New Hampshire (Appellant Exhibit #3) do not constitute a change in domicile. Similarly, a vague intent to return to Georgia where the Appellant once lived with his now deceased parents is not a clear an honest purpose to change.

Counsel for the Appellant argued that one must look to the intent of the guardian. In Holyoke v. Haskins,<sup>12</sup> the courts established the guardian's authority to decide where the ward should live. In the Appellant's case, there are two guardians, both of whom have determined that the Appellant should reside in Massachusetts. There is more recent case law that has suggested that you could also look at the intent of the ward, a New Jersey case in the matter of MR in 1994, in which the court gave deference to the ward's desires. The ward had a clear preference to live with her father as opposed to her mother who was the guardian. In this case the court said that the mother had the burden of proving that the ward was not competent to make that choice. In the Appellant's case, the Appellant's guardianship order has not been modified in any way to give the Appellant back discrete powers such as the power to determine domicile, even though there is now a new uniform probate code that took effect [REDACTED] 2009, which could allow a court to tailor the guardianship to allow the ward to retain some powers.

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<sup>6</sup> See Dane at 171

<sup>7</sup> See Dane at 165

<sup>8</sup> Dane at 163

<sup>9</sup> Hershkoff, 366 Mass. At 580

<sup>10</sup> Coulombre v. Registrars of Voters of Worcester, 3 Mass. App. Ct. 206 (1975)

<sup>11</sup> Hershkoff, 366 Mass. At 578

<sup>12</sup> Holyoke v. Haskins, 22 Mass. 20, 28 (1827)

Counsel for the Appellant argued that there are past DDS Fair Hearing decisions whereby the Hearing Officer (SM) considered an incapacitated person's wishes to be domiciled in Massachusetts. One example was a case of an Appellant who fell into a regulatory category under 115 CMR 6.04(b), a category that presumed him to be not domiciled in Massachusetts because he had been placed in a Massachusetts program by out-of-state parents. In this instance, the Hearing Officer considered the Appellant's wishes to remain in Massachusetts and found him to be domiciled in Massachusetts. Of note was the Hearing Officer's determination that even if the Appellant's intention was not clear, the guardian's intention was clear. This was a case where the Hearing Officer allowed the ward to overcome a presumption that he was not domiciled in Massachusetts.

Counsel for the Appellant reviewed the facts surrounding a second example of a DDS domicile finding by the Hearing Officer (SM) where the decision was again in favor of the Appellant, this time based on the guardian's determination (after considering the incapacitated person's wishes) that it would be in the best interest of the Appellant to remain in Massachusetts. In this instance the Hearing Officer was mindful of the ward's desire to remain in Massachusetts even though he fell into a regulatory category under 115 CMR 6.04(b), whereby a presumption of not domiciled is stated.

The Courts have reaffirmed the principle that a person must have capacity to establish domicile in Palmer v. Commissioner of Revenue,<sup>13</sup> finding that a person changes her domicile when she has the capacity to do so, is physically present in the new place, and intends to make that place her home for an indefinite period.

Counsel for the Appellant argued that a finding of domicile would not compromise the policy goal of the eligibility statute of preventing people from moving to Massachusetts for the purpose of obtaining services; in this case the Appellant came to Massachusetts by chance and was not intending to get services by any agency. Counsel opined that it would be bad public policy to suggest that there is a higher hurdle for a person who is in an institution or who cannot reason their intent clearly.

#### SUMMARY OF DDS's POSITION AS PRESENTED IN OPENING STATEMENT

DDS has found that the Appellant does not reside in Massachusetts with the intent to remain here permanently, or for an indefinite period, as is required for DDS eligibility. The Appellant is a man who is dual diagnosed with mental illness and cognitive impairment, and who has a history of involvement with the criminal justice system. DDS has argued that the Appellant was never domiciled in Massachusetts; his containment in Massachusetts was a result of his criminal activity. His only involvement with Massachusetts has been through the criminal justice system and because of his mental illness, the mental health system. The Appellant has been incarcerated and held in Massachusetts mental health facilities since his first involvement with the Commonwealth in 2002. DDS has argued that the Appellant's residence since his arrival in Massachusetts in 2002 has been involuntary and, therefore, it is inappropriate and contrary to case law to have the Appellant declared domiciled in the Commonwealth of Massachusetts by virtue of his presence in Massachusetts.

<sup>13</sup> Palmer v. Commissioner of Revenue, 56 Mass. App. Ct. 1110 (2002)

DDS argues that the Appellant has never had intent to remain in the Commonwealth of Massachusetts. Federal law has always allowed a look back period and it is appropriate to look at the intentions of the person at the time of arrival. The Appellant was living in New Hampshire at the time of his arrest in Massachusetts, and it was understood that he, his family and the Massachusetts Department of Mental Health intended for him to return to New Hampshire. The document identified as Appellant Exhibit #3 is proof of the Massachusetts Department of Mental Health's intent to transfer the Appellant back to New Hampshire where he had lived and had family. The transfer did not take place based on clinical reasons, not on eligibility reasons.

DDS argues that the Massachusetts Department of Mental Health's goal is to get the Appellant discharged as soon as possible. The Appellant currently resides at [REDACTED] Hospital, which is closing. He has been identified in DMH's Mandatory Forensic Review (Appellant Exhibit #7 page 7) as a person who presents a tremendous safety concern and risk, which DDS argues is the reason the Appellant has not been discharged into the community. DDS also point out that the Commonwealth is experiencing a severe fiscal crisis at this time. DDS opines that the Department of Mental Health has been impacted significantly by the budgetary crisis, probably more than all of the departments in the Commonwealth. It is DDS's position that the Department of Mental Health seeks to remove the Appellant from their coffers by discharging him to DDS.

DDS argues that the Appellant has consistently voiced his desire to leave Massachusetts and return to Georgia, the state where he has family. He was on his way to Georgia in a car that he had stolen when he ran out of gas in Massachusetts and was arrested. The Appellant clearly voiced his desire to return to Georgia at the Informal Hearing that was held in November of 2008; the Appellant was not under guardianship at that time and had not been under guardianship for many years. The Department of Mental Health has since pursued and obtained guardianship for the Appellant effective [REDACTED] 2009. It is DDS's position that the Appellant is perfectly capable of stating his intentions, with or without guardianship. He is a person who had made all his own decisions. DDS points out that the Appellant was not under guardianship until his involvement with the Massachusetts Department of Mental Health when, in 2002, while the Appellant was at [REDACTED], a hearing was held in [REDACTED] New Hampshire Probate Court, during which the Appellant's brother, Mr. [REDACTED], was granted a temporary guardianship of the person. Guardianship for the Appellant lapsed in [REDACTED] 2004 and was not again obtained until after the Informal Conference where the Appellant had made clear his desire to return to Georgia. DDS contends that the Department of Mental Health's pursuit of guardianship is motivated by their need to obtain DDS services for the Appellant in order to discharge the Appellant from the coffers of the Department of Mental Health.

DDS argues that the case law cited by counsel for the Appellant in support of their contention that the Appellant is domiciled in Massachusetts cannot be used as an indicator of domicile in this matter; it is case law related to the right to vote. The case law regarding voter registration is held differently because of the fundamental importance of the right to vote and the recognition that people travel. One's right to vote can travel with the person's residence; it is not proof of domicile. A person can have several residences but only one domicile.

DDS argues that the Appellant has been very, very clear about his expressed intent to not reside in the Commonwealth of Massachusetts. He was contained in the Commonwealth of Massachusetts by a combination of the judicial system and the mental health system, but has

said all along that he wants to be in Georgia, where he lived for most of his life, and where he felt comfortable. Public policy would say that guardian, or no guardian, the Appellant is capable of stating his intention, and newly promulgated guardianship regulations effective [REDACTED] 2009 uphold this argument. DDS has denied eligibility based on the fact that the Appellant is not domiciled in Massachusetts, but rather is being presented as domiciled by an agency within the state (the Department of Mental Health), so as to enable the Appellant to get discharged from that agency.

### DDS ELIGIBILITY CRITERIA

The issue on appeal is whether the Appellant, [REDACTED], has met the requirement of domicile as that term is used and defined in DDS regulation. The Department's eligibility criteria found at 115 CMR 6.04 are as follows:

#### General Eligibility

- (1) Persons who are 18 years of age or older are eligible for supports provided, purchased, or arranged by the Department if the person:
  - a) Is domiciled in the Commonwealth; and
  - b) Is a person with mental retardation as defined in 115 CMR 2.01"
- (2) Domicile:
  - (a) For purpose of 115CMR 6.04(1) (a), a person shall be considered to be domiciled in Massachusetts if he or she resides in Massachusetts with the intention to remain here permanently or for an indefinite period.
  - (b) There shall be a presumption that the following individuals are not domiciled in Massachusetts"
    1. Persons who reside in a home or other setting subject to licensure or regulation by the Commonwealth, which residence was arranged or is being funded by another State, including any agency or political subdivision thereof and any entity under contract with the other State for such purposes:
    2. Persons who reside in a home or other setting subject to licensure or regulation by the Commonwealth which residence was arranged by a parent, guardian, or family member who is not domiciled in Massachusetts and was not so domiciled at the time of the person's placement
    3. Persons, other than those covered under 115 CMR 6.04(2) (b) 1. or 2., ages 18 through 21, who reside in a residential special education program and whose parent or guardian is not

domiciled in Massachusetts.

I find the applicable regulation in this matter, for a determination of domicile for the purpose of eligibility for DDS services, to be found at 115 CMR 6.04 (2)(a); both parties have agreed that 115 CMR 6.04 (2)(a) is the relevant regulatory category in this matter.

#### HEARING OFFICER CONCLUSIONS:

After a thorough review of all of the evidence, I find that the Appellant has failed to show by a preponderance of the evidence that he meets the DDS eligibility criteria of domicile found at 115 CMR 6.04(2)(a). My specific reasons are as follows:

- The burden of proof is on the Appellant to prove domicile in the state of Massachusetts as that term is understood in the context of eligibility of services from the Department of Developmental Services.
- The past findings of Fair Hearing Officers are not dispositive in this matter and were not considered; the cases cited are not applicable to the facts in this matter. The regulatory criteria in the cases cited are related to different sections of the DDS eligibility regulations regarding domicile. The findings made in previous Fair Hearings are based on the individual circumstances of each appeal.
- Case law regarding domicile for the purpose of voting must be looked at differently when determining domicile for the purpose of eligibility of DDS services, and therefore is not relevant in this matter. Domicile for the purpose of voting does not necessarily establish domicile within the meaning of 115 CMR 6.04. The government has a greater interest in lowering the barriers to voting and allowing all citizens to exercise this important basic right by allowing a person who resides in two states to determine where they may want to vote. The standard of domicile for eligibility of DDS services is a higher standard than that of domicile within the state for voting purposes. Thus the fact that the Appellant is enrolled to vote in the state of Massachusetts does not, in and of itself, establish domicile in the state of Massachusetts.
- The Department has brought forth the argument that DMH's interest in this matter is not based on the best interest of the Appellant but based on a desire to reduce DMH's financial burden of providing residential care to the Appellant by transferring the responsibility to DDS. DDS also points to the fact that DMH's [REDACTED], where the Appellant currently resides, is scheduled for closure in 2010, presenting another motive for DMH's desire to transfer responsibility for the Appellant's care to DDS.

DDS has developed an argument that points to their eligibility regulations found at 115 CMR 6.04 (2)(b)(1-3) where the Department clearly has invoked a look back provision to ascertain the conditions and motives that were present at the initial time

of residence in Massachusetts, the clear intent of which is to carefully assess circumstances so as to prevent a blatant transfer of financial responsibility from out-of-state families to the tax payers of Massachusetts. DDS presents the argument that these regulations regarding a determination of domicile (115 CMR 6.04 (2)(b)(1-3) require that an individual establish domicile for a reason other than receiving the state's services. DDS then applies these regulations to the present case, arguing that domicile is being pursued by the Massachusetts Department of Mental Health in order to transfer the financial responsibility to the Massachusetts Department of Developmental Services. DDS makes an analogy between out of state entities and in state agencies.

Notwithstanding this argument, I find that the eligibility regulations found at 115 CMR 6.04 (2)(b)(1-3) are not applicable to this case. While DMH's pursuit of eligibility may be motivated in whole or part by the fiscal concerns described by DDS, the regulations are silent with respect to preventing transfer of financial responsibility from one Massachusetts agency to another Massachusetts agency. 115 CMR 6.04 (2)(a) is the standard that must be applied in this instance, a standard where domicile is assessed as present when the individual resides in Massachusetts with the intention to remain permanently or for an indefinite period.

- The Department correctly carries out its statutory responsibility of allocating Commonwealth resources to those domiciled in the Commonwealth by exercising a gatekeeper function to ensure that individuals presenting as domiciled under 115 CMR 6.04 (2)(a), for the purpose of receiving DDS state services, meet the stated requirements of 115 CMR 6.04 (2)(a). It is therefore appropriate for DDS to look at the circumstances that brought the individual into the state of Massachusetts, to question and assess the facts regarding domicile within Massachusetts along with a possible domicile outside of the state, and to assess the individual's intent to remain permanently or for an indefinite period.
  
- In this case, the Appellant was living with his brother in the State of New Hampshire when he (the Appellant) was arrested and subsequently incarcerated in the State of Massachusetts. Prior to that time, the Appellant was domiciled in Georgia. While it has not been established that the Appellant's living with his brother in New Hampshire for a few months was indeed a change in domicile from Georgia to New Hampshire, it is clear that the Appellant was not domiciled in Massachusetts at the time of his arrest. After his arrest, the evidence shows that the Appellant was either confined, or believed that he was confined to various DMH mental health hospitals, where he was, in fact, prevented from leaving to return to his original home state of Georgia, or to the state of New Hampshire, even though he voiced his desire to do so on multiple occasions. Although the Appellant has been in residency in the Commonwealth of Massachusetts since 2002, either in the Massachusetts criminal justice system or the Massachusetts mental health system, his involuntary presence in the state of Massachusetts for these many years does not, alone, indicate that he is a domiciliary of Massachusetts. He has been confined against his will; intent to change domicile must be proven.



- The evidence supports a contention that guardianship of the person was used as a mechanism to subvert the Appellant's wishes to leave the state of Massachusetts and return to his family members in Georgia or New Hampshire. This observation is made based on the following facts: the Appellant was not under guardianship prior to his involvement with DMH; although the Appellant's guardianship lapsed for several years while under the care of DMH, DMH did not again pursue guardianship until after notice of ineligibility for DDS services ; the Appellant informed DDS's Southeast Regional Director at the Informal Hearing that he did not want to remain in Massachusetts; the Appellant has expressed his desire on multiple occasions to return to Georgia and/or other out of state locations in order to be with one of his brothers; the Appellant has a history of escape or elopement in attempts to return to his brothers, none of whom lived in the state of Massachusetts; the Appellant again stated at his Fair Hearing that he did not want to remain in Massachusetts; the Appellant's overall testimony at the Fair Hearing was not indicative of a person who intended to remain in Massachusetts. Furthermore, I have not seen evidence that the co-guardians are adequately considering the Appellant's obvious desire to live outside of Massachusetts so that he can be with, or close to, his family and friends.
- The Massachusetts Guardianship Law changed as of July 1, 2009. The new guardianship law now in effect recognizes the importance of considering the incapacitated person's wishes and desires when making a decision on behalf of the person. Substantive changes have been adopted to limit the guardian's powers based on the needs of the incapacitated person and to allow the incapacitated person to retain more personal liberty as opposed to taking over all of the person's decision making capacity. This law supports the premise that guardianship should be used only when impaired judgment or capacity poses a major threat to the person's welfare and not when the person merely shows poor judgment.<sup>14</sup> The Massachusetts Uniform Probate Code M.G.L. 190B section 5-309 requires that the guardian afford the incapacitated person with as much freedom as possible to make his or her own decisions. "A guardian shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions...."
- It is reasonable to conclude that a guardian in making a decision that is expressly contrary to the incapacitated person's expressed desire, should measure that decision against the same standard used to determine the need for guardianship: would allowing the incapacitated person's stated desire pose a threat to his welfare? In this case, the Appellant has consistently expressed his desire to leave Massachusetts so that he could be with or close to his family and friends. The Appellant's co-guardians are not considering the Appellant's feelings or opinions when they overlook his express wishes.

Mr. [REDACTED], the Appellant's Attorney co-guardian, has testified that his decision

<sup>14</sup> Guardianship and Conservatorship Under the Massachusetts Uniform Probate Code (MCLE, Inc. 3<sup>rd</sup> ed.2009) pg1-3

to have the Appellant domiciled in Massachusetts is based on his favorable opinion of the Department of Developmental Services and the fact that the Appellant would be eligible if deemed to be domiciled in Massachusetts. He also has acknowledged a personal bias to obtaining domicile in Massachusetts in that it will allow him to continue in the capacity of co-guardian, a function that he very much wants to retain. Attorney [REDACTED], however, has not researched the services that may be available in Georgia, explaining that he has not done so because he has not been asked to do so. Mr. [REDACTED], the Appellant's other co-guardian has similarly not researched other options that would more closely conform to the Appellant's wishes in this matter. Both have expressed their intent to have the Appellant domiciled in Massachusetts without considering whether allowing the Appellant the dignity and respect of considering his wishes would in any way place him in jeopardy. The evidence indicates that it would not.

The Appellant is currently receiving care and treatment in a secured unit of a DMH psychiatric hospital where he is benefiting from the expertise that is available from professionals who have background and expertise in mental illness, treatment that could potentially bring the Appellant to a level of self-monitoring that might allow him to meet his expressed desire of returning to Georgia. It has been established that care and treatment will continue even after [REDACTED] closes. There is no concern of jeopardy in keeping the Appellant under the care of his existing treatment team. Also significant is the fact that no evidence has been presented to indicate that a transfer of care and treatment to DDS would in any way be superior to the care and treatment he is now receiving. No evidence has been presented to prove that a transfer of responsibility from DMH to DDS will result in improved care and treatment for the Appellant, and conversely, no evidence has been presented to prove that remaining with DMH will diminish the Appellant's care and treatment. A finding of Domicile in Massachusetts would simply transfer the responsibility from one state agency to another without evidence of benefit to the Appellant.

In summary, I find that the co-guardians actions and decision in this matter are not in keeping with the expectations and intent of the Guardianship Law in Massachusetts; those decisions are therefore rejected as decisive to a finding of domicile for the Appellant. The evidence shows that the Appellant has consistently expressed his desire to leave Massachusetts and live in the state that he grew up in, where the brother who he has lived with in the past is currently residing, and where childhood friends and family live. His clear intent is to be with or close to one of his brothers, none of whom live in Massachusetts. Based on the evidence presented I find that the Appellant does not meet DDS's regulatory requirement for domicile found at 115 CMR 6.04 (2)(a) as he does not intend to remain in Massachusetts permanently or for an indefinite period. The weight of the evidence shows that the requirement of domicile, as that term is used and interpreted by DDS for the determination of DDS supports, is not met in this case as the provisions of 115 CMR 6.04 (2)(a) are not present. Therefore, DDS's determination of ineligibly is upheld.

**APPEAL:**

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L.c.30A [115CMR 6.34(5)]

Date: \_\_\_\_\_

\_\_\_\_\_  
Jeanne Adamo  
Hearing Officer