

PLAN CONFERENCE May 11-12, 2011
Guardianship – Representing the Alleged Incapacitated in a Guardianship Matter
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GUARDIANSHIP

AND

THE OLDER ADULT PROTECTIVE SERVICES ACT

I. Significant Provisions in the Guardianship Statute:

A. Right to Counsel.

B. Attendance at hearing of alleged incapacitated individual.

Positive evidence required to excuse attendance.

C. Evidence required.

Positive Evidence:

1. Expertise required.

2. Deposition or appearance needed to get testimony
before court. Local practices do modify this
requirement.

3. Clear and Convincing: How does this differ from
preponderance of evidence standard in most other
civil case?

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II. Similarities between Guardianship Statute and Older Adult Protective Services Act.

A. Right to Counsel:

1. Guardianship statute requires appointment of counsel in appropriate cases.
2. *Appropriate cases* is not defined.
3. Petitioner required to advise court at least seven (7) days prior to hearing whether counsel has been retained by or on behalf of the alleged incapacitated individual. If individual is unable to pay for attorney, county will be ordered to pay the fees.
4. Issues: What happens locally? When does this happen?
Role of counsel?

B. Protective Services Act requires that court will appoint counsel for older adult by including appropriate language in emergency order.

1. Appointment is after the court grants the emergency relief requested.
2. However, under the protective services regulations,

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protective services agencies are required to attempt to secure an attorney for the older adult before presenting the emergency petition to the court. County also could be liable for payment of fees for attorney appointed to represent older adult.

3. Difference:

Under the OAPSA right to counsel provisions, Protective Services (PS) is required to either contact the older adult's attorney, if known. In the alternative, if no known attorney or if he/she refuses to accept case, then PS must contact the legal services provider identified by the AAoA in its protective services plan.

ISSUE: When does this happen?

Does Court appoint local counsel without requesting the AAoA to provide as required by regulations? Cost oftentimes is an issue.

Role of counsel?

Role of Guardian Ad Litem?

If appointment is after emergency order is granted by Court, older

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adult could effectively be deprived of representation because orders could automatically terminate by inaction of the protective services providers. What about review orders. Are they routinely setting hearings for review of the order entered at the filing of the petition?

C. Evidence required in guardianship is very specifically set forth.

Evidence required in PS §10 (35 P.S. § 10225.307) case is not spelled out and may consist of testimony from PS workers or from other service providers who may be familiar with the situation giving rise to the filing of the petition.

D. Duration of Initial Orders:

1. Emergency Orders Granting Involuntary Intervention: The Older Adult Protective Services Act contains no restriction on the length of the order, although the protective services regulations indicate that agencies can request orders no longer than seventy-two (72) hours in duration. What is the practicality of this?

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2. The guardianship statute provides that an emergency guardian may be appointed of the person and/or of the estate of the alleged incapacitated person, but shall not continue for more than seventy-two (72) hours. If the emergency continues beyond the seventy-two (72) hours, then the emergency appointment of guardian of the person may be extended for twenty (20) days; the emergency appointment of the guardian of the estate may be extended for thirty (30) days.

ISSUE: Is the Involuntary Intervention by Emergency Order an alternative for relief when following the appointment of an emergency guardian, the Guardianship Petition for the Appointment of a Guardian cannot be heard by the court within the time constraints imposed by the statute, mentioned above? It is important to remember that the Court is not bound by the regulatory requirement that PS should not request orders longer than 72 hours in duration.

E. Final Orders: Both laws provide that permanent relief may be

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granted, but there are to be limits on the relief.

1. Protective Services: For example the PS act indicates that the relief granted should be limited in that it should direct or require the provisions of "only such services as are necessary to remove the conditions creating the established need." Section 10(b) Regulations require that the petition itself state why the requested services or remedy is not overbroad in extent or in duration and that services should be specific, short-term, and represent the least restrictive alternative. 6 PA Code §15.72, The Petition.

2. Guardianship: The relief granted by way of the appointment is very broad unless a limited guardian is deemed appropriate. If it is plenary of both person and estate, powers and therefore the relief are very broad. However, court must make very specific findings of fact, and there is no similar requirement in

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PS Act.

III. Protective Services Emergency Order versus Emergency Guardian

Appointment:

A. Fact gathering prior to filing in both situations may be similar.

What's needed?: in both cases might need financial information to secure a placement. The PS act would be the more expeditious method because of the provisions regarding the access to records. This is a very broad provision of the PS act.

B. Evidence required to secure emergency appointment of guardian and that required to secure emergency order for involuntary intervention is similar.

C. Final Guardianship order (the one entered by the court after the final hearing) requires further court action to dissolve; the emergency order granted under the Older Adult Protective Services Act could dissolve after specified time, if appropriate language is included in order.

D. Protective Services Act contains very useful language about getting injunctions against those who interfere with the delivery of

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a protective services plan.

E. Why might PS be better qualified or able to assess least restrictive alternative, what supportive services are required, etc.?

F. Competent Refusal: Under the PS act and applicable regulations there is no mention of this term. We attempted to get it placed in the regulations, but we were unsuccessful. Petition must state what efforts were made to secure informed consent. Assumption if a petition is filed that informed consent cannot be secured and that competent refusal cannot be made by older adult because they have no understanding of situation or of the consequences of their actions or failure to act in the situation.

G. Competent Refusal in Guardianship is presumed to be impossible because of person's incapacity. However, this could be disproved.

FOCUS ON PROTECTIVE SERVICES

I. Protective Services Definitions:

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- A. Older Adult in Need of Protective Services: Defined by 35 P.S. § 10225.103 as an incapacitated older adult who is unable to perform or obtain services that are necessary to maintain physical or mental health, for whom there is no responsible caretaker and who is at imminent risk of danger to his person or property.
- B. Protective Services: Defined by 35 P.S. § 10225.103 as those activities, resources and supports provided to older adults under this act to detect, prevent, reduce or eliminate abuse, neglect, exploitation and abandonment.
- C. Neglect: Defined by 35 P.S. § 10225.103 as the failure to provide for oneself or the failure of a caretaker to provide goods or services essential to avoid a clear and serious threat to physical or mental health No older adult who does not consent to the provision of protective services shall be found to be neglected solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care.

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- D. Abuse: Defined by 35 P.S. § 10225.103 as the occurrence of one or more of the following acts:(1) The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.(2) The willful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health.(3) Sexual harassment, rape or abuse, as defined in the act of October 7, 1976 (P.L 1090, No 218), known as the Protection From Abuse Act.
- E. Exploitation: Defined by 35 P.S. § 10225.103 as an act or course of conduct by a caretaker or other person against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.
- F. Abandonment: Defined by 35 P.S. § 10225.103 as the desertion of an older adult by a caretaker.

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II. What Uses Can be Made of the Protective Services Act & Under What Circumstances?

A. Providing Protective Services:

1. With Consent: Deliver services pursuant to a plan to detect, prevent, reduce or eliminate abuse, neglect, exploitation and abandonment. Scope of services can be very broad. See, 35 P.S. § 10225.304(B).
2. No Consent: Since services may only be received voluntarily by a consumer, services cannot be provided absent a consent. See, 35 P.S. § 10225.304(B).
 - a. Can any services be provided without consent?
Perhaps the only time protective services may be delivered without consent and outside of an involuntary intervention emergency court order is when there is interference with an older adult's right to consent to the provision of protective services. See, 35 P.S. § 10225.304(B) provides as follows: Except

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as provided in section 307, an individual shall receive protective services voluntarily. In no event may protective services be provided under this chapter to any person who does not consent to such services or who, having consented, withdraws such consent, unless such services are ordered by a court, requested by a guardian of the older adult or provided under section 307. Nothing in this chapter shall prevent the agency from petitioning for the appointment of a guardian pursuant to Title 20 of the Pennsylvania Consolidated Statutes (relating to decedents, estates and fiduciaries).

- b. INTERFERENCE WITH SERVICES.-- If any person interferes with the provision of services or interferes with the right of an older adult to consent to provision of services, the agency may petition the court for an order enjoining such interference.

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3. What Kind of Petition Can be Filed? Mentioned in Act but there is no suggested form available.

a. Consider using the damages section set forth in 35 P.S. §10225.302(C.1). This section provides “INTIMIDATION; PENALTY.-- Any person, including the victim, with knowledge sufficient to justify making a report or cooperating with the agency, including possibly providing testimony in any administrative or judicial proceeding, shall be free from any intimidation by an employer or by any other person or entity Any person who violates this subsection is subject to civil lawsuit by the person intimidated or the victim wherein the person intimidated or the victim shall recover treble compensatory damages, compensatory and punitive damages or \$ 5,000, whichever is greater.”

b. What can be asked for under this penalty

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section and by whom?

-PS worker can request relief if she or he
has been intimidated or threatened.

Examples: Threats of physical violence

- What relief may be requested:
Injunction, treble compensatory, punitive,
or compensatory and punitive damages
or \$5000.00, whichever is greater.

B. Other Court-Ordered Relief Outside of an Involuntary
Intervention Emergency Court Order:

1. Petition for Access to Records: 35 P.S.
§10225.304(H) provides as follows: If the agency is
denied access to records necessary for the
completion of a proper investigation of a report or a
client assessment and service plan, or the delivery of
needed services in order to prevent further abuse,
neglect, exploitation or abandonment of the older
adult reported to be in need of protective services, the

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agency may petition the court of common pleas for an order requiring the appropriate access when either of the following conditions apply:(a) The older adult has provided written consent for any confidential records to be disclosed and the keeper of the records denies access.(b) The agency can demonstrate that the older adult is denying access to records because of incompetence, coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment.

(1.) When does this subsection apply? Care giver will not permit access to records

(2.) Agent under POA denies access.

(3.) If older adult cannot consent because of incapacity, Court-appointed guardian can provide consent but record keeper may deny consent.

(4.) What is needed to prove coercion, extortion, or justifiable fear of future abuse, neglect, exploitation, or abandonment?

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- Prior Report of Need

- Prior domestic violence incidents

- Criminal record involving violence or threatened violence by record holder/care giver against consumer.

- Comments by care giver/record keeper during investigation.

- How did care giver/record keeper act during home visits? Were private conversations permitted between PS caseworker and older adult?

Did the care giver/record keeper answer all of the questions asked of the older adult?

(c). What is needed to show denial of access due to incompetence?

- Be careful when trying to show this was the basis for the denial. Is it the same as incapacitated?

- This section of the Older Adult Protective Services Act mentions incompetence, but this term is not

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defined in the Act.

-OAPSA regulations do provide some guidance here.

6 Pa. Code § 15.2 provides as follows: Incapacitated older adult -- An older adult who, because of one or more functional limitations, needs the assistance of another person to perform or obtain services necessary to maintain physical or mental health. The definition of capacity or incapacity or competence or incompetence, as defined in 20 Pa.C.S. §§ 5501 -- 5555 (Relating to guardianship), does not apply to this definition.

- Incapacity is also defined in the Pennsylvania guardianship law at 20 Pa.C.S.A. § 5501, which states as follows: "Incapacitated person" means an 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

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to meet essential requirements for his physical health and safety.

-History of the different terms:

-OAPSA passed in 1987

-OAPSA implemented in about 1989

-Guardianship law amended in 1992, and the amended law does not mention incompetency.

2. Petition for Access to Person: 35 P.S. § 10225.304(f) states:

DENIAL OF ACCESS TO PERSONS.-- If the agency is denied access to an older adult reported to be in need of protective services and access is necessary to complete the investigation or the client assessment and service plan, or the delivery of needed services in order to prevent further abuse, neglect, exploitation or abandonment of the older adult reported to be in need of protective services, the agency may petition the court for an order to require the appropriate access when either of the following conditions apply: (1) The caretaker or a third party has interfered with

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the completion of the investigation or the client assessment and service plan or the delivery of services. (2) The agency can demonstrate that the older adult reported to be in need of protective services is denying access because of coercion, extortion or justifiable fear of future abuse, neglect, or exploitation or abandonment.

(a). Slight difference between the grounds for denial that can be alleged under this section and grounds that can be alleged under section dealing with denial of access to records. Incompetence is not an available ground here.

(b). When does this subsection apply? Care giver will not permit access to records; care giver will not allow delivery of services; care giver will not provide or make arrangements to have provided other services, such as assistance with housekeeping, grocery shopping, etc.

(c). Agent under POA denies access to the older adult.

(d). What is needed to prove coercion, extortion, or

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justifiable fear of future abuse, neglect, exploitation, or abandonment?

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- How did care giver/record keeper act during home visits? Were private conversations permitted between PS caseworker and older adult?

Did the care giver/record keeper answer all of the questions asked of the older adult?

3. Involuntary Intervention by Emergency Court Order:

Pursuant to Section 10 (35 P.S. § 10225.307) of the Act, a petition seeking emergency involuntary intervention may only be filed where there exists the possibility that

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death or serious physical/will occur unless a protective services provider delivers protective services. From the standpoint of an advocate who would be representing the older adult, other elements should be present. Furthermore, pursuant to the regulations at 6 PA Code §15.72(a) (6), the protective services agency must state in any Petition under Section 10 (35 P.S. §10225.307 the Act why it has been unable to secure the informed consent of the older adult. Informed consent is not defined in the Act nor is it defined in the regulations. However, it is helpful to look at other laws in Pennsylvania which have defined this term. The Health Care Services, Malpractice Act, 40 P.S. §1301.103 does define this term. In reviewing the definition under the Malpractice Act, a fair interpretation of the term informed consent under the Act could be as follows: “Informed consent is that consent given after having been informed of the purpose of the protective services, the type of protective services, the duration and frequency of the protective

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services, and of the consequences of not receiving the protective services.” [Please note that this definition is not contained in the Act or in the regulations. It is a definition from the author of this outline and is intended for discussion purposes.]

If an older adult would be in imminent danger of death or serious physical harm but could make a competent refusal to receive the offered services, then the Court could dismiss the Petition seeking the emergency order granting involuntary intervention. It is, therefore, incumbent on protective services agencies to demonstrate by evidence offered in court that they have not been able to secure an informed consent because the older adult is unable to understand the situation he or she is in and is unable to comprehend the consequences of not receiving the services. This type of information would be obtained through the investigative process engaged after receiving an emergency report.

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(a). Duration of the Emergency Order: 35 P.S. §10225.307 is silent as to how long the order can last. Act does say that “[t]he court, after finding clear and convincing evidence of the need for an emergency order, shall order only such services as are necessary to remove the conditions creating the established need.” The 72 hour duration requirement comes from the regulations.

The regulations for Petitions for Involuntary Intervention by Emergency Court Order are found at 6 Pa. Code § 15.72 and the following text sets forth the requirements for the petition:

§ 15.72. Petition (a) Contents. The petition which the agency files for an emergency court order of involuntary intervention shall state the following information:(1) The name, age and physical description of the older adult insofar as these facts

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have been ascertained.(2) The address or other location where the older adult can be found.(3) The name and relationship of a guardian, care giver or other responsible party residing with the older adult, when applicable.(4) A description of how the older adult is at imminent risk of death or serious physical harm.(5) The physical and mental status of the older adult, to the extent known.(6) The attempts made by the agency to obtain the informed consent of the older adult, or the older adult's court appointed guardian, when applicable, to the provision of protective services by the agency.(7) The specific short-term, least restrictive, involuntary protective services which the agency is petitioning the court for an order to provide.(8) A description of how the proposed services would remedy the situation or condition which presents an imminent risk of death or serious physical harm.(9) A statement showing why the proposed

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services are not overbroad in extent or duration and why less restrictive alternatives as to their extent or duration are not adequate.(10) A statement that other voluntary protective services have been offered, attempted or have failed to remedy the situation.(11) A statement that reasonable efforts have been made to communicate with the older adult in a language the older adult understands in the case of an older adult who is hearing impaired or who does not understand the English language.(12) Other relevant information deemed appropriate by the agency.(b) Oral petitions. Nothing in this chapter precludes or prohibits the oral presentation of a petition for emergency involuntary intervention. When oral presentation is warranted, the written petition shall be prepared, filed and served on the older adult and counsel within 24 hours of the entry of the emergency order or on the next business day, when the 24-hour period would fall on a weekend

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or legal holiday.(c) Affidavits. Allegations which are not based upon personal knowledge shall be supported by affidavits provided by persons having that knowledge. The affidavits shall be attached to the petition.(d) Emergency order duration. In the petition, the agency shall request an emergency order of a specific duration which may not exceed 72 hours from the time the order is granted. The agency shall request the court of common pleas to hold a hearing when the initial emergency order expires to review the need for an additional emergency court order or other continued court and protective services involvement, or both. The issuance of an emergency order is not evidence of the competency or incompetency of the older adult.

The 72 hour duration directive does not appear to bind the Court, so, therefore an Order that exceeds 72 hours in duration may be entered. Look closely at

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what the regulation says. It says the Agency cannot ask for an Order that lasts longer than 72 hours. It does not say the Court cannot enter one that lasts longer. More importantly, these regulations do not bind the Court. Opposing counsel could conceivably ask for an Order that lasts longer than 72 hours.

(e). What must be shown at hearing.

(1). Serious physical harm. This term is not defined in the Act or in the regulations. However, the regulations at 6 Pa.Code §15.2 provide some guidance. This regulation states the following:

(2). Serious bodily injury -- Injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a body member or organ.

(3). Serious physical injury -- An injury that does one of the following:(i) Causes a person severe pain.(ii)

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Significantly impairs a person's physical functioning,
either temporarily or permanently.

(f). Right to Counsel in Involuntary Intervention
Cases.

(1) 35 P.S. § says that “In order to protect the rights of an older adult for whom protective services are being ordered, an emergency court order under this section shall provide that the older adult has the right to legal counsel If the older adult is unable to provide for counsel, such counsel shall be appointed by the court.” However, this is an appointment after the Order has been entered, which could be the most critical time to have counsel.

(2) Remedied by Regulations: The regulations have attempted to address this gap by requiring the agency attempt to find out who represents the older adult. If there is no attorney that represents the older adult, then agency is required to contact its legal services

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provider so that the older adult may be represented at the initial hearing. 6 Pa.Code 15.73 indicates that [t]he act requires that an emergency order under this section provides that the older adult has the right to legal counsel. If no representation for the older adult is present at the time the emergency order is requested, the agency shall inform the court of its efforts to notify counsel under § 15.71(b) (relating to involuntary intervention by emergency court order). If the older adult is unable to provide for counsel, the court will appoint counsel as authorized by the act at the time the emergency order is entered to ensure that legal representation will be provided at the time of the emergency protective services review hearing. 6 Pa.Code §15.12(b)(3) works with this section in that it requires efforts to procure counsel at the time of the initial hearing.