

## **GUARDIANSHIP OUTLINE**

### **I Highlights of the Guardianship Law:**

- A. Right to Counsel: Provisions found at 20 Pa.C.S.A. §5511(A)(2).
- B. Attendance at Hearing Required Except When There Is Evidence to Excuse: Provisions found at 20 Pa. C.S.A. §5511(a)(1).
- C. Evidence Required to Establish Incapacity: Provisions found at 20 Pa. C.S.A. §5518.
- D. Limited Guardianship: Provisions found at 20 Pa.C.S.A. §5512.1(b) & (d).
- E. Review Hearing (Who Has Burden of Producing Evidence): Provisions found at 20 Pa.C.S.A. §5512.2(a) & (b).
- F. Independent Medical Evaluation: Provision found at 20 Pa. C.S.A. §5511(C)
- G. Annual Reports: Provisions found at 20 Pa.C.S.A. §5521(c).
- H. Guardianship Support Agencies: Provisions found at 20 Pa. C.S.A. §5551 to §5555.

### **II. Right to Counsel:**

The statute at §5511(a) provides as follows:

Petitioner shall be required to notify the court at least seven days prior to the hearing if counsel has not been retained by or on behalf of the alleged incapacitated person. In appropriate cases, counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual.

- A. The term *appropriate cases* is not defined in the statute. However, it would seem that the better practice would be to appoint counsel if counsel is requested, if the alleged incapacitated person is in a coma, or if someone requests counsel on behalf of the alleged incapacitated person. Also, counsel should be appointed if there is a dispute over who will be appointed guardian or in a review hearing to determine if a guardianship is still warranted or

if the areas of incapacity should be expanded.

B. What to expect when trying to find counsel.

1. Attorney that has represented older I adult in past may not be interested in assuming representation of the older in a guardianship case. May not be comfortable in that area of the law, particularly if case began as a PS case involving a Petition for Involuntary Intervention by Emergency Court Order.
2. Fees could be an issue as could be conflict of interest.

III. Appearance at Hearing:

- A. Statute provides that “[t]he alleged incapacitated person shall be present at the hearing unless . . . the court is satisfied, upon the deposition or testimony of, or sworn statement by a physician or a licensed psychologist, that his physical or mental health would be harmed by his presence . . . .” 20 Pa.C.S.A. §5511(a)(1).
- B. This section also provides for the hearing to be held at the residence of the alleged incapacitated person. Some courts have made provisions for a master to preside over hearings at the residence of an alleged incapacitated person. As in other types of cases where a master is used, a report is filed by the master after the hearing, and the report can be modified or adopted by the court as a decree.
- C. What actually happens in court with this requirement?
1. Are respondents really forced to be at the hearing?
    - What if his/her presence would not harm his/her physical or mental health, but he/she does not wish to attend the hearing?

- What will the court do in this situation?

2. Is attendance based solely on the testimony or sworn statement of a physician or licensed psychologist?
3. Does this expert need to be qualified in the same manner as the expert that provides testimony about the alleged incapacitated person's incapacities or disabilities?
4. What if the attorney representing the alleged incapacitated person does not believe the alleged incapacitated person should attend the hearing?

#### IV. Evidence Required:

Pursuant to 20 Pa.C.S.A. §5518 in order to establish the incapacity of the alleged incapacitated person, the petitioner must

present testimony in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition; adaptive behavior; and social skills.

- A. The change here is significant because the person testifying about the incapacity of the person who is the subject of the petition must be qualified and must have a background in evaluating individuals with incapacities similar to those from which the alleged incapacitated person suffers. The evidence presented must conform to the condition or disability alleged in the petition.
- B. Notwithstanding the above requirement, some courts may still permit presentation of the required evidence through doctor's letters or affidavits. Some courts may require at least a telephone deposition or testimony provided over the telephone.

-Is this fair?

-Is it really important for the alleged incapacitated person's attorney to have a chance to cross examine the physician or expert? In all cases? When limited guardianship is a possibility?

C. Practical considerations regarding depositions:

- Costs
- Scheduling
- In court testimony?

D. What kind of doctor should testify?

- General practitioner or family or primary care physician?
- Psychiatrist? What kind of psychiatrist?
- Psychologist? When is this appropriate?

V. Limited Guardianship:

The statute at 20 Pa.C.S.A. §5512.1(b) and (d) provides as follows:

(B) Limited guardian of the person. - - Upon a finding that the person is partially incapacitated and in need of guardianship services, the court shall enter an order appointing a limited guardian of the person with powers consistent with the court's findings of limitations . . . .

. . . .

(D) Limited guardian of the estate. - - Upon a finding that the person is partially incapacitated and in need of guardianship services, the court shall enter an order appointing a limited guardian of the estate with powers consistent with the court's findings of limitations . . . .

The statute also indicates that the court shall prefer limited guardianships. 20 Pa.C.S.A. §5512.1(a)(6).

A. This means that a person may be found to be only partially incapacitated. This is perhaps the

biggest change brought about by the amendments because it means that now every guardianship need not be an all or nothing situation. Certain areas of responsibility concerning the person and/or the estate can be managed by a partially-incapacitated person. However, those areas which can be handled by a partially-incapacitated person must be set forth in the court's findings of limitations. Decrees should be drafted so that it is clear what areas of responsibility have been reserved for the partially-incapacitated individual.

B. Limited Guardianships require more work on the part of counsel for the alleged incapacitated person.

- Whose responsibility is it to advocate for a limited guardianship?

- Important to discern which cases are appropriate for limited guardianships.

- Important to participate in deposition of physician to discover in what areas the alleged incapacitated person may be able to manage for himself/herself.

- Better to have a transcript in these cases so as to be able to include specific diagnosis and limitations in the decree.

- Ideally decree should spell out very specifically what the diagnosis is, what the limitations are, and what areas the alleged incapacitated person may be able to manage.

- This requires much more time on the part of the attorney representing the alleged incapacitated person than when a person is declared totally incapacitated

## VI. Review Hearings:

Title 20 at §5512.2(a) provides the authority for a review hearing. It provides as follows:

(a) TIME OF HEARING.-- The court may set a date for a review hearing in its order establishing the guardianship or hold a review hearing at any time it shall direct. The court shall conduct a review hearing promptly if the incapacitated

person, guardian or any interested party petitions the court for a hearing for reason of a significant change in the person's capacity, a change in the need for guardianship services or the guardian's failure to perform his duties in accordance with the law or to act in the best interest of the incapacitated person. The court may dismiss a petition for review hearing if it determines that the petition is frivolous.

(b)Burden of Proof and Rights. - - The incapacitated person shall have all of the rights enumerated in this chapter. Except when the hearing is held to appoint a successor guardian, the burden of proof, by clear and convincing evidence, shall be on the party advocating the continuation of guardianship or expansion of areas of incapacity.

- A. Subparagraph (b) is the interesting part of this section. This represents a significant departure from the provisions of the law prior to the 1992 amendments. Under prior law, when an incompetent person wanted to be adjudicated competent, he/she had the burden of producing evidence (usually medical testimony in person) that he/she had regained competency. Under the 1992 amendments, in a review hearing concerning the issue of whether a guardian is still necessary, the burden of proof is on the party who takes the position that the guardianship is still necessary or that the areas of incapacity should be expanded.
- B. In Re Estate of Rosengarten: In this case, the Pennsylvania Superior Court addressed the issue of what should take place once a person that has been adjudicated incapacitated claims that he/she has regained some or all of his/her capacity. The Superior Court said:

We first hold that if an allegation of competency is made, the orphans' court must immediately proceed to either make a determination of frivolity based on sound evidence or logic or hold a review hearing. In the instant case, the initial determination of incapacity was based upon the fact that Ms. Rosengarten suffered from bipolar disorder but was not taking her medication. By necessary implication, if she had started to take her medication properly, it would follow that a review hearing would be in order, certainly before her assets were disposed of against her wishes. We also observe that while the initial burden of proving incapacity is a clear and convincing standard, In re Hyman, supra, the incapacitated person has the burden of establishing that he has regained capacity only by a fair preponderance of the evidence. In re Estate of Porter, 463 Pa. 411, 345 A.2d 171 (1975). These burden-of-proof principles, coupled with the

recited facts, precluded a facial determination of frivolity when Ms. Rosengarten alleged a change in her capacity before the orphans' court.

1. Potential problem with this holding is that it seems to place the burden on the incapacitated person to prove that he/she is no longer incapacitated. Is this consistent with 20 Pa.C.S.A §5521.2(b).

## VII. Annual Reports:

Title 20 at §5521(c) provides as follows:

- (1) Each guardian of an incapacitated person shall file with the court appointing him a report, at least once within the first 12 months of his appointment and at least annually thereafter . . . .

The areas which must be addressed by the reports are set forth in this section of the statute.

The statute provides no direction as to whom is responsible for ensuring that the reporting requirement is enforced. Some few orphans' courts have staff who are able to check guardianship files to determine if the reports have been filed and to request the court to assist in having the guardian comply with the reporting requirement.

## VIII. Guardianship Support Agencies:

These agencies were intended to serve as an alternative to guardianships through the provision of services to individuals whose decision-making abilities are impaired. They were also intended to provide services to guardians and the court, and to serve as guardians in the absence of any one else willing and qualified to so serve.

However, except for a few pilot programs which were funded through demonstration project grants from the Pennsylvania Department of Aging, these public agencies do not exist. No funding came with the amendments for this agency nor have any funds been appropriated for this agency since the passage of the amendments.

IX. Miscellaneous:

A. Emergency Guardianships: These are available as they were under the act before the 1992 amendments. The authority is found at 20 Pa.C.S.A. §5513. The act before the amendments provided for temporary guardians, but the purpose of the emergency and the temporary guardians are essentially the same. An emergency guardian of the person or of the estate may be appointed when it is shown by clear and convincing evidence that the alleged incapacitated person lacks capacity, is in need of a guardian, and a failure to make the appointment will result in irreparable harm to the person or estate of the alleged incapacitated person. The evidence requirements §5518, above, need not be met in a hearing on a request to appoint an emergency guardian. Notice is to be given in conformance with §5511, except when the court finds that such notice is not feasible.

Emergency guardians have only those powers, duties, and liabilities as directed in the decree. An emergency guardian of the person and/or of the estate of the alleged incapacitated person may be appointed, 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. The act prior to the amendments did not contain a specific limitation on the length of time for which a temporary guardian could serve.

B. Form Orders in Local Rules: Local rules should be checked to determine if the local court of common pleas has adopted local rules since the passage of the 1992 guardianship law amendments. Such rules might contain suggested forms, including petitions, citations, orders, etc. The Pennsylvania Supreme Court has adopted new state rules of procedure for



guardianship cases. However, these rules provide that local rules of procedure for shall set forth practice and procedure guardianship proceedings and the local rules shall not be inconsistent with the rules put in place by the Supreme Court. While the Supreme Court rules are minimal, they do provide some detail as to what needs to be alleged and set forth in a Petition for Review Hearing.

C. Joint Accounts: A problem frequently encountered is that of guardians identifying themselves as joint tenants with right of survivorship when setting up account using funds owned by the incapacitated person. This should be avoided. Guardians doing this are essentially making gifts to themselves.

D. Representation of Alleged Incapacitated When Client Cannot Provide Guidance:

1. Guardian *Ad Litem*: If there appears to be a dispute amongst those interested in the proceeding as to whom should be appointed guardian or as to other significant issues, then it would be prudent to request the court through an appropriate pleading to appoint you as guardian *ad litem*. This, of course, would enable you to make decisions which you would believe to be in the best interests of the alleged incapacitated person.
2. Best Interests vs. Advocating to Secure Client's Wishes: If the client is able to provide some intelligent and meaningful direction to guide you in representing him/her, then you may be in a position of making some difficult decisions. Your client may want to accomplish some things which you may not believe are in his/her best interests, and it may not be clear to you as to how significantly his/her judgment is impaired.
3. Contested: The most contested issues in many guardianship proceedings is who will serve as the guardian. This generally occurs when there are family members who disagree over what should be done for the alleged incapacitated person and over how it should be done.

Oftentimes, in these situations, the client is capable of expressing a preference as to whom he/she would prefer to serve as the guardian. This preference should be expressed to the court.

4. Client Dignity: Every effort should be made to preserve client dignity. This can often be achieved by requesting the court to appoint as guardian the individual chosen by the client.
5. Guardian Fees: When is this not a problem as far as being an allowable fee for the purpose of determining what income is available for payment of nursing facility charges.
6. Common Pleas Decisions: Some courts in Pennsylvania have had an opportunity to consider when a petition should be dismissed and who has standing to intervene in a guardianship proceeding. See, *In re: Ord Brubaker*, 27 D&C 4<sup>th</sup> 220 (C.P. Blair Cty. 1994) and *In re Palm*, 27 D&C 4<sup>th</sup> 279 (C.P. Perry Cty. 1994).
  - A. *In re Palm*: This case provides a limited discussion about who can intervene in a guardianship proceeding. Under §5511(a) the Petitioner provided notice of the petition and hearing to those who would have been entitled to share in the estate of Mr. Palm if he had died intestate at that time. The day before the scheduled hearing on the petition, a health-care provider filed a petition to intervene. However, this health-care provider was not a current service provider of Mr. Palm's. Their petition to intervene was filed in order to voice their concern that Mrs. Palm, the proposed guardian, was not best suited to fulfill the role of guardian and to pursue a worker's compensation claim filed on behalf of Mr. Palm. The health care provider asserted that Mrs. Palm was not diligent enough regarding the worker's compensation claim. It appears that the health-care providers motive in attempting to intervene was based on their concern that their outstanding claim in excess of \$200,000 would not be satisfied in full, if the worker's compensation claim was not pursued more forcefully.

The court denied the petition to intervene. Its decision was based on its interpretation of the language of §5511(a) & (f). The court felt that 5511(a) requires notice to only *current* health-care providers and stated that this health-care provider was not entitled to intervene, since it was a former provider of Mr. Palm's. Moreover, the court cited 5511(f) which states that "[i]f appropriate, the court shall give preference to a nominee of the incapacitated person." The court then found that while Mr. Palm had stated no preference nor could he currently state a preference, "the court can reasonably presume that Mrs. Palm, his wife of 30 years, would be Mr. Palm's preferred guardian." *In re Palm*, 27 D&C 4<sup>th</sup> 279, 283 (C.P. Perry Cty. 1994).

- B. *In re: Ord Brubaker*: The petitioner in this case filed a petition that did not meet the requirements for a petition as set forth in 20 Pa.C.S.A. §5511(e). Petitioner claimed that the appointment of a guardian was needed due to Mr. Brubaker's advanced age (93) and "the infirmities that come with such a passage of years." *In re: Ord Brubaker*, 27 D&C 4<sup>th</sup> 220, 222 (C.P. Blair Cty. 1994) The petition did allege that the appointment of a guardian was necessary to make health-care decisions for Mr. Brubaker. The alleged incapacitated individual had previously signed a durable power of attorney for health care some two years prior to the filing of the petition. The alleged incapacitated individual filed preliminary objections to the petition.<sup>1</sup> The petition was dismissed since it did not contain the information required by the statute and since Mr. Brubaker had a durable power of attorney in place at the time the petition was filed.

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The court found that preliminary objections to a guardianship petition are proper, based on the language of 20 Pa.C.S.A. §5511(a) that states "[t]he court may dismiss a proceeding where it determines that the proceeding has not been instituted to aid or benefit the alleged incapacitated person or that the petition is incomplete or fails to provide sufficient facts to proceed."