



# Guardianships

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# The Purpose of Guardianship



Recognizing that every individual has unique needs and differing abilities, Pennsylvania Guardianship statute (20 Pa C.S. 5502) promotes general welfare of all citizens by

- Permits incapacitated persons to participate as fully as possible in all decisions which affect them,
- Meets requirements for physical health and safety,
- Protects rights,
- Manages financial resources,
- Develop or regain abilities to maximum extent possible,
- Using the least restrictive alternatives;
- Find suitable individuals or entities to serve as guardians

# Lesser Restrictive Alternatives to Guardianship



- Power of Attorney (financial and/or health care)
- Trusts (financial)
  - Can transfer monies to a Trust, managed by Trustee, in order to provide financial protection and management
  - Revocable Trust that provides for Trustee change upon incapacity of Settlor
- Health Care Representative (health care)
- Supported Decision Maker (financial and/or health care)

# Must present evidence as to less restrictive alternatives at hearing



- In re: JL, an incapacitated person, Np. 582 MDA 2021 (Pa. Super Ct., April 16, 2021)
- Superior Court reverses Orphans' Court finding of incapacity and remands case back to Orphans' Court for new hearing
- Orphans' Court must hear evidence as to whether lesser restrictive alternatives are available including evidence on whether and what advance healthcare directives and healthcare powers of attorney appellant executed and evidence concerning whether appellant's sister is willing to act as his guardian or healthcare power of attorney

# Power of Attorney vs. Guardianship



- Power of Attorney is a document by which one person (the Principal) grants another person (the Agent) authority to act on Principal's behalf for financial and/or medical issues
  - Principal retains full ability and right to act
- Guardianship is a legal determination that person does not have the capacity to act on his own behalf
- Guardianship necessary if a person is incapacitated and did not previously execute a Power of Attorney

# Power of Attorney



- **Durable POA -- lasts beyond incapacity**
  - Unless stated otherwise in POA, all POAs are presumed Durable
- **Springing or Immediate**
  - Springing goes into effect upon occurrence of terms in POA
    - ✦ Generally, when a doctor(s) certifies the principal's incapacity
  - Interpretation problems may arise
  - Agent cannot act if Principal temporarily unavailable
- **Agent has the duty to:**
  - Exercise powers for the benefit of the Principal
  - Keep his assets separate from the Principal's
  - Exercise reasonable caution and prudence
  - Keep full and accurate records of all actions, receipts and disbursements

# Power of Attorney



- Principal must have adequate capacity to enter into POA
  - At a minimum, Principal must understand:
    - ✦ The nature of the authority giving under the POA
    - ✦ The assets he owns that are subject to the POA
    - ✦ What the plain language of the notice means
  - Who decides?

# Revoking a Power of Attorney



- Principal can Revoke a Power of Attorney at any time and appoint a new Agent under a new POA
  - Issue if a principal can be manipulated by designing persons
- Is it possible to Petition the Court to make a Power of Attorney Irrevocable?
  - Even if irrevocable, still does not prevent Principal from acting himself



# Supported Decision Maker (SDM)



- Signed written Agreement between Principal (person with special needs) and his chosen Supporter(s)
  - Alaska, Colorado, Delaware, D.C., Indiana, Louisiana, Nevada, North Dakota, Rhode Island, Texas, Washington, Wisconsin have laws allowing SDM agreements
  - Principal must have capacity to understand agreement
- Principal retains decision making capacity and has Supporter(s) to help him in decision making
- Supporters assist Principal in:
  - Understanding information/options regarding finances or medical care
  - Obtaining information needed for decision making
  - Making Decisions about health and finances
  - Communicating decisions and wishes
  - Monitoring affairs or services
- Agreement can list decisions with which Supporter can and cannot provide assistance

# Health Care Representative



- When adult (over 18) deemed incompetent by physician and no Healthcare POA designated or guardian appointed, “health care representative” may act
  - Pa Statute – 20 PaCS Section 5461
- Same powers as Healthcare Agent under POA
- Health Care Representative can be designated in writing
- If no designation - the following, in descending order, as reasonably available, may act as health care representative:
  - Spouse (unless an action for divorce is pending)
  - Adult children (18 years of age or older)
  - Parent
  - Adult sibling
  - Adult grandchild
  - Adult who has knowledge of the potential research subject’s preferences and values, including but not limited to religious and moral beliefs, who is able to assess how the patient would make decisions



What if person does not have  
capacity to execute Power of  
Attorney and no  
available/sufficient Less  
Restrictive Alternative?

# When Guardianship may be needed

(and no less restrictive alternative is available)



- Person who has been disabled since birth (i.e., intellectual disabilities) attains age 18 and needs legal decision maker
- Adult becomes disabled and no POA
- Adult becomes disabled but Agent under POA is misappropriating funds, abusing authority, family is fighting, Co-Agents cannot agree, etc.
- Adults with mental health illness
- POA is not broad enough or is not accepted

# Guardianship Basics



- Incapacitated person (IP or AIP for Alleged Incapacitated Person)
  - [A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety. 20 Pa. C.S. § 5501.
- Guardian of Estate
  - Makes decisions regarding the incapacitated person's financial assets
- Guardian of Person
  - Makes decisions over the incapacitated person, such as where that person will reside and what medical, social, educational, psychological and vocational services and opportunities the incapacitated person will receive

# Plenary Guardian



- Plenary Guardian of the person and/or estate may be appointed when the Court finds a person to be totally incapacitated
- Total decision making authority

# Limited Guardian



- When a person is partially incapacitated, the Court may appoint a limited guardian, who will have powers only over what the Court expressly orders
  - Limited to areas where incapacity restricts ability to make and communicate decisions
  - Partially incapacitated person shall be incapable of making any contract, gift, or instrument in writing in those specific areas in which the person has been found to be incapacitated
- The incapacitated person retains all other powers over his affairs
- Theoretically favored in law where feasible, but interpretation and oversight may be practically challenging

# Emergency Guardian



- Only in extreme circumstances where failure to make appointment will result in irreparable harm to AIP or his estate
- Only effective for 72 hours (may be extended for 20-30 days)
- Then permanent guardian must be appointed



# Who may Petition?



- Any person interested in the alleged incapacitated person's welfare may petition for appointment of a guardian for an incapacitated person
- Cannot have interest adverse to incapacitated person
- May be individual or an agency

# Who May Serve?



- Court must find suitable individuals or entities willing to serve. 20 Pa. CS 5502
- Any qualified individual, corporate fiduciary, nonprofit corporation, guardianship support agency or county agency
- Court is required to give preference to a nominee of AIP if appropriate. 20 Pa. CS 5511(f)
- What is in AIP's best interest?
- Court analysis of AIP and Proposed Guardian's values & whether there is love & concern for AIP
- Should Court appoint co-guardians?
- Should Court appoint Successor Guardians?

# Who May Not Serve?



- Court will not appoint guardian whose interests conflict w/ AIP
- What gives rise to unsuitability?
  - Rivalry among family members
  - Hostile relationship w/ AIP
  - Direct financial Interest in AIP's estate
  - Allegations of Inappropriate handling of finances as an Agent under POA or otherwise

# Who May Not Serve?



- Allegations of Neglectful conduct
- Conflicting Religious beliefs
- Conflicting End of Life beliefs
- Non-cooperation w/ Hospital or Nursing Home in discharge or care planning
- Non-cooperation w/ Department of Human Services in obtaining Medicaid for Long Term Care

# Who May Not Serve?



- Can divorced parents serve as co-guardians?
  - ✦ Decision may vary depending on Court
  - ✦ Appoint 3<sup>rd</sup> party as “mediator” before can head to Court with disagreements

# Criminal History Check on Proposed Guardians



- Proposed Guardian must attach to Petition a Pennsylvania State Police criminal history report issued within six months of the filing of the petition.
- As well as criminal history report for any state in which proposed guardian has resided within the previous five-year period
- This is newer requirement implemented with recent changes updates to Pennsylvania guardianship system

# Petition Contents



- Jurisdiction- County of alleged incapacitated person's domicile, residence, or long term care facility
- Name, age, DOB, address of alleged incapacitated person (AIP)
- Residential Service provider, if any.
- Nature of disability
- Description of physical and mental functioning
- Names/addresses of spouse, parents, next of kin
- Service providers
- Proposed guardians and whether adverse interest
- Why guardianship sought

# Petition Contents



- Type and duration of guardianship sought
  - Limited or plenary guardian of estate/person.
- Statement whether served armed forces
- Whether less restrictive alternatives are appropriate
- Value of estate and all sources of income (for Guardian of estate)
- Whether any Will, Power of Attorney, Advanced Medical Directive or Burial account exists (attach)



# Service of Petition



- Written notice, in large type and in simple language to the alleged incapacitated person
- Notice must indicate the purpose and seriousness of the proceeding and the rights that can be lost in the proceeding
- Notice must state date, time and place of hearing and the rights of the incapacitated person, including the right to be represented by an attorney, and to have counsel paid for, if the alleged incapacitated person cannot afford an attorney

# Service of Petition (continued)



- Petition and Citation must be personally served upon alleged incapacitated person at least 20 days before hearing
- Contents must be explained to the maximum extent possible in language the alleged incapacitated person is most likely to understand
- The Orphans' court does not have personal jurisdiction over the AIP until personal service is effectuated or there is a general appearance on the AIP's behalf.

# Right to Counsel



- Alleged incapacitated person may request a jury trial
- Alleged incapacitated person has right to an attorney
  - At least 7 days before hearing Petitioner must inform Court if counsel has not been appointed by or on behalf of alleged incapacitated person
  - Court may appoint counsel in certain cases or counties
  - What if AIP wants to hire own attorney?

# Change to Orphans' Court Rules



- (a) Private Counsel. If the alleged incapacitated person has retained private counsel, counsel shall prepare a comprehensive engagement letter for the alleged incapacitated person to sign, setting forth when and how counsel was retained, the scope of counsel's services, whether those services include pursuing any appeal, if necessary, how counsel will bill for legal services and costs and the hourly rate, if applicable, who will be the party considered responsible for payment, whether any retainer is required, and if so, the amount of the retainer. Counsel shall provide a copy of the signed engagement letter to the court upon request

# Notice to Next of Kin



- Notice of Petition and hearing must be sent via certified mail, return receipt requested, to all persons who are sui juris and would be entitled to share in the estate of the alleged incapacitated person, were he to die intestate, as well as residential provider
- Proof of service must be filed with Court
- Consents signed by heirs must be filed with Court

# Possible Court Actions Before Hearing



- Issuing Order which allows court-appointed counsel access to financial or medical records.
- Allowing court-appointed counsel to obtain subpoena for records where necessary.
- Issuing Order for IME.
- Emergency hearing where circumstances suggest need for immediate appointment of emergency guardian(s).
- Action to freeze accounts to prevent dissipation of AIP's assets.

# Hearing



- AIP is presumed to have capacity
- Petitioner has burden to prove incapacity by clear and convincing evidence
- To establish incapacity, must present testimony (in person or through Doctor's affidavit) by person trained and experienced in alleged incapacitated person's type of disability, which establishes the person's:
  - Mental, emotional and physical condition
  - Adaptive behavior
  - Social functioning
  - Ability to meet essential requirements for his health and safety
  - Ability to manage financial resources
  - Probability that the disability will lessen or change
  - Whether guardianship is appropriate

# Should Alleged Incapacitated Person Appear at Hearing?



- Not if testimony from Doctor that the alleged incapacitated person's physical or mental condition would be harmed by his presence
- Not if alleged incapacitated person is out of the Commonwealth
- Yes if AIP wants to contest Guardianship or proposed Guardian



# Testimony by Guardian



- Name, address, relationship to incapacitated person
- Family relationship/dynamics
- Physical, Mental, Social functioning
- Current placement and future plans
- Significant assets
- Public Benefits

# Compelling AIP to Testify



- AIP cannot be compelled to testify.
- Taylor, Incapacitated Person, 21 Fid Rep. 2d 205 (Montg. 2001) Petitioner has the initial burden of making a prima facie case for incapacity without AIP's own testimony. If that initial showing is made, AIP will be subject to questions from the bench by interview rather than by direct or cross. No questions by counsel unless AIP (or his counsel) acquiesces.
- Cannot prove incapacity through testimony of the AIP alone.

# Service with Notice of Appeal



- After hearing, must serve incapacitated person with Notice of his Right to Appeal within 30 days of Adjudication
- At any time after 30 days, IP can request review hearing with Court to show change in circumstances, and why guardianship no longer necessary

# Duties of Guardian of Person



- Act in incapacitated person's best interests
- Respect the expressed wishes and preferences of the incapacitated person to greatest extent possible
- Assist development of plan for supportive services to meet incapacitated person's needs
- Encourage incapacitated person to participate to maximum extent possible in all decisions that affect him, to act on his own behalf whenever he is able to do so, and to develop or regain his capacity to manage his own affairs

# Duties of Guardian of Person (continued)



- General care, maintenance, and custody of incapacitated person
- Assist in finding place for incapacitated person to live
- Responsible for training, education, medical and psychological services of incapacitated person
- Annual reports must be filed with Court

# Vaccination for COVID-19



- In the Matter of A.C.G., an Incapacitated Person, (Chester County Orphans' Court), No. 1517-0336 (October 5, 2021)
  - Guardianship case involving a 31-year-old woman with down syndrome
  - Divorced parents are co-guardians
  - Father sought to have her vaccinated against COVID-19; mother opposed.
- Court was charged in finding what was in ACGs best interest and Court allowed vaccination
  - Court evaluated testimony from primary care physician, cardiologist, neurologist and other expert witnesses
  - Court did not address mother's religious convictions

# Duties of Guardian of Estate



- Act in incapacitated person's best interests
- Inquiry and discovery of assets
- Safeguard assets
- Management of assets
- Payment of debts, obligations, expenses
  - Can expend Income on care and maintenance of IP without Court approval
  - Must get Court approval to expend Principal

# Duties of Guardian of Estate (continued)



- **Annual Report must be filed with Court**
  - Show all income received and income/principal expended
  - Final Report must be filed at IP's passing/change of guardian
- **Fiduciary Duty owed to incapacitated person**
  - Legally obligated to use prudent judgment
- **Estate planning**
  - May request Court to authorize if substantial assets
- **Inventory- must be filed with Court within 90 days of hearing**
  - List all assets of IP



# Disclosure of Digital Assets – 20 PaCS 3914



- Court may grant guardian of estate access to digital assets of protected person
- Custodian shall disclose to a guardian of estate the catalog of electronic communications sent or received, other than the content of electronic communications, if the guardian of estate gives custodian:
  - (1) Written request for disclosure;
  - (2) Certified copy of the court order that gives guardian authority over digital assets; and
  - (3) if requested by custodian: (i) username, address or account identifier; or (ii) evidence linking the account to protected person
- Guardian of estate with general authority to manage assets of protected person may request a custodian of digital assets to suspend or terminate an account for good cause.
  - Must provide certified copy of Court order giving guardian authority over estate

# Guardianship Tracking System (GTS)

(for filing reports of estate and/or person)



- <https://ujportal.pacourts.us/Guardianship.aspx>
- Pennsylvania Guardianship Tracking System (GTS)- online tool where guardians can file inventory and annual person/estate reports online
  - Payment of fees may be made online
  - When filed, is forwarded to court for processing
- Failure to file reports timely will result in Rule to Show Cause why report not filed
  - Can result in removal as guardian

# Removing and Replacing Guardian



- Review hearing may be requested or ordered sua sponte by court
- Court will monitor Annual reports
- Any party interest may petition to remove guardian
- Review hearing - court will determine whether Petitioner showed clear and convincing evidence exists that guardian failed to perform duties or act in best interest of AIP

# Grounds For Removal:



- Wasting or mismanaging the estate
- Became incapacitated
- Left PA without posting bond
- Charged with voluntary manslaughter or homicide
- When, for any other reason, the interests of the estate are likely to be jeopardized

# Recovering Funds?



- Pursue Criminal Charges
- Request Accounting
- What does DHS expect? The Court?
  - To recover assets.

# Hypothetical – Part I



The Matter of Sam. Mom and Dad ask you to represent them in getting guardianship over their adult son, Sam. Sam has a longstanding mental health illness. He can function when he takes his medication but has never been able to work. Without his medications, he is psychotic and can be aggressive. He has had multiple hospitalizations in the past.

# Hypothetical – Part I, cont'd



Mom and Dad state that Sam is not taking his medication, he left home and is living in an apartment, which is filthy, the utilities are turned off, he is not eating and has lost a lot of weight. Mom and Dad want guardianship:

- To sign Sam into an inpatient psychiatric treatment facility;
- To force him to take his medication;
- And to consent to treatment, including Electro-convulsive therapy.

# Limits of Guardianship



Do Mom and Dad get their wish?

- Powers specifically excluded: power to admit the incapacitated person to an inpatient psychiatric facility or State Center for the intellectually disabled. 20 Pa. C.S. § 5521(f)(1).



# Limits of Guardianship



- Powers controlled by other Statute: The court may not grant the guardian powers controlled by other statutes. 20 Pa. C.S. § 5521(f).
  - Guardian cannot admit incapacitated person to inpatient psychiatric facility or State center for person with intellectual disabilities 5521(f)(1)
- The Mental Health Procedures Act (“MHPA”) establishes the rights and procedures for **all involuntary treatment of mentally ill persons**, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. 50 P.S. § 7103.

# The MHPA



- Involuntary Commitment. 50 P.S. § 7302.
- A person is severely mentally disabled when, as a result of mental illness, “his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a **clear and present danger of harm to others or to himself.**”

# Independent Evaluation and Discovery



- What if Sam will not submit to an independent evaluation?
- Motion for discovery, OC Rule 7.1.
- Need petition and for cause shown.
- The Court may order an independent evaluation or the AIP may request an independent evaluation. 20 Pa.C.S. § 5511(d).
- MH records are confidential.

# Limits of Guardianship



- Absent a Court Decree with specific findings of fact, a guardian shall not have the power to:
  - Consent to Abortion, sterilization, psychosurgery, electroconvulsive therapy (“ECT”) or removal of a healthy body organ. 20 Pa. C.S. § 5521(d) (1)
  - Prohibit the marriage or consent to the divorce of IP. 20 Pa. C.S. § 5521(d) (2)
  - Consent on behalf of IP to experimental biomedical or behavioral medical procedure or participate in any biomedical or behavioral experiment 20 Pa. C.S. § 5521(d) (3)
- Can present findings of fact at hearing as to why these powers are needed

# Limits on Guardianship



- Court cannot grant Guardian powers controlled by another statute
  - Guardian cannot consent on behalf of incapacitated person to the relinquishment of the person's parental rights - 20 Pa.C.S. Section 5521(f)(2)

# Substituted Judgment



- Upon petition, the Court can substitute its judgment for that of the incapacitated person's for the benefit of the incapacitated person, his family, his household, his friends and charities in which he was interested. PEF Code Sec. 5536(b)
- Could include
  - gifting
  - disclaiming contingent and expectant interests
  - enter into contracts
  - create trusts
  - exercise rights under life insurance policies
  - modify will or revocable trust
- Court must be satisfied that assets exist that are not needed for IP's maintenance, support and well being

# End of Life Decisions



- In re: Fiori, 543 Pa. 592 (1996)
  - Competent 20 year old who suffered severe head injuries and was in a persistent vegetative state with no hope of recovering
  - No POA or living will
  - After 17 years in PVS, mom, legal guardian, petitioned Court to remove feeding tube after nursing home refused
  - 2 neurologists testified that he would not recover
  - Son had not spoken with mom about his wishes, but she believed, based on his love of life and personal ethics that he would want to end treatment
  - Court allowed mom/guardian to exercise “substituted judgment”
    - ✦ Lesser standard than clear and convincing evidence
  - Holding limited to exact facts

# End of Life Decisions



- **IN RE: D.L.H., an incapacitated person (Pa. Superior Ct., 2009)**
- **ISSUE:**
  - Whether guardians of life long incapacitated person (profound ID) could deny life sustaining treatment
- **FACTS:**
  - Swallowed hairpin and had aspiration pneumonia. Required ventilator to breathe, which guardians declined. Hospital put him on ventilator, parents petitioned court but did not show that removing ventilator was in best interests
  - DLH was not in end stage condition or permanent vegetative state
- **HOLDING:**
  - Court held - guardian's authority is not as broad as authority of health care agent (appointed under HC POA or LW)
  - Guardian must petition court for authority to decline life preserving treatment and must prove its in IC best interest by clear and convincing evidence
    - ✦ Extraordinary burden
    - ✦ In IC best interest and not for convenience of guardians, family or society in general
    - ✦ must show reliable medical evidence documenting severe medical condition, deterioration, pain



# Attorney and Fiduciary Fees



- Reasonable fees
- Upon Petition only approved by Court
- Extent & value of services must be properly established
- Guardian has burden of proof
- How do you analyze whether reasonable:
  - Amount of work;
  - Character of the services;
  - Difficulty of the problems involved;

# Reasonableness



- Importance of the litigation;
- Amount of money or value of property in question;
- Degree of responsibility incurred;
- Whether the fund was “created” by the attorney;
- Professional skill & standing;
- Results obtained; and
- Ability of IP to pay

# Transfer of Guardianship to Another State



- 4 Step Process
  1. Provisional Order to Transfer Guardianship by transferring State
  2. Provisional Order to Accept Guardianship by accepting State
  3. Final Order Confirming Transfer and Terminating Guardianship by transferring State
  4. Final Order Accepting Guardianship by accepting State
    - Order may need to be modified to comply with accepting State
- Registration of Guardianship Order from another State
  - Register by filing as a foreign judgment
  - Upon registration, guardian may exercise all powers in Order, except as prohibited by laws of PA

# Thank you for attending!



- Please contact Lesley M. Mehalick with questions at 610-648-9300 or [lmehalick@mcandrewslaw.com](mailto:lmehalick@mcandrewslaw.com)