



Guardianship Bench Book

P E N N S Y L V A N I A

The Advisory Council on
Elder Justice in the Courts

and

The Administrative Office
of Pennsylvania Courts

AOPC

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NOTES ON STYLE CHOICES: Some authors have used “they” and “their” rather than “he or she” and “his or her” as a grammatically acceptable alternative pronoun that is inclusive of people who may not identify as he or she.

Throughout the editors will use the abbreviation AIP for alleged incapacitated person, which refers to a person with respect to whom a petition has been brought but no court has adjudged him or her to be incapacitated and will use the abbreviation IP for a person who has been adjudged to be incapacitated.

Generally, the editors will use the term incapacitated, as used in the Pennsylvania Guardianship Act. Certain other statutes may use the term “incompetent.” Some authorities, including some medical providers, consider the term “incompetent” to refer to a determination that a person lacks the capacity to make a particular decision.

Note that this Bench Book concerns guardianships of adults (over age 18) determined or alleged to be incapacitated and does not address guardianships of minor children.

DISCLAIMER: This publication is intended to provide useful information regarding the subjects covered, but may not contain all relevant information or recent changes to statutes, case law, regulations, or the Rules of Court. The opinions, findings and conclusions expressed are those of the author(s) and do not represent any official position or policy of the Pennsylvania Judiciary or the Administrative Office of Pennsylvania Courts. The information contained is not intended to provide legal advice, and should not be considered a substitute for legal counsel, nor should it be relied on as a source of substantive law, procedural law, or any other legal authority.

Foreword by Madame Justice Debra Todd

SUPREME COURT OF PENNSYLVANIA

On behalf of myself and my fellow Justices of the Supreme Court of Pennsylvania, I commend the members of the Advisory Council on Elder Justice in the Courts, as well as the editors and contributors, for their ambitious undertaking of publishing this First Edition of the Judicial Bench Book on Guardianships. This essential guide comes on the heels of the Advisory Council's recent publication of the Pennsylvania Elder Abuse Bench Book, and, not surprisingly, the high quality of both works is exactly what you would expect from such an illustrious group of jurists and elder law professionals.

Guardianship is a critical legal tool to assist persons with diminished capacity or persons with a disability in managing their affairs. Often, guardianship determinations involve elders who are unable to care for their own person or property. It is the courts who are tasked with appointing a legal guardian for those individuals in need; however, guardianship decisions are some of the most difficult in the law. While it might be desirable, and even necessary, to safeguard an individual by assuring the provision of care and asset protection through the granting of a guardianship, such establishment necessarily curtails the freedom and autonomy of an individual, as it allows the guardian to make important financial and non-financial decisions for the incapacitated person. Determinations of whether a guardianship is appropriate, or how to arrive at the least restrictive form of guardianship, involves the striking of a balance between protection and autonomy, and has always been a challenging inquiry. Related thereto, answering the question of who should serve as a guardian, once such a relationship is determined to be necessary, is a significant responsibility. Such a vital determination is made only after substantial investigation and solemn consideration of what is uniquely appropriate for the individual who is incapacitated. Yet, until now, there was no easily accessible, single-volume publication to offer the judiciary a practical means of navigating the various aspects of the guardianship process.

The Judicial Bench Book on Guardianships fills this void and is a welcome resource for judges to best make these critical guardianship decisions. The result of the editors' and contributors' tireless efforts is a detailed description of all legal facets of the guardianship process, as well as practical questions, and best practices and tips for judges. The Bench Book covers a wide spectrum of topics, including alternatives to guardianship, petitions for guardianship, jurisdictional and transfer questions, due process concerns, the appointment of counsel, the identification and appointment of qualified guardians, emergency guardianships, hearing and post-hearing procedures, as well as the supervision and monitoring of guardians. Not only does the Bench Book address virtually every aspect of the guardianship process, it is especially valuable due to its clear, informative, and pragmatic approach.

The Pennsylvania Supreme Court, through the creation of the Elder Law Task Force, and the subsequent establishment of the Advisory Council on Elder Justice in the Courts and Office of Elder Justice in the Courts, continues to demonstrate its ongoing dedication to Pennsylvania's elders. The Supreme Court is deeply appreciative of the Advisory Council, its Chair, the Honorable Paula Francisco Ott and Vice-Chair, Zygmunt A. Pines, Esquire. Special thanks to Editor-in-Chief, the Honorable Lois E. Murphy, the other editors and contributors who are listed in the Acknowledgements section, as well as the staff of the Administrative Office of Pennsylvania Courts and the many individuals who contributed in numerous ways to the creation of this Bench Book. Through these individuals' efforts, the Judicial Bench Book on Guardianships stands as yet another crucial milestone in the evolution of the field of elder law.

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Introduction

The determination that a person is incapacitated and the appointment of a guardian are among the most significant deprivations of personal liberty and autonomy that a court can impose. Such a deprivation requires that the due process rights of the alleged incapacitated person (AIP) be given the highest level of protection, as required by the United States Constitution for any deprivation of liberty. A person for whom a guardian is appointed faces losing the basic right to make their own decisions, enjoyed by all adults, and will no longer have control of their life, liberty, or property.

Although the effects of a guardianship order may be severe, in many cases a guardianship order is necessary to protect the person from harm or to effectuate decisions and take practical actions that the person is unable to make and to take without assistance. Because guardianship has draconian consequences, courts must strive to give every petition for guardianship careful consideration in order to reach an appropriate balance between protection and preservation of autonomy. Indeed, due process under the United States Constitution requires significant procedural protections before a person can be adjudicated as incapacitated and a guardian appointed.

This Judicial Bench Book is intended to give Pennsylvania courts a road map for reviewing petitions, appointing counsel, conducting pre-trial proceedings, conducting the trial on the Petition for Adjudication of Incapacity and Appointment of Guardians, conducting post-trial proceedings, and monitoring court-appointed guardians. Throughout this book we strive to provide helpful tips and best practices, based upon experience, to enable courts to protect the fundamental constitutional rights of individuals who are alleged to be incapacitated, while promoting efficient and effective practices. Reference is made to statutes, Orphans' Court Rules, and case law to provide further guidance.

Pennsylvania courts are also required by statute to prefer limited guardianship over plenary guardianship, where possible, and to consider in every case whether guardianship is the least restrictive alternative. It is important to remember that even when a person has a significant cognitive impairment, a guardianship is not needed and may not be granted where a less restrictive alternative is available. Granting authority to family members, rather than to strangers, is encouraged in appropriate

cases to maximize the autonomy and dignity of the IP and ensure that his or her preferences and wishes are respected to the maximum extent possible.

Mental capacity is evaluated on a spectrum, not as an "all or nothing" concept. The determination of whether or not a person has capacity may change according to the circumstances of the individual and may vary with respect to the specific decision or decisions to be made. There may be no bright line dividing a person who has capacity to make a certain decision from a person who does not. An AIP may have the ability to make some decisions but not others. Capacity may vary depending on the nature or complexity of the decision; the decision-making strengths of the person, which may fluctuate during a day; the amount of support or opposition expressed by family members or loved ones for the person's decision; surrounding events; and the person's ability to communicate regarding the decision.

This variable nature of capacity makes clear that a person may be able to handle small sums for daily purchases but may be unable to make decisions regarding investments or large expenditures. A person who is capable of working and handling routine household expenses but has become susceptible to scammers may be a candidate for a limited guardianship: limited to those specific areas in which it is demonstrated by clear and convincing evidence that the person lacks capacity.

This variable nature of capacity also increases the need for courts to be aware of and sensitive to alternatives to guardianship and opportunities to craft a limited guardianship order where appropriate and necessary.

Purpose of the Statute

Chapter 55 of the Fiduciary Code, most commonly referred to as the "Incapacitated Persons Act" or the "Guardianship Act," empowers the court "upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the Commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate."¹

Pennsylvania's Guardianship Act sets forth the purpose of the law as follows:

¹ 20 Pa.C.S. § 5511(a).

Recognizing that every individual has unique needs and differing abilities, it is the purpose of this chapter to promote the general welfare of all citizens by establishing a system which permits [IPs] to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.²

Burden of Proof

The burden of proof of incapacity is a heavy one: **clear and convincing evidence**. This has been called the second highest burden of proof, next only to the standard of proof required in criminal proceedings, “beyond a reasonable doubt.” The petitioner must prove by clear and convincing evidence both that the person suffers from an incapacity and that a guardianship is needed, including proving that there is no available, adequate less restrictive alternative. In essence the court must determine that there is clear and convincing evidence of the following:

Standard of Proof for
Determination of Incapacity:
Clear and Convincing Evidence.

1. **Incapacity:** That the incapacitated person (IP) suffers from a cognitive incapacity, with specific findings as to the nature of the incapacity; and that the incapacity has impaired the individual’s ability to understand information, to make reasoned decisions, and to effectively manage their financial resources or assure their own physical well-being; and

2. **Guardianship:** That there is a need for guardianship services and that there is no less **restrictive** alternative to guardianship appropriate for the circumstances. The court must also determine whether the guardianship could be limited or must be plenary.

If the court determines both that a person is incapacitated and that a guardian must be appointed, then the court must next consider whom to appoint as guardian of the person and/or as guardian of the estate.

Types of Guardianship

A petitioner may seek appointment of the following types of guardians:

- **Guardian of the Person**, to make personal, residential, and medical decisions for an AIP; or
- **Guardian of the Estate**, to make and implement financial decisions and manage income and property (many other states use the term “conservator” for a guardian appointed only for financial matters); or
- **BOTH, Guardian of the Person and Guardian of the Estate;** or
- **Plenary Guardianship** (full) or **Limited Guardianship**. In the case of limited guardianships, the court must specify the areas over which the guardian has authority and the areas over which the IP retains authority; or
- **Emergency Guardianships of the Person or Estate** may also be sought on a temporary basis, as discussed more fully in CHAPTER EIGHT.

Alternatives to Guardianship and Limited Guardianship

Because a guardianship deprives an individual of his or her legal rights and restricts the IP’s rights to autonomy and self-determination, a guardianship order should be considered a last resort. A court must determine that there is no suitable less restrictive alternative before adjudicating a person incapacitated and appointing a guardian of the person or estate. Alternatives to guardianship are

² 20 Pa.C.S. § 5502.

discussed in greater detail in CHAPTER ONE.

Generally, guardianships should be as limited as reasonably possible to address the needs of the IP. The court should allow the person to retain decision-making responsibility in areas where they are able to make and communicate decisions. Of course, it may become necessary to remove all of an individual's rights and grant total responsibility to a guardian. A petitioner and court should explore and exhaust possible alternatives to guardianship before committing to the drastic act of depriving an individual of all rights.

Right to Appeal and Review Hearings

LESS RESTRICTIVE

ALTERNATIVES: A court must seriously consider any less restrictive alternative to guardianship before determining to appoint a guardian.

Naturally, following the conclusion of a hearing and the entry of a final decree finding a person to be incapacitated and appointing a guardian or guardians, the IP has a right to receive a copy of the final decree and has a right to appeal to the Superior Court within 30 days. The final decree is required, by Pa. O.C. Rule 14.7, to specifically include a notice of right to appeal within 30 days, a right to request reconsideration, and a right at any time to request a review hearing. Counsel for the IP should consider whether an appeal is appropriate and necessary to protect the legal rights and interests of their client. Counsel should also consider whether they have an obligation to request a review hearing at any time following the determination of incapacity. A review hearing may be requested at any time if it is

LIMITED GUARDIANSHIP:

Pennsylvania law requires that “the court shall prefer limited guardianship”.

alleged that the IP has regained capacity, no longer needs a guardian, or that the guardian is not acting appropriately or in the IP's best interests.

Conclusion

This Bench Book is organized around the various phases of and considerations in guardianship proceedings. It is intended to provide judges with a comprehensive and functional resource to help assure that the court affords due process to the citizens who appear before the court. Throughout this Bench Book you will find highlighted “Best Practices,” which are based upon decades of experience of our many contributors to this volume. Our goal is to provide guidance that will help you balance the rights of the individual who is the subject of these hearings with the rights of other parties and the need for judicial efficiency. We hope this book will provoke consideration and further discussion of our roles in guardianship cases and assist us as we commit ourselves to providing the highest quality of justice.

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Alternatives to Guardianship and Limited Guardianship

In balancing an AIP's need for protection with respect for their autonomy, judges are required by the United States Constitution's guarantee of Due Process to protect the rights of the AIP to the greatest extent possible. Appointment of a guardian, with the resulting loss of rights for the AIP, may not be necessary in situations where other resources are available to assist the AIP.³ Even where the evidence clearly demonstrates an incapacity, judges are required to consider whether there is a less restrictive alternative to guardianship that can meet the person's needs. Judges are required under Pennsylvania law to favor limited guardianships over plenary guardianships in appropriate cases.⁴ Where possible, limited guardianship orders should be framed to address the specific areas in which the court determines, based on the testimony and evidence, that an individual lacks the capacity to meet the essential requirements for their well-being and is in need of guardianship services.

Judges must consider, and should expect counsel to present evidence regarding, alternatives to guardianship that may provide adequate protection for an IP.⁵ Pennsylvania law expressly requires that the court consider whether there is a need for guardianship "in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts."⁶ In other words, it is critically important that evidence of all possible alternatives to guardianship be explored to determine whether the needs of the IP can be met without guardianship.

The regulations pursuant to the Older Adult Protective Services Act also include a definition of less restrictive alternatives, which is helpful to consider and defines least restrictive alternative as: "[t]he appropriate course of action on behalf of the older adult which least intrudes upon the personal autonomy, rights and liberties of the older

adult in circumstances when an older adult lacks the capacity to decide on matters and take actions essential to maintaining physical and mental health."⁷

LESS RESTRICTIVE

ALTERNATIVES: A judge must consider the availability of family, friends and other supports that can assist the individual without the need for guardianship.

Certain alternatives may function as a wholly adequate substitute for guardianship. For example, a power of attorney or a trust may serve to appoint an appropriate person who is willing and able to manage the funds of the IP. Other forms of support may provide a less restrictive option for many decisions even where a limited guardianship may be needed for major decisions. Alternatives discussed below, with which courts should be familiar, include supported decision-making, mediation, powers of attorney and health care powers of attorney. Bear in mind that a person who may lack the capacity to handle financial affairs, may have the capacity to select an agent under a power of attorney and understand the delegation of authority to that agent.

A person with an intellectual disability or incapacity whose needs can be met by an agent under a power of attorney, or by a supportive family, may not require appointment of a guardian at all. Many such cases are never brought to court. When they are, the IP and their family or other advocates may present evidence of an adequate less restrictive alternative that meets the person's needs. Where a less restrictive alternative is demonstrated, the court is obliged under the statute to dismiss the petition for appointment of a guardian, even if the court has

³ *In re: Peery*, 727 A.2d. 539 (Pa. 1999).

⁴ 20 Pa.C.S. § 5512.1(a)(6); see also PA Joint State Government Commission, "Guardianship in Pennsylvania: Report of the Working Group on Guardianships," May 2007.

⁵ 20 Pa.C.S. § 5512.1(a).

⁶ 20 Pa.C.S. § 5512.1(a)(3).

⁷ 6 Pa. Code § 15.2.

determined that the person has an incapacity.⁸ A court may also terminate a guardianship previously granted if a less restrictive alternative can later be identified to meet the person's needs. Judges must be familiar with the kinds of less restrictive alternatives that may be available to support a person with disabilities and incapacities, in order to avoid unnecessarily depriving individuals of their rights and autonomy by appointing a guardian.

One of the best ways to assure that less restrictive alternatives are considered and attempted is to appoint counsel to represent the AIP before the initial hearing on the petition. Legal counsel may not only represent the AIP at the hearing, but ideally will also play a role in identifying and implementing less restrictive alternatives such as powers of attorney, where appropriate. Courts should expect legal counsel for the AIP to be zealous advocates, and to address specifically the steps taken to explore whether less restrictive alternatives are available and adequate. See a further discussion of counsel for the AIP in CHAPTER FIVE.

Less Restrictive Alternatives to Guardianship of the Person

- **Health Care Agent:** appointed under a written health care power of attorney signed by the person, who, at the time the document is signed, has adequate understanding to sign and to select a responsible agent to make medical decisions.
- **Health Care Advance Directive:** also called a Living Will, a written document in which a person with adequate understanding at the time of the writing, sets forth wishes and preferences regarding health care, especially (but not only) end-of-life care.
- **Health Care Representative:** pursuant to 20 Pa.C.S. § 5461, family members (listed in

⁸ While some authorities discuss less restrictive alternatives and family and community supports as if they remove the legal incapacity, it may be helpful to courts making decisions in such cases to distinguish between (1) the determination whether the evidence demonstrates clearly that the person suffers from a cognitive impairment that causes incapacity; and (2) the determination regarding whether the needs of a person, even a person for whom clear evidence of incapacity has been provided, can be met adequately by family and community supports without the need for a court-appointed guardian.

priority order) are authorized to make medical decisions for a person who lacks capacity to make decisions.

- **Family and Community Support; Supported Decision-making:** Often the needs of a person who suffers from developmental disability or cognitive impairment can be met by family members or members of their community who assist with meeting daily needs such as shopping, meal preparation, and assistance getting to doctor's appointments. Increasingly courts recognize that such supportive networks may be adequate to meet all of the needs of an IP or partially incapacitated person.
- **Case Management Services:** Another resource for community support, often provided to persons with certain mental health issues or intellectual disabilities.

Less Restrictive Alternatives to Guardianship of the Estate

- **Power of Attorney:** also called a Durable Power of Attorney, where an agent is appointed to handle financial affairs by a person who, at the time the power of attorney is signed, has adequate understanding to sign and to select an agent to make financial decisions, and selects individuals who are responsible and trustworthy.
- **Trust:** where a trustee appointed to handle certain assets of a person who, at the time the trust is signed, has adequate understanding to sign and to select a trustee to make financial decisions, and selects individuals who are responsible and trustworthy.
- **Representative Payee:** a person appointed to receive and manage monthly Social Security benefits or other federal benefits.
- **Supported Decision-Making and Family Supports:** Often family and friends can assist with shopping, paying bills and rent, and other tasks without a formal appointment as a guardian.

Supported Decision-Making

Supported decision-making is rapidly gaining support as an alternative paradigm for providing assistance to individuals suffering from cognitive disability. In August of 2017, the ABA adopted a Resolution in support of supported decision-making as an alternative to guardianship.⁹ The goal of supported decision-making is to empower individuals with cognitive challenges to make decisions for themselves with support from one or more others, giving the person the assistance they need to make decisions for themselves. Supported decision-making incorporates a range of models, all of which allow the individual with cognitive disability to retain the final say in their life decisions. These models include formal, written agreements as well as “circles of support,” that can create or re-invigorate a support network for the IP. The circle of support most often consists of a group of family members and/or friends, who meet regularly with the IP to help them make decisions. Although Pennsylvania does not currently have a statute specifically recognizing the enforceability of a written supported decision-making agreement, Pennsylvania’s guardianship statute recognizes that a person may not need a guardian where family or community supports are available and adequate to assist the person in making his or her own decisions. Courts are required by statute to give serious consideration to whether the family and community supports can meet the needs of an incapacitated or partially incapacitated person without the need for a guardianship.

Mediation

Often a guardianship petition is filed with the court as a response to family conflict regarding care for an incapacitated relative or distrust among family members regarding the use and disposition of the AIP’s assets. The introduction of a neutral third party with conflict resolution skills may make it possible for the parties to engage in a guided discussion and reach a decision regarding the needs of an incapacitated adult without the appointment of a guardian. An important consideration in adult guardianship mediation is the ability of the AIP to participate in the mediation process. However, mediation may also be appropriate among family members even where the AIP is not able to

⁹ https://www.americanbar.org/content/dam/aba/administrative/law_agging/2017_SDM_%20Resolution_Final.pdf.

participate. Even in cases in which mediation does not eliminate the need for appointment of a guardian, mediation services can assist both the court and the parties by reducing the areas of conflict and identifying available supportive resources.

Restoration of Rights/Termination of Guardianship/Review Hearings

Judicial orders appointing a guardian for an incapacitated adult rarely have a termination date. In cases in which the IP’s condition does not improve, a guardianship generally continues until the death of the IP. However, the conditions giving rise to the need for a guardian may change over time. A person who has been adjudicated to be incapacitated may regain capacity for a variety of reasons. The condition that interfered with capacity may have been temporary or reversible, the person may have successfully responded to a treatment plan, or new evidence may demonstrate that a supportive environment exists so that guardianship is no longer necessary. Examples of conditions that may be treatable and from which a person may recover capacity, totally or partially, include stroke, traumatic brain injury, major depression, and bi-polar disorder.

RESTORATION OF RIGHTS: When a person’s condition improves the court should conduct a review hearing to consider a request to terminate or modify a guardianship decree.

When the need for protection that provided the basis for appointment of a guardian has diminished, a guardian may no longer be needed. In some cases, a change in the scope of the guardianship from a plenary to a limited guardianship is appropriate. When these circumstances arise, the court should convene a review hearing so that, to the fullest extent possible, the rights of the person adjudicated incapacitated may be restored.¹⁰

Where a person is declared incapacitated as a result of a condition from which the person may

¹⁰ 20 Pa.C.S. §§ 5517, 5512.2.

recover or see improvement, the court must be open to scheduling a review hearing to consider vacating or modifying the guardianship. While we do not have current statistics on how often termination of guardianship occurs because the person regained capacity, we expect to review this question as data becomes available from the new Pennsylvania Guardianship Tracking System (“GTS”). In the majority of guardianship cases, the person who has been adjudicated incapacitated suffers from a progressive disease (such as dementia) or a life-long disability (such as autism spectrum disorder or intellectual disability) that is unlikely to improve significantly. However, in a significant minority of cases a person has been adjudicated incapacitated due to severe but treatable mental illness, stroke, traumatic brain injury, or other conditions that may improve. In such cases courts have readily vacated a guardianship decree upon request.

One significant challenge to be addressed is removing obstacles to making the request to terminate or modify a guardianship. Courts should make readily available a form petition to request a review hearing and may also consider conducting review hearings on a regular basis. Many courts will consider any written request that essentially seeks a review, including a letter from the IP or a family member notifying the court of a change in circumstances, to be a request to schedule a review hearing. In these ways, courts can assist in removing obstacles to scheduling a review hearing and reconsidering the need for guardianship.

Judges should also convene review hearings when there is cause to believe that the interests of the IP are not being properly protected and served by the guardian or the guardian is acting improperly.¹¹ Review hearings are discussed more fully in CHAPTER ELEVEN.

Limited Guardianship

Pennsylvania law favors limited guardianship rather than plenary guardianship. The statute provides quite clearly “[t]he court shall prefer limited guardianship.”¹² In practice, however, Pennsylvania courts and practitioners have found it difficult to educate banks, financial institutions, and medical institutions to accept instructions from limited guardians on areas within their authority. Often the language stating that a decree appointing a guardian is limited is seen as a red flag, causing

¹¹ 20 Pa.C.S. § 5512.2.

¹² 20 Pa.C.S. § 5512.1(a)(6).

BEST PRACTICE: The Court should consider whether a limited guardianship may be appropriate, and may require counsel to explore the potential for a limited guardianship. For example, the Court may determine that a person can retain the right to vote, the right to handle a limited amount of money weekly, or the right to make certain personal decisions with support.

hospitals and financial institutions to question the guardian’s authority. It is a priority for the Advisory Council on Elder Justice in the Courts’ Committee on Guardianship to promote education about, and greater use of, limited guardianships by the courts, assuring that a partially incapacitated person retains the greatest possible autonomy.

Consider as an example a developmentally disabled young adult who still attends school and is working toward mastering certain life skills. This individual may have the ability to handle up to \$100 of spending money on a limited debit card but may not have the ability to make major life decisions and make major purchases unaided. A limited guardianship decree could reserve to the individual the right to transact business with a debit card,

LIMITED GUARDIANSHIP: Pennsylvania law requires that “the court shall prefer limited guardianship.” Courts should strive to reserve rights to a partially IP, such as the right to vote or to manage a small bank account.

limited to transactions of up to \$100. Such a person may also have the ability to exercise a right to vote. These are just a few examples of the types of rights that may be expressly reserved to an individual in a decree to protect their autonomy and dignity to the maximum extent possible.

Courts are encouraged to work with petitioners, counsel, and families to craft a decree appointing a limited guardian that specifically itemizes the duties delegated to the limited guardian, while specifically reserving certain rights and abilities to the IP or partially incapacitated person. Limited guardianships must be crafted on a case-by-case basis, to address the specific needs, abilities, and disabilities, of the IP or partially incapacitated person.

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Petition for Adjudication of Incapacity and Appointment of Guardians

A complete petition for adjudication of incapacity and appointment of guardians ensures that the court has the essential information to hear the case promptly and effectively, and that the appropriate parties are identified, receive appropriate notice, and have a meaningful opportunity to participate in the hearing. Before scheduling the hearing, the court staff or the judge should review the petition to determine whether it is adequate and complete. The petition should identify the nature of the incapacity, the reasons for the request to appoint a guardian, the type of guardian or guardians sought, and must include essential exhibits. The petitioner should also explain whether less restrictive alternatives have been considered.

A court may dismiss a petition “where it determines that the proceeding **has not been instituted to aid or benefit the AIP, or that the petition is incomplete or that it fails to provide sufficient facts to proceed.**”¹³ Prompt review of the petition may benefit all parties by requiring the petitioner to meet the requisite standards before the hearing is scheduled.

Jurisdiction and Venue

The petition should identify the basis of the court’s jurisdiction over the AIP. The first and most obvious question is, where does the AIP reside?

A court has the authority to appoint a guardian of the person or a guardian of the estate for an AIP who:

1. Is domiciled in the county;
2. Resides in the county; or
3. Is a resident of a long-term care facility in the county.¹⁴

Notably, a resident of another county who is present in a hospital, is not a resident of the county in which the hospital is located; similarly, a person temporarily visiting a family member but not residing there, is not a resident of the county where the family member lives.

¹³ 20 Pa.C.S. § 5511(a) (emphasis added).

¹⁴ 20 Pa.C.S. § 5512(a).

In addition, the court may have jurisdiction to appoint a guardian of the estate only (and not a guardian of the person) for an AIP who is not a domiciliary or resident of Pennsylvania, but who owns real property in the county, or who is a beneficiary of property under an estate or trust administered in the county.¹⁵

Jurisdiction over a person and their guardian must be exclusive in only one court. The petition must also advise that no guardian has been appointed by any other court within the Commonwealth or by any court in the United States, for the same person.

Interstate Issues

Pennsylvania has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.¹⁶ This act provides rules for determining which state has jurisdiction over an AIP, when it is alleged that the person has been moved from one state to another or there is a dispute about the person’s domicile. See CHAPTER THREE for a fuller description of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, including how to determine jurisdiction and how to transfer or accept a transfer of jurisdiction in a guardianship matter.

Who May be the Petitioner?

Section 5511(a) provides “[t]he petitioner **may be any person interested in the alleged incapacitated person’s welfare.** The court may dismiss a proceeding where it determines that the proceeding has not been instituted to aid or benefit the [AIP] or that the petition is incomplete or fails to provide sufficient facts to proceed.”¹⁷

This gives broad discretion for the court to entertain a petition filed by **any person interested in the welfare of the AIP.** This may include family, friends, neighbors, an attorney, or other professional with a relationship with the AIP. Petitions are also

¹⁵ 20 Pa.C.S. § 5512(b).

¹⁶ 20 Pa.C.S. § 5901, *et seq.*

¹⁷ 20 Pa.C.S. § 5511(a) (emphasis added).

often filed by the area agency on aging, or by hospital, nursing home, or other health care provider. Courts must be mindful that in certain cases a petition may be filed by someone who is **not** acting in the best interests of the AIP. Consider carefully whether a creditor, a nursing home, or certain family members (including a spouse contemplating a divorce) may file a petition for an improper purpose, such as to deprive the person of rights.

What Must Be Included in the Petition?

1. **Personal Data:** The thoroughly completed petition must contain the name, age, and address of the AIP, as well as names, addresses, and relationship to AIP of all interested parties.
2. **Factual Background:** includes valid reasons for seeking guardianship, specifically noting the physical and mental condition of the AIP, along with any limitations.
3. **Existence of Documents:** such as Powers of Attorney, Health Care Powers of Attorney or Advance Directives for Health Care.
4. **Efforts to Implement Least Restrictive Alternatives.**

See the Checklist of Required Averments for Petition for Adjudication of Incapacity at the end of this chapter, as well as a Checklist of Required Exhibits to the Petition.

Nature of the Proposed Guardianship

1. **Type of Guardianship Sought:** Emergency or Permanent; Limited or Plenary; Guardian of the Person or Estate, or both.
2. **Proposed Guardian:** qualifications, no adverse interests to AIP, criminal background check (Pa. O.C. Rule 14.2).

The properly filed and completed petition for adjudication of incapacity and appointment of a guardian ensures that the case will be heard in a timely manner and the parties will be prepared to present appropriate evidence. Strategically, the petition outlines the purpose for the request and is supplemented with vital documents to support the request.

A petition for adjudication of incapacity and for appointment of guardian requesting a hearing on an

emergency basis must also contain averments that make clear the imminent harm that forms the basis for the need for an emergency hearing. Hearings for the appointment of an emergency guardian are discussed more fully in CHAPTER EIGHT.

Emergency Petition for Protective Services

Under the Older Adult Protective Services Act, the local Area Agency on Aging may bring a different type of petition, not governed by the Guardianship Act, seeking access to the home or records of an older adult, or access to the person of the older adult, in order to provide protective services. This relief may be granted only when the court is presented with clear and convincing evidence that the person is at imminent risk of death or serious physical harm. In some cases involving older adults who are resisting assistance and even refuse to allow the agency to see them or enter their home, this may be a less restrictive first step for the agency to take, to gain access to the person, determine whether they require any health care or assistance, and to examine bank records for any evidence of fraud or financial exploitation. Courts should be familiar with these petitions and must consider them on an expedited basis. These petitions may sometimes lead to a subsequent guardianship petition, but in other cases may permit the agency to provide urgently needed services while avoiding the need for a guardianship proceeding.

Pennsylvania law contains the following provisions regarding an emergency petition for involuntary intervention by the area agency on aging to protect an older adult:¹⁸

- (a) **Emergency petition.**—Where there was clear and convincing evidence that if protective services are not provided, the person to be protected is at imminent risk of death or serious physical harm, the agency may petition the court for an emergency order to provide the necessary services. The courts of common pleas of each judicial district shall ensure that a judge or district judge is available on a 24-hour-a-day, 365-day-a-year basis to accept and decide on petitions for an emergency court order under this section whenever the agency determines that a delay until normal court hours would significantly increase the danger the older adult faces.

¹⁸ 35 P.S. § 10225.307.

- (b) Limited order.**—The 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.
- (c) Right to counsel.**—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.
- (d) Forcible entry.**—Where it is necessary to forcibly enter premises after obtaining a court order, a peace officer may do so, accompanied by a representative of the agency.
- (e) Health and safety requirements.**—The agency shall take reasonable steps to assure that while the person is receiving services under an emergency court order, the health and safety needs of any of the person's dependents are met and that personal property and the dwelling the person occupies are secure.
- (f) Exclusion of remedy.**—Nothing in this chapter shall be interpreted to deny any older adult access to the emergency medical services or police protection that would be provided to anyone, regardless of age, in similar circumstances.

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MONTGOMERY COUNTY COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

CHECKLIST FOR GUARDIANSHIP PROCEEDINGS

Alleged Incapacitated Person's (AIP's) Name:

Petitioner's Name:

Attorney:

Attorney/Pet. Phone Number:

Case # 20 -X

Attorney's/Petitioner's Email:

1. Petition for Adjudication of Incapacity must contain:

a. All of the following are required per 20 PA C.S.A. 5511(e) & PA O.C. Rule 14.2:

- Name, age, residence and mailing address of AIP
- Name and address of spouse, parents and adult heirs of AIP
- Name and address of residential facility
- Name and address of Proposed Guardian(s)
- Statement that Proposed Guardian(s) has/have no interest adverse to AIP
- Name and address of any individual appointed under a Power of Attorney or Health Care Power of Attorney
- Description of functional limitations and physical and mental condition of AIP
- Steps taken to consider less restrictive alternatives to guardianship
- Specific areas of incapacity for which Guardian is to be assigned powers
- Any areas of capacity for which AIP should retain authority
- Qualifications of Proposed Guardian
- Gross Value of Estate (*assets*) of AIP and monthly income of AIP
- Information about whether a pre-paid Burial Account exists
- Statement that no other Guardian has been appointed and no other Court has assumed jurisdiction over this AIP

b. Verification signed by Petitioner

c. Consent signed by Proposed Guardian(s)

d. Pennsylvania State Police criminal record check

e. Out-of-state criminal record check if guardian has lived outside of Pennsylvania in last 5 years

f. Guardianship Certification (required for professional guardians only)

g. Attorney entry of appearance if applicable

h. Forms:

- Completed Expert Report
- Doctor's Affidavit if AIP cannot attend hearing
- Form SP-4-131 (*Notice of no firearms*)
- Proposed Orders

2. Venue (20 PA C.S.A. §5512):

- AIP is domiciled in or resides in Montgomery County or resides in a long-term care facility within Montgomery County.
- AIP is not a resident of Montgomery County, but is a beneficiary of an Estate or Trust in Montgomery County or has Real Property in Montgomery County.

3. Other items due at least 7 days before scheduled Plenary Hearing:

Forms:

- Affidavit of Service upon Alleged Incapacitated Person
Service of the Petition, Citation and Notice must be made by Personal Service upon the Alleged Incapacitated Person, at least 20 days before the scheduled hearing, and the contents of the Petition must be explained to the maximum extent possible in terms the person is most likely to understand.
- Affidavit of Service upon adult heirs, care providers and agents under any Power of Attorney (*as the Court may direct, generally by first class mail at least 20 days before hearing*)
- Notice of Retention/Non-Retention of Counsel for AIP

CHECKLIST OF REQUIRED AVERMENTS FOR PETITION FOR ADJUDICATION OF INCAPACITY

Pa. O.C. Rules 14.2(a) and (b)

1. The name, age, address (and if different, mailing address), and relationship to the AIP of the petitioner.
2. The name, age, and address (and if different, mailing address), of the AIP.
3. The names, addresses, and relationship to the AIP of all interested parties including:
 - a) All presumptive heirs (close relatives including the spouse, children, parents, and other close relations such as siblings) of the AIP (it should be stated whether these individuals are sui juris or non sui juris).
 - b) Any person or institution providing residential services to the AIP.
 - c) Any other service provider. (It should also be listed what the nature of the service provided is.)
 - d) Any person designated to act as agent of the AIP, in writing, under either an executed healthcare power of attorney, a power of attorney, or any other writing giving such authorization.
 - e) Any person the petitioner proposes should receive notice of the filing of guardianship reports.
 - f) The person or entity the petitioner seeks to nominate as guardian. The proposed guardian's qualifications and relationship to the AIP should be listed as well. If the guardian is an entity, the name of the person who will have direct responsibility over the AIP, as well as the name of the organization, should be given.
4. The reason the guardianship is sought. A description of functional limitations, as well as the physical and mental state of the AIP should be included.
5. Whether the petitioner requests the appointment of:
 - a) A limited or plenary guardian of the estate;
 - b) A limited or plenary guardian of the person; or
 - c) Co-guardianship in any capacity.
6. If the guardianship being sought is limited or not plenary in nature, the areas of incapacity over which a guardian should be given authority need to be specified.
7. If a guardianship of the estate is sought (whether limited or plenary), the petition should include:
 - a) The gross value of the assets of the AIP to the extent known by the petitioner;
 - b) The net income of the AIP to the extent known to the petitioner; and
 - c) Whether there exists a prepaid burial account to the extent known to the petitioner.
8. If a prior incapacity hearing concerning the AIP has occurred. If so the name of the court, date of the hearing, and that court's findings (and whether or not the court's ruling is still in effect) should be listed.
9. An explanation of the efforts made to employ a less restrictive alternative rather than seeking appointment of a guardian and why these alternatives will not or did not work.
10. The likelihood of improvement with regard to the mental and physical condition of the AIP.

11. The veteran status of the AIP and whether the AIP is receiving benefits from the USVA on behalf of themselves or through a spouse.
12. A representation that each proposed guardian has no adverse relationship to the AIP.
13. The availability and ability of the proposed guardian to visit or confer with the AIP.
14. If the proposed guardian has completed any guardianship training the following information should be included:
 - a) Name of the program;
 - b) Length of the program; and
 - c) The date of completion.
15. Whether the proposed guardian is a certified guardian and the current status of any certification and or any disciplinary action against the guardian.
16. If the guardian is or was in any other guardianships. If so, the number of the active guardianships they are involved in should be listed.
17. Whether petitioner seeks to nominate different guardians for the person and the estate.

**CHECKLIST OF REQUIRED EXHIBITS TO PETITION FOR ADJUDICATION
OF INCAPACITY AND APPOINTMENT OF GUARDIANS
Pa. O.C. Rule 14.2(c)**

1. A verification by the petitioner, as with any petition.
2. A consent to serve signed by each proposed guardian.
3. A proposed Preliminary Decree with Citation.
4. A proposed Final Decree.
5. All durable powers of attorney and health care powers of attorney, if available to the petitioner.
6. The certified response to Pennsylvania State Police criminal record check for each proposed guardian.
7. If the guardian has resided outside of Pennsylvania within the five years before the petition was filed, and was over the age of 18 at such time, a certified criminal record check from the state or states where the guardian resided.
8. A consent to serve as guardian signed by any proposed guardian or guardians.

Additional documents may be filed with the petition, or presented to the court before or at the hearing:

1. Expert report signed by a health care provider attesting to the provider's opinion regarding the capacity and functional limitations of the AIP. (See expert report form G-6 in Appendix).
2. If the AIP is not expected to attend the hearing, the court should receive an affidavit of a physician or psychologist stating that attendance at the hearing by the AIP may be harmful to his or her physical or mental condition.
3. A proposed Form SP-4-131 Firearms Notice is required to be filed with the Clerk of the Orphans' Court so that the Clerk may file it with the State Police following any order determining incapacity.
4. Affidavits of Service of the required notices (discussed in CHAPTER FOUR).

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Interstate Issues: Jurisdiction and Transfer of Guardianship

Jurisdiction and Transfer of Guardianship

Pennsylvania has enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)¹⁹ to address jurisdictional issues and transfer of guardianship matters. Because in our society people move to different states at different stages of their lives, to be near relatives or for retirement, jurisdictional issues may arise in determining where a guardianship hearing should occur and where an IP should live and be cared for. Disputes may arise among family members about which state is the appropriate jurisdiction for any guardianship proceedings.

If it is alleged in the petition that the person resides in another state, or that the person resides in Pennsylvania but has resided here for less than six months, consider carefully whether or not Pennsylvania is the “home state” or is a “significant connection state” for the AIP under this statute. If Pennsylvania is not the home state or a significant connection state, it may be appropriate to dismiss the petition for lack of jurisdiction. Before dismissing the petition, consider carefully whether an emergency exists which will likely result in substantial harm to the AIP’s health, safety, or welfare, which may provide jurisdiction for the limited purpose of entering an emergency order.

Jurisdiction: Does the Pennsylvania Court Have Jurisdiction?

Where a party has moved or has been moved from one state to another, how do you determine whether your court has jurisdiction to consider a petition to adjudicate incapacity? How might this question arise? For example:

- A mother, who suffers from dementia, who has lived in Pennsylvania her whole life, is taken to Florida by son without the consent of other children. Son has also transferred all of mother’s funds to a new joint account. Which is the home state?
- A father who has spent winters in Florida and

summers in New Jersey for over a decade (not necessarily spending six consecutive months in either place, often visiting children or other relatives), is moved into daughter’s Pennsylvania home by daughter, without agreement of all parties as to whether this is best for him.

- A developmentally disabled child whose parents are divorced is moved from Pennsylvania, where he has lived most of his life with mother, to father’s home in Ohio. Father becomes Representative Payee in Ohio for son’s Supplemental Social Security Income.

Just as in child custody matters, interstate guardianship questions and disputes may be expected to increase in frequency as family members’ residences have become more dispersed across the United State and around the world.

1. Home State: First, determine whether Pennsylvania is the person’s “home state” as defined by the UAGPPJA.²⁰ Generally, jurisdiction is appropriate in the “home state” in which the person has been living for at least six months consecutively prior to the filing of the petition. Under the statute, the “home state” is defined as:

- a) The state in which the AIP was physically present for at least six consecutive months (including any period of temporary absence) immediately before the filing of the petition; or
- b) If there is no state in which the person was physically present for the preceding six consecutive months, the state in which the person was present for at least six consecutive months ending within the six-month period preceding the filing of the petition.

2. If not “Home State,” Jurisdiction Determination:

- a) First, determine whether there is a “home state” other than Pennsylvania and consider contacting the appropriate court in that state.

¹⁹ 20 Pa.C.S. §§ 5901, *et seq.*

²⁰ 20 Pa.C.S. § 5911(a).

- b) Review pleadings carefully to determine whether the parties have pleaded sufficient facts from which to determine what state is the “home state,” whether proceedings have been commenced in any other state, and whether Pennsylvania is a “significant connection state.”
- c) Next, determine whether Pennsylvania is a “significant connection state”²¹ as defined by statute: A significant connection state is a “state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.” In determining whether Pennsylvania is a “significant connection state” the court shall consider the following factors:
 - i) The location of the person’s family and other persons required to be notified of guardianship proceedings.
 - ii) The length of time the person was physically present in the state, and the duration of any absence.
 - iii) The location of the person’s real and personal property.
 - iv) The extent to which the person has ties to the state, including voter registration, state and local tax return filing, driver’s license, vehicle registration, social relationships, and receipt of services.
- d) If Pennsylvania is a “significant connection state” then the Pennsylvania court may exercise jurisdiction if one of the following clauses also applies:
 - i) The person has no home state (e.g., has moved frequently among more than one state in the year preceding the filing of the petition); or where the home state court has declined to exercise jurisdiction;
 - ii) The person has a home state, but all of the following circumstances apply:
 - (1) no petition for adjudication of incapacity is pending in that state court nor in any other “significant connection state;”
 - (2) no petition for adjudication of incapacity is filed in the “home state”

prior to the Pennsylvania court issuing its final decree;

- (3) no objection to jurisdiction in Pennsylvania is filed by a person entitled to notice; and
- (4) the Pennsylvania court concludes that it is an appropriate forum.

BEST PRACTICE: Where Pennsylvania is not the “home state” be aware that notice of any guardianship petition must be provided to all parties who would be entitled to notice in the home state.

Where a person may have a residence or family in another country, a foreign nation may be treated similarly to another state by a Pennsylvania court analyzing the most appropriate forum for guardianship proceedings.

- 3) **Emergency Order:** Even where the Pennsylvania court does not have jurisdiction under the provisions described above, where either the person or his or her property is present in Pennsylvania, a Pennsylvania court may issue an order, **effective for up to 90 days, to address the following issues on a temporary basis:**²²
 - a) Appointing a guardian in an emergency for a term not exceeding 90 days for a person who is physically present in Pennsylvania; or
 - b) Protecting real or personal property located in Pennsylvania; or
 - c) Appointing a guardian for a person for whom a provisional order transferring the proceeding from another state has been issued.

²¹ *Id.*

²² 20 Pa.C.S. § 5914.

4) Declining Jurisdiction; Dismissing the Petition; Continuing Jurisdiction:

- a) A court may decline to exercise its jurisdiction (even where found to have jurisdiction under the statute) at any time when the court concludes that a court of another state is more appropriate.²³
- b) Where the court determines that it has acquired jurisdiction as a result of the “unjustifiable conduct” of a party, the court may:
 - i) decline to exercise jurisdiction;
 - ii) exercise jurisdiction for the limited purpose of fashioning an appropriate order to ensure the health or safety of the person or to prevent the unjustifiable conduct; or
 - iii) continue to exercise jurisdiction as appropriate.²⁴
- c) Where Pennsylvania is not the “home state,” upon the request of a court of the “home state,” a Pennsylvania court shall dismiss any petition seeking an emergency guardianship or protective order.
- d) A court that has determined that it has jurisdiction and issues an order shall have exclusive and continuing jurisdiction over the proceedings until such time as such order expires by its own terms or the court terminates the proceedings.

5) Transfer of guardianship – procedure for transfer to another state: Typically transfers of guardianship are uncontested matters that arise due to a change of circumstances or a change in primary caregiver. However, be alert to notice requirements to assure that any party who might object has an opportunity to be heard.

- a) A court-appointed guardian may petition to transfer the guardianship matter to another state, in a case in which the IP has been or will be moved to another state.²⁵
- b) Notice must be given to all persons entitled to notice of the guardianship petition.
- c) A court shall hold a hearing on the petition to transfer guardianship to another state, either on its own motion or upon the request of the guardian, the IP or another person required to be given notice.
- d) When to grant a request to transfer guardianship to another state? When the IP is in the other state or will be moved to the other state; when plans for the care of the IP in the other state are reasonable and sufficient; and where there is no objection to the transfer, or an objector has not established that the transfer is contrary to the IP’s best interests.
- e) The court shall issue a provisional order, granting the request to transfer guardianship of the person and/or guardianship of the estate of an IP to another state.
- f) The court shall issue a final decree, transferring the guardianship of the person and/or guardianship of the estate to another state upon receipt of a provisional order issued by a court in the other state, accepting the guardianship(s); and any final report required to be filed to close the guardianship in this state.

6) Acceptance of jurisdiction over a guardianship from another state:²⁶

- a) A petition to confirm transfer of

Where a party, through “unjustifiable conduct” has attempted to invoke the court’s jurisdiction in a guardianship proceeding, the court may assess reasonable fees and costs, including attorneys’ fees, witness expenses and travel expenses, against that party.

²³ 20 Pa.C.S. § 5916.

²⁴ 20 Pa.C.S. § 5917.

²⁵ 20 Pa.C.S. § 5921.

²⁶ 20 Pa.C.S. § 5922.

guardianship of the estate and or person of an IP who has moved to Pennsylvania must include a certified copy of the provisional order from the other state approving the transfer of guardianship to Pennsylvania.

- b) Notice of a petition to transfer guardianship must be provided to all persons entitled to notice of a guardianship petition.
- c) The court shall hold a hearing on the petition to transfer guardianship to another state, either on its own motion or upon the request of the guardian, the IP or another person required to be given notice.
- d) The court shall issue a provisional order accepting guardianship of the person and or estate unless:
 - i) An objection is made and the objector establishes that transfer of the proceedings would be contrary to the best interests of the IP; or
 - ii) A guardian is ineligible for appointment in Pennsylvania.
- e) The court shall issue a final decree accepting the transfer of guardianship upon receipt from the original state court of a final order approving the transfer to Pennsylvania.
- f) Within 90 days after issuing a final decree accepting the guardianship, the court shall determine whether the guardianship requires modification to comply with the laws of Pennsylvania.

7) Cooperation between courts

- a) **Phone calls and communications between courts:** A judge or court staff in Pennsylvania may contact a court of another state to discuss jurisdictional issues and to coordinate proceedings related to guardianship. Contact may be as simple as a phone call between judges or court staff to discuss scheduling, jurisdictional questions, or procedures, or may be a discussion that is transcribed and made part of the record. Where the communication between courts involves matters other than scheduling, calendars,

and other administrative matters, the statute requires that the court shall make a record of the communication, which may be limited to the fact that the communication occurred.²⁷

b) **Interstate cooperation regarding testimony, evidence and court proceedings:**

For instance, if the AIP has a domicile in Pennsylvania but has been moved by one of the children to another state, and the parties dispute jurisdiction and whether a guardianship is needed, the Pennsylvania court may ask the court in another state to assist in evaluating the AIP or in arranging for testimony by individuals located in that state.²⁸ The following are examples of requests that a judge or court staff from Pennsylvania may request of the appropriate court in another state:

BEST PRACTICE: Where there is a dispute about jurisdiction, consider making a phone call or sending a letter to the judge in another state to coordinate proceedings and avoid inconsistent rulings. Make a record of this communication.

- i) Hold an evidentiary hearing.
- ii) Order a person in that state to provide evidence or testify.
- iii) Order an evaluation of the AIP.
- iv) Order an investigation.
- v) Forward to the court in Pennsylvania a certified copy of the transcript of any proceedings.
- vi) Issue an order to assure the presence of any person necessary for the proceeding.

²⁷ 20 Pa.C.S. § 5904.

²⁸ 20 Pa.C.S. § 5905.

- vii) Issue an order authorizing the release of medical, financial, criminal or other relevant information in that state.
- viii) “Take or refrain from taking any other action to facilitate the prompt and fair resolution of matters subject to this chapter.”²⁹

²⁹ 20 Pa.C.S. § 5905(a)(8).

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Pre-Hearing Issues

Because a petition to appoint a guardian requests a deprivation of an individual's rights, due process requirements apply to every aspect of the proceedings, as protection of individual rights and liberties are at the very core of the United States Constitution and our system of justice.

The purpose of this chapter is to address matters that the court may consider before the hearing, to afford the AIP due process, to accommodate witnesses, and to comply with requirements for access to justice. Pre-hearing decisions of the trial court or actions of the parties may significantly affect the ability of the court to hear and decide the matter at the time scheduled for hearing. It is important that the court carefully review the initial petition and any answer filed in response, as well as any competing petitions, or motions to strike a petition filed before the hearing.

By reviewing the petition or any subsequent pleadings, the court may be able to immediately identify issues that must be addressed prior to the hearing. Sometimes the issues aren't easily identified and may take additional inquiry of the court or the court's staff to get the information necessary to be able to proceed with the actual hearing. Of course, the court's inquiries and actions must comply with the law and the Code of Judicial Conduct and the court must avoid ex parte communications.

General Access to the Courts and Language Access

Recommended checklist for court staff to confirm prior to hearing:

- Language access? Need for an interpreter?
- Hearing or sight issues (need for assisted listening devices or CART real time display of transcript, so that AIP may follow along with testimony)?
- Overstimulation issues (for instance where the AIP may suffer from autism or other developmental disability)?
- Need for access for a person in a wheelchair, with a walker or other assistance?
- Need for an aide or supportive person to be

permitted to accompany the AIP?

- Adequate (ideally private) waiting room?
- Need for Sheriff? (Consider whether case involves history of family disharmony or domestic violence.)

Special consideration should be given to the location and scheduling of hearings, for example:

- Time of day?
- Other hearings listed at the same time?
- Privacy considerations?
- Ease of access to the courtroom? Ramps?

BEST PRACTICE: Judges are encouraged to carefully review the petition and if necessary, have their staff or court administration confirm with counsel or the self-represented parties whether or not any of the petitioners, witnesses, or the AIP may need an interpreter or listening devices.

Article 1, § 26 of the Pennsylvania Constitution and 42 U.S.C. § 126 of the American with Disabilities Act assure that litigants and parties to an action shall have access to the courts which shall include interpreter services when necessary. More specifically, 42 Pa. C.S §§ 4412 and 4432 assure that interpreters are provided for those with language needs or for the hearing impaired.

Access to the Courts

It is not uncommon in guardianship proceedings to have to accommodate the special needs of the AIP. Some individuals may require substantial medical assistance and the use of various devices such as motorized wheelchairs, assisted listening devices, or other apparatus to be able to appear at the hearing and meaningfully participate in the hearing. Depending on the style, design, and age of your courthouse, there may be a need to ensure that individuals have access to ramps, elevators, and courtrooms that can accommodate these devices. Some individuals may have certain disabilities that cause them to have anxiety or other adverse reactions to the stimulation of the proceedings and the strange environment of the courtroom. The hearing may prompt reactions that may be disruptive during the course of the proceedings or may be harmful to the individual. In those instances, it is not uncommon for the family or facility to have aides who can assist with the care of the individual. This does not necessarily mean that the party should not be present and observed by the court. Ultimately this decision rests with the judge, to balance whether it is important for the AIP to be present, if able, to participate, with whether participation may provoke anxiety, stress, and fear, and may indeed cause harm to the individual.

Sensitivity should be given to the challenges of attending a hearing for the AIP and for the family members or facility staff in attendance at the hearing. Care should be taken to minimize stimulation by careful coordination with those most familiar with the AIP. Careful pleading by counsel for the petitioners will afford you some of this information.

BEST PRACTICE: Accommodations should be made by the court to facilitate the AIP's attendance.

Consider accommodating the AIP with hearing aids or amplification in the courtroom, permitting the AIP to participate by video, or holding the hearing at the AIP's facility or residence where appropriate.

However, court staff could reach out to the attorneys to see if there are any special needs of the AIP or accommodations that may be required given the particular alleged physical or mental disabilities.

An AIP may request that the hearing be closed and conducted in private in the courtroom. The statute permits the hearing to be closed to the public to protect the privacy and confidential personal information of the AIP. Be prepared for these requests. Because significant confidential personal information, financial information, and health information must be shared in an incapacity hearing, consider scheduling incapacity hearings individually, so that the public and other parties and families are not present in the courtroom during testimony. Be aware that the AIP may request that the hearing be closed to the public.³⁰

Appointment of Counsel

20 Pa.C.S. § 5511(a) requires that the petitioner who is seeking to proceed with a hearing and have a guardian appointed for the AIP notify the court at least seven days before the hearing if counsel has not been retained by or on behalf of the AIP. The statute provides no guidance as to what information must be supplied in the notification to the court. If the court is advised that the AIP does not already have their own counsel, the court should carefully review the petition filed and, based on the allegations, determine whether or not an attorney should be appointed for the AIP.

Orphans' Court judges across the Commonwealth have different approaches on when and how frequently to appoint counsel, and whether to wait to see if the AIP requests counsel. Many courts appoint an attorney in all cases alleging incapacity. Others decide whether or not the appointment of counsel is necessary on a case-by-case basis. Other considerations, such as whether any parties in interest oppose guardianship, or whether there are allegations of misfeasance or malfeasance or abuse and neglect should also be considered in this analysis. The statute provides that the AIP has a right to request that the court appoint counsel. Although not all AIPs will exercise this right, some judges feel it is prudent to protect the fundamental constitutional rights of all AIPs by appointing counsel in all cases.

Upon receipt of a seven-day notice to the court that counsel has not been retained for the AIP, the

³⁰ 20 Pa.C.S. § 5511(a).

court may decide to appoint independent counsel to represent the AIP. The court may also defer making that decision to the time of the hearing. The court may wish to observe the person during the course of the proceedings, and if there is evidence presented that the person's interests would be served by the appointment of counsel, the court may continue the proceedings and appoint counsel to the AIP.

BEST PRACTICE: Counsel for the petitioner should be expected to advise the court whether the AIP has counsel, whether the AIP has requested counsel, or whether the case is expected to be contested, at the earliest possible date. The court may wish to appoint counsel early to minimize the need for continuances.

If counsel is appointed within seven days prior to the hearing, the attorney may request a continuance to prepare for the hearing and to provide adequate representation at the hearing. Some courts may choose to appoint counsel in all cases following initial review of the petition, in order to avoid requests for continuances in these circumstances. Practitioners should be encouraged to request counsel immediately, together with the filing of the petition, particularly if it is known that the case will be contested or if the AIP has indicated an intent to make a request for counsel.

The role of counsel for an AIP is discussed more fully in CHAPTER FIVE of this Bench Book.

Service of the Petition on the AIP

Section 5511(a) requires that the petition must be served upon the AIP at least 20 days in advance of the hearing. The service must be in person, and the contents of the petition must be read or explained to the AIP in language and terms that they are likely to understand, including the right to counsel. The notice to the AIP is required to include a notice in

large type and in simple language. See Required Form of Notice to AIP in Appendix. The person serving the notice, citation, and petition on the AIP is required to explain, "to the maximum extent possible in language and terms the individual is most likely to understand," the purpose and seriousness of the petition.³¹

BEST PRACTICE: The Court may require that the Petitioner provide a copy of the Bill of Rights of an Alleged Incapacitated Person (copy in Appendix) to the AIP at or near the time they are served with the Petition.

The person serving the petition on the AIP must look for indications as to whether the AIP will contest the question of incapacity and whether they want to be represented by counsel. This information should be contained in the letter or notice to the court describing whether counsel should be appointed.

The court may wish to have staff carefully check the docket pre-hearing to determine if an affidavit or certificate of service has been filed. If an affidavit of service has not been filed before the hearing, the court may wish to have court staff request that proof of service be filed prior to the hearing. If the court allows, some attorneys bring the proof of service to the hearing. If proof of service hasn't been confirmed prior to the hearing, or there is inadequate proof that personal service on the AIP actually occurred, the

BEST PRACTICE: Check the docket to determine if the appropriate affidavits of service have been filed. If not, query petitioner to ensure service is made prior to the hearing date.

³¹ 20 Pa.C.S. § 5511(a).

hearing may have to be delayed or rescheduled.

An Affidavit of Personal Service on the AIP, as well as Affidavits of Service on family members and interested parties (including Agents under a Power of Attorney), are required to certify that all involved have received advance notice of the hearing, and that the AIP specifically had the petition personally served and the notice read.

The AIP must receive written and oral notice at least 20 days before the hearing of:³²

- Right to counsel including right to request that counsel be appointed, and to have counsel paid for if it cannot be afforded;
- Hearing date, time and location;
- Legal purpose and seriousness of the hearing, including possible loss of rights; and
- A copy of the petition.

Notice to Other Parties

The petitioner must provide written notice of the petition and the date and time of the hearing to all persons who would be intestate heirs of the AIP, to any agent under a power of attorney, to any institution providing residential care services to the AIP, and to all other persons as directed by the court.

BEST PRACTICE: Upon receipt of the 7-day notice indicating that the AIP is not represented by his or her own counsel, or upon first review of the petition, consider whether to appoint counsel to represent the AIP.

7-Day Notice to Court of No Counsel for AIP

The petitioner must notify the court at least seven days before the hearing if to the best of petitioner's knowledge counsel has not been retained by the AIP.

BEST PRACTICE: When considering crafting a limited guardianship, the Court may need additional information not included in the Expert Report, and may require testimony by the expert in person, by video, by telephone or by deposition.

Testimony of Physicians or Health Care Providers

Evidence regarding the nature of a person's alleged incapacity may be presented in person or by deposition, pursuant to 20 Pa.C.S. § 5518. Testimony concerning incapacity is subject to cross-examination. 20 Pa.C.S. § 5518.1. The testimony to support a determination of incapacity must be from a professional who has the requisite training and experience to express an opinion about the specific condition that causes the alleged incapacity of the person who is the subject. Professionals who may testify may include medical doctors, psychiatrists, psychologists, nurse practitioners, social workers, and other professionals, provided that their training has qualified them to evaluate the type of condition that is affecting the AIP. Pennsylvania's Supreme Court Orphans' Court Rules Committee has adopted a form, Orphans' Court form G-6, for an Expert Report, which may be used in lieu of live expert testimony when the question of incapacity is uncontested. A copy of the Expert Report form, Orphans' Court Form G-6, appears in the Appendix.

BEST PRACTICE: Where the issue of incapacity is not contested by any party, the right to cross-examine the expert may be waived and the court may accept a written expert report.

³² *Id.*

Affidavit or Testimony Excusing AIP from Attending Court Hearing

The AIP is expected to attend the hearing and participate unless their attendance would be harmful to them. The court may excuse attendance by the AIP where the court is satisfied, based upon a sworn statement or testimony of a physician or licensed psychologist, that the AIP's physical or mental health would be harmed by attending. 20 Pa.C.S. § 5511(a) (1). Care should be taken to assure that the petitioner and physicians or other experts are not merely excusing the AIP because it would be inconvenient for them to attend or if they wouldn't understand the proceeding. However, where a person may suffer significant anxiety, agitation or discomfort by attending, the court should be sensitive to the possibility that a court appearance may impose an intolerable amount of stress on the AIP.

BEST PRACTICE: When the AIP is not present in the courtroom, the court should inquire at the outset and a sworn statement or deposition of the physician/psychologist explaining the reason that the AIP is not present must be made part of the record, or ideally filed before the hearing. Physicians and petitioners should be reminded that inconvenience is not a reason for the AIP not to be present, and the presence of the AIP will be excused only if presence in court will likely HARM the AIP.

Appointing an Expert to Conduct an Independent Evaluation

The court may appoint an expert to conduct an independent evaluation of the AIP, either on its own motion or at the request of the AIP or counsel for the AIP. The court is required to consider appointing

an evaluator nominated by the AIP.³³ The court may appoint its own expert when there is any doubt as to whether the petitioner's expert has conducted a fair and independent evaluation, or where the petitioner's expert may not have the appropriate training best suited to the nature of the condition from which the AIP suffers, or where the AIP requests a second and independent evaluation. The request for an independent evaluation may not be made by another interested party, but only by the AIP or their counsel, or on the court's own motion. The court may order the costs of the independent evaluation to be paid by the county, to be reimbursed by the Commonwealth.³⁴

BEST PRACTICE: If the AIP would be harmed by being required to come to the courtroom, but can participate, the court should consider permitting the AIP to participate in the hearing by video.

Pre-Trial Conferences

Although there is no statutory provision for a pre-trial conference under the Incapacitated Person Act, the court always has the discretion to schedule a pre-hearing conference. The scheduling and conduct of a pre-hearing conference can become more complicated or difficult depending on whether or not all of the parties are represented by counsel.

A common scenario encountered by the court is one where a county area agency for the aging is the petitioner seeking the appointment of either a guardian of the person or the estate. The proposed guardian isn't the agency. While the area agency on aging, as petitioner, will have counsel, the proposed guardian may not have counsel.

Depending upon the court's earlier decision whether or not to appoint counsel, the AIP may or may not have counsel. The person may not have hired counsel. It is possible that there may

³³ 20 Pa.C.S. § 5511(d).

³⁴ *Id.*

be challenges to the petition by family members or associates of the AIP, or by a person who had been granted power of attorney by the AIP. These individuals also may be participants in the hearing who are unrepresented. It is essential that the court clarify which parties have representation before convening a pre-hearing conference. This may affect whether or not the court can hold the conference in chambers, via telephone, or in a hearing/courtroom. It also may affect whether the court wishes to conduct the pre-hearing conference on the record or not. If all parties have counsel, the pre-hearing conference can be conducted more easily than if there are unrepresented parties.

The lack of counsel should not discourage the court from holding a prehearing conference to address outstanding issues that, if resolved, will assure that a more orderly hearing will be held. Matters to discuss and consider may be whether or not physicians will be testifying in person, via telephone, via video, or if a deposition has been scheduled prior to the hearing and whether an expert report will be accepted in lieu of testimony.

The court may have to confirm in advance of the hearing whether or not the AIP is to be present at the hearing. At the pre-hearing conference the court can make clear to the parties that in the event the AIP is not present at the hearing, the court must be satisfied by the testimony, deposition, or expert report of a physician, psychologist, or other health care provider, that the AIP's physical or mental condition would be harmed by their presence, or it is impossible for the AIP to be present. A record can be made establishing the basis for the person's absence. The reasons given for the absence should not be generalized statements that the person would be harmed, or that it would be inconvenient, but rather should provide detail about how that person's specific conditions would be harmed by being present in court. Where frequent petitions for adjudication of incapacity and appointment of guardians are filed by a particular petitioner, such as a nursing home or health care provider, and that petitioner employs an expert who routinely asserts that the AIP is unable to attend, the court may want to make an inquiry to assure that the rights of the AIP to attend are not being abridged. If the court concludes the evidence is insufficient to establish that it would be harmful for the AIP to attend the hearing, the hearing can be continued and resumed once the court can guarantee the person's attendance or permit the parties time to gain adequate evidence to justify the person's absence from the hearing.

Conclusion

The court has the ability with sufficient pre-hearing planning to address many issues that if overlooked may thwart the successful completion of an incapacity hearing, which may have substantial consequences to the person's physical well-being, health care, and estate management. The court's careful prehearing planning will frequently be appreciated by the parties, counsel, and witnesses.

Counsel for the Alleged Incapacitated Person

Under the Pennsylvania Guardianship Act, the AIP has a right to have counsel represent them at the hearing on the petition for adjudication of incapacity and appointment of guardians. The AIP has “the right to request appointment of counsel and to have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot be afforded.”³⁵ The court shall appoint counsel to represent the AIP “in appropriate cases.” Counsel for the AIP may be paid by the Commonwealth “if it cannot be afforded” by the AIP. The petitioner must provide notice to the court as to whether the AIP is or is not represented at least 7 days prior to the hearing.

Legal Requirement: Pennsylvania law recognizes a right to request counsel, and requires that counsel for the AIP shall be appointed “in appropriate cases.”

The statutory right of the AIP is to have legal counsel appointed to represent them and is not satisfied by the appointment of a guardian ad litem.

How is Counsel Selected? Court-Appointed Counsel or Private Counsel Selected by AIP?

An AIP may have sufficient capacity (even if ultimately it is established that they are impaired or incapacitated in many respects) to select their own counsel and they are not limited to court-selected counsel. An AIP or an IP has a right to “counsel of [his or] her own choice.” Although the court may have entered an order appointing counsel, where an AIP or IP with some ability has selected their own counsel, the court should allow the AIP’s selected counsel to appear for that person and vacate any

³⁵ 20 Pa.C.S. § 5511(a).

order appointing another attorney as counsel.³⁶ However, the court may find it necessary to inquire into, and may require a brief hearing to determine from facts placed on the record, whether the AIP or another person actually engaged the attorney. The following list of questions may help a court to determine whether the AIP has genuinely engaged their own counsel.

Questions to Pose to Counsel Claiming to Represent the AIP

- Who contacted and retained counsel? Did a relative or agent actually hire counsel for the AIP? If so, does that person have a potential conflict of interest?
- How long counsel has known or represented the AIP?
- Does the AIP have knowledge of and ability to engage or select counsel? Does the AIP remember specifically engaging this person as counsel?
- Does counsel entering appearance for the AIP have any conflict? For instance, does the same attorney also purport to represent an agent acting under a power of attorney or another family member or interested party? Such proposed dual representation may pose a conflict of interest and justify court appointment of independent counsel for the AIP. In some cases, it may become evident that the counsel seeking to enter an appearance to represent the AIP was in fact engaged by a person with a possible adverse interest to the AIP. In such cases, the court would be wise to appoint independent counsel to represent the AIP.

Role of Counsel for the AIP/IP

Counsel for the AIP, whether court-appointed or privately engaged, should be expected to:

³⁶ *In re: Estate of Rosengarten*, 871 A.2d 1249 (Pa Super. 2016).

- Determine the AIP’s goals and wishes with regard to the guardianship proceeding, if the AIP is able to express them; act as a zealous advocate for the AIP’s expressed positions, as required by Pa.R.P.C. 1.2, which provides that a lawyer shall abide by a client’s decisions concerning the objectives of representation;
- Advocate for the AIP’s expressed positions, goals, and wishes, to the extent possible; and
- Where appropriate, inform the court of the AIP’s expressed positions, goals and wishes.

lawyer shall abide by a client’s decisions concerning the objectives of representation. In this regard, the role of counsel for the AIP is the same as that of an attorney representing any other client, with the attorney playing the traditional role of zealous advocate for the client’s position. This obligation applies even if the attorney believes that the client is partially or totally incapacitated.

There may be circumstances in which an attorney for the AIP may request intervention or take other action to protect a client’s interests, even over the client’s opposition. For example, if the attorney reasonably believes that an AIP is being financially exploited or seriously abused or neglected by a third party but as a result of their incapacity cannot or will not act to protect their own interests, their attorney may take actions needed to protect the client’s interests, under Pa.R.P.C. 1.14(b). Generally, however, where the AIP objects to a finding of incapacity or appointment of a guardian, the attorney for the AIP should oppose the determination of incapacity and the appointment of a guardian. The role of counsel for the AIP is not to assist the petitioner in having a guardian appointed over the AIP’s objection, although there may be cases where there is no other outcome that would adequately protect the AIP’s interests. In such cases, counsel may also consider requesting that if a guardian is appointed to address an urgent concern, the court should consider scheduling a review hearing to review whether a guardian continues to be necessary and appropriate.

Pa.R.P.C. 1.14(c) provides that information relating to representation of a client with diminished capacity is protected by Pa.R.P.C. 1.6, which in turn states that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation...”. There are several exceptions to this requirement, including a provision that an attorney may reveal such information to the extent that the lawyer reasonably believes necessary “to prevent reasonably certain death or substantial bodily harm”. Pa.R.P.C. 1.14(c) further directs that when an attorney takes protective action pursuant to Pa.R.P.C. 1.14(b), “the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.” An attorney’s belief that the client is incapacitated is not sufficient, by itself, to meet this standard.

The comments to Pa.R.P.C. 1.14 also note that

BEST PRACTICE: Be aware that counsel for the AIP must, to the extent reasonably possible, maintain a normal attorney-client relationship with the AIP, even a person with diminished capacity. Counsel must zealously advocate for the AIP’s legal interests, which in many cases will mean opposing the petition for adjudication of incapacity and for appointment of guardians. Counsel should also consider advocating for a less restrictive alternative than guardianship.

In the representation of the AIP in an incapacity proceeding, the Pennsylvania Rules of Professional Conduct should be carefully considered. Particularly relevant is Pa.R.P.C. 1.14 (Client with Diminished Capacity), which requires counsel for the AIP to maintain, as much as reasonably possible, a normal attorney-client relationship with the AIP. This means that the attorney should, to the extent possible, determine the AIP’s goals and wishes with regard to the guardianship proceeding and act as an advocate for the AIP’s positions. Pa.R.P.C. 1.2 provides that a

“[t]he fact that a client suffers from a diminished capacity does not diminish the lawyer’s obligation to treat the client with attention and respect.”

It is important to note the distinction between the role of counsel for the AIP and that of a guardian *ad litem*, whose role is to investigate the facts of the case impartially, make an independent assessment of the need for a guardian, and make a report to the court. A guardian *ad litem*’s role may involve disclosing the AIP’s confidences and making recommendations which conflict with the wishes of the AIP, actions which could conflict with the ethical obligations of counsel for the AIP, including both Pa.R.P.C. 1.2, discussed *supra*, and Pa.R.P.C. 1.6 (Confidentiality of Information), discussed below. As such, counsel should not attempt to assume both of these roles simultaneously. However, counsel for an AIP may request the appointment of a separate guardian *ad litem*, if that step would be helpful in protecting the interests of the AIP.³⁷

Responsibilities of Counsel for the AIP

Counsel for the AIP should be expected to:

- Meet with their client to determine whether client can form and express an opinion concerning their goals for the representation. If the client is unable to do so (for example, if the client is comatose or unable to communicate in any way), the attorney will argue for the course of action that is in the client’s best interests;
- Interview family members, caregivers, medical or social services providers and others with knowledge of the AIP’s medical condition(s), decision-making ability, wishes and circumstances;
- Explain to the AIP their rights and the nature of the court proceedings;
- Review expert reports and depositions, and seek an independent evaluation where appropriate;
- Explore whether less restrictive alternatives to guardianship would alleviate the need for a guardianship;

³⁷ Note that while the court may order the county to pay the costs of court-appointed counsel for the AIP, there is no provision for the court to order payment of the costs of a guardian *ad litem* for the AIP.

- File responsive pleadings and motions as appropriate;
- Advocate for the AIP’s wishes to the court;
- Request appointment of a guardian *ad litem*, if necessary, in cases in which the AIP’s expressed legal interests appear to be in conflict with their best interests;
- Ensure that the petitioner meets the burden of proof by clear and convincing evidence and that court procedures are followed;
- Present evidence and cross-examine witnesses in contested cases;
- Advocate for less restrictive alternatives or for limited guardianship, wherever possible;
- Assure that the IP, if determined to be incapacitated by the court, is notified of rights to appeal and to seek a review hearing; and
- File appeals where appropriate.

Engagement Letter of Private Counsel

Counsel, of course, must comply with all of the Rules of Professional Conduct. In addition, private counsel engaged by an AIP is required to prepare a “comprehensive engagement letter . . . setting forth the scope of counsel’s services . . . how counsel will bill for legal services and costs and the hourly rate, . . . who will be the party considered responsible for payment, [and] whether any retainer is required.”³⁸ Counsel shall provide a copy of the signed engagement letter to the court upon request.

BEST PRACTICE: The role of counsel and scope of representation should be clearly defined in an engagement agreement prepared by private counsel and in a court order appointing counsel.

³⁸ Pa. O.C. Rule 14.4(b).

Court Order Appointing Counsel

A court order appointing counsel for an AIP shall delineate the scope of counsel's services and whether those services include pursuing any appeal.³⁹ It is wise to prepare counsel for the possibility that they may be expected to file a notice of appeal for a client, and that they may not abandon a client or miss deadlines that could affect the client's rights. However, if counsel lacks the time or resources to take an appeal, the court should consider appointing new counsel, upon the filing of a petition for leave to withdraw by appointed counsel.

Duration of Representation

LEGAL REQUIREMENT:

An IP may be entitled to appointment of counsel for matters that arise after the Final Decree adjudicating incapacity.

An appointment or engagement of counsel frequently continues after appointment of guardian. Following the appointment of a guardian of the estate, the guardian is the legal representative of the IP with the authority to sue and be sued, and to collect assets. However, issues that may arise following appointment of guardian where an attorney for IP may have a role include:

- Filing a notice of appeal on behalf of client, and pursuing an appeal.
- Review of proposed expenditures by guardian.
- Review of a proposal to sell home by guardian and advise court of any opposition by the IP.
- Request a review hearing if IP's capacity improves.

- Request a review hearing if the guardian is not properly managing funds or assets or is not meeting the needs of the IP.
- Represent IP with regard to any end-of-life decision-making and advise court of client's instructions and interests, if any.

Court Approval of Counsel Fees

Counsel fees are paid from the estate of the IP where funds are available and are to be based upon hours worked and reasonable hourly rate for legal services. The fees are reviewed in proportion to assets available to sustain the IP and fees approved from the estate of an IP must be on the "most modest scale."⁴⁰ If the IP is unable to pay, the fees will be paid by county, and reimbursed by Commonwealth, for those persons unable to pay. Different courts have different views on the reasonableness of hourly rates and amounts of attorneys' fees. However, bear in mind that the assets of the IP's estate are a limited fund to support that person, typically for the rest of their life, and professional fees must be balanced in proportion to the living expenses and needs of the IP.

³⁹ Pa. O.C. Rule 14.4(c).

⁴⁰ *Williams Estate*, 9 Fiduc. Rep. 681 (O.C. Allegheny, 1959); *Lewis Estate*, 18 Fiduc. Rep. 2d 211 (O.C. Montgomery, 1998).

Counsel for Other Parties: Petitioner, Guardian, Agent Under Power of Attorney, and Parties in Interest

In addition to counsel representing the AIP, attorneys may participate in guardianship proceedings to represent several other parties. In most cases, an attorney is likely to represent the petitioner seeking an adjudication of incapacity. However, family members sometimes file a petition without an attorney, seeking appointment of a guardian, particularly where funds are scarce. Attorneys may also enter an appearance to represent the guardian, to represent a person who has been named as an agent under power of attorney by an AIP, and to represent relatives and other interested parties.

Counsel for Petitioner

Petitioner's counsel has obligations to assure that the petition complies with the rules and incorporates all of the required averments and attachments, to ensure notice of the proceedings to all interested parties, and to arrange for personal service of the citation about the AIP, with the notice to be read and explained to the AIP in terms the person is most likely to understand. Petitioner's counsel also must notify the court if the AIP is represented by counsel, so that the court may timely consider whether appointment of counsel to represent the AIP is appropriate.

Petitioner's counsel may be expected to nominate a qualified proposed guardian and obtain the consent of the proposed guardian. Petitioner's counsel may also be expected to advise the court if the petition is likely to be contested and if the hearing is likely to be lengthy, which may require the court to reschedule the hearing date. Petitioner's counsel should be familiar with the Supreme Court Orphans' Court Rules and any local Orphans' Court Rules regarding guardianship matters. Petitioner's counsel also has the responsibility to offer evidence, either through an expert report or through expert testimony presented in person or by deposition, to establish by clear and convincing evidence that the AIP is incapacitated and in need of a guardian. Petitioner's counsel must also present evidence concerning whether less restrictive alternatives are feasible and whether they have been attempted, and whether guardianship could be limited or must be plenary.

Where counsel is representing a petitioner which is a nursing facility with a claim for payment from the assets of the AIP, it is important to bear in mind that this type of petitioner has an interest in the outcome and may also be engaged in civil litigation to collect its fees. This makes it all the more important for the court to ensure that the AIP's rights are fully protected; appointment of counsel for the AIP may be particularly appropriate in this situation. It is also important for the court to carefully consider the choice of guardian in this situation. Because the nursing facility as petitioner has nominated the guardian, and may frequently nominate that guardian to serve for its residents, it is important to assure that any guardian who is appointed does not see their obligation mainly as ensuring that the nursing facility gets paid, but rather will be fully attentive to their ongoing duties to ensure that the IP receives quality care and services.

Counsel for an Agent Under a Power of Attorney

In cases in which the AIP has signed a power of attorney, the person named as an agent under a power of attorney is entitled to notice of the hearing and may wish to participate in the guardianship proceedings. An agent under a power of attorney may assert that a guardianship of the estate or person is not needed as the power of attorney is an adequate less restrictive alternative that is effective for the needs of the AIP. An agent named under a power of attorney may also have been nominated by the AIP in the power of attorney to serve as a guardian should a guardian be necessary. In some cases, an agent under a power of attorney may engage counsel to be paid from the funds of the AIP pursuant to the power of attorney. Such counsel may or may not explicitly seek to have the court recognize him or her as representing the interests of the AIP. Exercise caution in these cases, as the distinct interests of the AIP may differ from the interests of the agent under the power of attorney. In most cases, to avoid a conflict of interest, the court will determine that appointment of independent counsel to represent the interests of the AIP is necessary. Counsel for the agent may represent the interests of the agent in the proceedings, which

may include opposing the need for a guardian, if the agent is able to meet the needs of the AIP.

Counsel for the Guardian

A guardian may require counsel to represent the guardian in connection with performing their duties in subsequent proceedings. Counsel should not be necessary to handle routine guardianship responsibilities, such as paying bills and filing annual reports. Typically, the fees approved for these routine functions are at a lower hourly rate than the fees of counsel. Counsel for a guardian may be needed in connection with many things that may arise in the course of a guardianship, including but not limited to: defending or pursuing litigation and claims on behalf of the estate, settling claims and seeking court approval for any such settlement, seeking return of assets from another party, seeking to sell the home or other real property of the IP, or preparing and filing a formal fiduciary account of transactions for court approval. Note that where a guardian seeks a court order authorizing the guardian to consent to a specific act or omission, if the guardian has knowledge of the opposition of the IP, whether expressed before or after the appointment of the guardian, the guardian must notify the court of this opposition. For example, where a guardian seeks court approval to sell a home, if the guardian knows that the IP opposes selling the home, the guardian or his or her counsel must notify the court of this opposition.

Guardians may also on occasion need counsel to represent them personally where allegations of negligence or misuse of funds arise. In such cases, there may be a conflict between the interests of the guardian and those of the IP's estate. Counsel representing guardians in such cases must determine and communicate clearly to both their client (including in their retainer agreement) and the court whether they are representing the guardian in their capacity as guardian of the estate or the guardian's personal interests. Where a conflict arises, the court should consider appointing separate counsel for the IP. The court should also consider whether it is proper for the guardian to be reimbursed for attorneys' fees from the IP's estate to defend the guardian as a fiduciary, in cases in which malfeasance by the guardian is alleged. Generally the court will have to decide the question of whether there was a breach of fiduciary duty, before determining whether attorneys' fees may properly be paid from the IP's estate.

Attorney Serving as Guardian

In some cases, an attorney will serve as a guardian of the person or as a guardian of the estate, either on an emergency basis or longer term. Often an attorney serving as a guardian may have significant knowledge, experience, and appreciation of the fiduciary responsibilities involved in a guardianship. However, an attorney should be cautioned that he or she should not expect to be paid at the same hourly rate for performing routine guardianship services as for performing more sophisticated legal services, and an attorney should be careful to keep detailed time records permitting the court and other parties to assess what services have been provided in the capacity as counsel, and what services have been provided as guardian. In addition, although an attorney may have professional liability insurance, the court should bear in mind that such insurance typically does not provide coverage for intentional acts. Therefore, in cases in which there are substantial assets over \$100,000, it may be wise to require a bond to adequately protect the assets of the AIP.

Unrepresented Parties and Counsel for Parties in Interest

Family members and other parties interested in the well-being of the AIP may appear in court without counsel to represent them. The court should be sensitive to assuring that family members receive notice of the proceedings and an opportunity to be heard, even though they may be unrepresented. Family members may wish to advocate for the maximum independence of the AIP, may be able to propose less restrictive alternatives to guardianship, and may be able to provide important history and factual context for the court to consider in determining whether a guardian is needed and if so, whom to appoint as a guardian of the person or estate. In some cases family members are aware of a history of exploitation or abuse by a party that might otherwise be concealed from the court. Courts should strive to assure that guardianship proceedings, even where closed to the public, are open to and include family members who wish to participate.

In some cases a family member may retain counsel to represent them with respect to a guardianship matter. This is certainly permissible, but typically such counsel must be paid by the interested party from their own funds, unless the party can establish

that their participation in the proceedings was directly beneficial to the IP or that they recovered assets for the IP.

Court Consideration of Fee Petitions by Counsel for Various Parties

In some cases, counsel for other parties may file a petition for fees to be paid from the estate of an IP. Fees for counsel for another party should be authorized from the IP's estate only where the counsel provided services that were of benefit to the IP. For example, filing the initial petition may be considered to be for the benefit of the IP. Reasonable and necessary fees for the counsel to the guardian, in connection with the guardian performing his or her duties, may be paid from the IP's estate to the extent that there are sufficient assets in the estate. Fee petitions should be scrutinized to assure that the fees proposed to be charged are for reasonable amounts of time, at reasonable hourly rates, and are reasonable relative to the total amount of assets available to support the IP.

BEST PRACTICE: Courts must scrutinize fee petitions to assure that the proposed fees are at reasonable rates, for reasonable amounts of time for the services provided, are reasonable relative to the total amount of assets of the IP, and that the fees were incurred for the benefit of the IP.

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Identifying and Appointing Qualified Guardians

When a court has determined that a person is incapacitated and that there is no less restrictive alternative to the appointment of a guardian of the person and/or a guardian of the estate, the court must next select a guardian or guardians who are qualified and will best meet the needs of the appointment.

The selection of a guardian for an IP is a decision that will have a significant impact on the person's life and well-being. The guardian of the person will determine where the IP lives and make medical decisions on behalf of the IP. The guardian of the estate will manage and spend funds for the benefit of the IP. Selecting a responsible and capable guardian can be a challenging task, particularly where there is conflict among family members or other care providers. Qualities needed by a guardian of the estate may differ from those needed by a guardian of the person.

BEST PRACTICE: The court should appoint a guardian suitable, capable, and willing to serve. Where possible, the court should appoint as a guardian a person requested by, related to, or known to the IP.

The selection of a guardian reflects on the court – leaving a positive impression where the guardian appointed is responsible, responsive, and capable – but leaving a negative view of the justice system where the guardian appointed lacks integrity, violates his or her fiduciary duties, or neglects or is not capable of meeting the needs of the IP.

The considerations most salient may differ across cases – depending, for example, upon whether appointing a guardian of the person, a guardian of the estate or both; whether the IP lives in the community or in a nursing facility; whether there is family harmony or family conflict; and whether the guardian will be managing significant valuable

assets. Because these considerations vary, it may be advisable to appoint one person as guardian of the person and a different person as guardian of the estate.

Important Qualifications of a Guardian of the Person

- Responsibility and trustworthiness;
- Familiarity with health care decision making;
- Ability to identify and access medical services, social services, educational services, residential options, and recreational opportunities;
- Availability to respond in a timely manner and in emergencies; ability to visit regularly; geographical proximity may be an important consideration;
- Ability and willingness to encourage socialization with all other family members and friends; absence of hostility to other family members and friends;
- Ability to handle possible additional future responsibilities;
- No conflict of interest.

Important Qualifications of a Guardian of the Estate

- Responsibility and trustworthiness;
- Understanding of obligation to manage funds as a fiduciary on behalf of another;
- Ability to manage, invest, and expend funds appropriately, considering the size of the estate and the nature of expected expenses;
- Ability to engage appropriate tax, accounting, investment, and financial planning professionals, as needed;
- Ability to create a plan for the short- and long-term needs of the IP;
- Understanding of the obligation to keep

the IP's funds separate and to account for the IP's funds, on an annual report and, if required, in an account to the court;

- Ability to manage real estate and pay appropriate expenses;
- Ability to apply for and obtain state and federal benefits including medical assistance;
- Ability to handle possible additional future responsibilities;
- No conflict of interest;
- Ability to communicate with an IP and their family who are limited English proficient or to provide interpretation and translation services.

Court Colloquy of Proposed Guardian

In order to determine whom to appoint as guardian of the person or estate of an IP, the court should require the proposed guardian to testify and answer questions so that the court can be assured that the person has the qualifications and experience to perform the duties of a guardian, and has no conflict of interest or other impediment to serving. Professional guardians are equally required to demonstrate their fitness to serve and their availability to meet the needs of an IP and should be asked specifically about the size of their caseload of IPs to assure that they are reasonably available to meet the needs of the individual and to fulfill their responsibilities. See the Sample Colloquy for Prospective Guardians at the end of this chapter.

Who Should be Appointed as Guardian?

A. Person nominated by IP:

In appointing a guardian of the person or a guardian of the estate, the court shall give preference to appointing a person who has been nominated by the IP before his or her incapacity, "if appropriate." A person may have nominated someone to serve as a guardian, should a guardian be needed, in a signed power of attorney. Although Pennsylvania's statute directs that the court shall give preference to a person nominated by the IP, the court has discretion not to appoint a person who has been nominated by the IP where the court finds that such an appointment would not be appropriate under the

BEST PRACTICE: Appointment of a family member to serve as a guardian of the person and/or as a guardian of the estate is preferred wherever possible. The term "family member" should not be limited to immediate family, but courts are encouraged to consider other relatives and friends of the IP who have the abilities and knowledge to serve as guardian of the person or guardian of the estate.

circumstances.⁴¹

B. Family members:

Advantages of appointing a family member:

- A family member will know and have a relationship with the IP;
- A family member may already be a key caregiver to the IP;
- A family member's help and guidance are likely to be accepted by the IP; and
- A family member may have the trust, confidence, and cooperation of the IP.

Where there is no person expressly nominated by the AIP, priority for appointment of a guardian of the person or estate is established under a new Orphans' Court Rule, (Pa. O.C. Rule 14.6(b)(1)).

When considering whom to appoint as a guardian of the person, the Rule requires the court to consider individuals in the following order of priority, provided any such individuals are available and suitable and have no conflict of interest:

1. The guardian of the estate (if already appointed);
2. The spouse, unless estranged or an action for divorce is pending;

⁴¹ 20 Pa.C.S. § 5511(f).

3. An adult child;
4. A parent;
5. The nominee of a deceased or living parent of an unmarried AIP;
6. An adult sibling;
7. An adult grandchild;
8. Other adult family member;
9. An adult who has knowledge of the AIP's preferences and values, including, but not limited to religious and moral beliefs, and would be able to assess how the AIP would make decisions; or
10. Other qualified proposed guardian, including a professional guardian.

LEGAL REQUIREMENT: A court should not appoint as a guardian any agency or person who benefits financially from providing housing, medical or social services to the IP.

BEST PRACTICE: When considering appointing a person known to the IP, a judge should inquire about the length, depth and nature of the relationship, in order to guard against empowering individuals who may be seeking to take advantage of the IP.

Similarly, when considering whom to appoint as a guardian of the estate, the court is required to consider a person nominated by the IP, and if there is no such nominee, the court is required by Pa. O.C. Rule 14.6(b)(2) to consider the following individuals in the following order of priority, again assuming that an individual is available, suitable, and has no conflict of interest, and excluding those cases in which the estate consists of substantial assets that may require a person with adequate training and experience to manage the assets:

1. The guardian of the person;
2. The spouse, unless estranged or an action for divorce is pending;
3. An adult child;
4. A parent;

Where no individual listed in subparagraphs (1) to (9), above, possesses the skills and experience necessary to manage the finances of the estate, the guardian of the estate may be any qualified proposed guardian, including a professional guardian or corporate fiduciary.

Although the court must be mindful of these priority lists, the court retains discretion to determine whether any family member or friend would be appropriate and best suited to serve as a guardian under the particular circumstances.

C. Professional Guardians:

In some cases, it may be appropriate to consider appointing a neutral person as a guardian of the estate or as guardian of the person. Parties may suggest to the court, or the court may be familiar with, professional guardianship firms or a person or corporation having necessary qualifications, certification, experience, or expertise that will be helpful to the IP.

A court may not appoint as a guardian a person or entity who receives fees for providing residential services to the IP or any other person or entity with a conflict of interest with the IP.⁴² The statute provides that a family relationship shall not by itself constitute

⁴² 20 Pa.C.S. § 5511(f).

a conflict of interest. However, the statute provides that the court shall not appoint a guardian who has a conflict of interest unless it is “clearly demonstrated that no guardianship support agency or other alternative exists.”⁴³ A court should seek a guardian of the person or estate who has the least potential for a conflict of interest with the IP.

When should the court consider appointment of a professional or neutral guardian?

- When there are no family members or agents or nominees identified by the IP able and willing to serve;
- When there is significant family discord, and it would not be in the best interests of the IP to appoint one person to the exclusion of another;
- When family members have a financial or other conflict of interest with the IP;
- When family members have exploited, abused, or neglected the IP; or
- When family members are determined by the court not to be trustworthy or not to be capable of managing the funds in question responsibly (with respect to a guardianship of the estate).

It may be difficult for some courts to identify qualified people and agencies willing to accept appointment as a neutral guardian for a person in need of the services of a guardian, particularly for those individuals who lack funds from which a guardian may be paid.

Resolving Disputes About Who Should Be Appointed as Guardian, and Identifying Conflicts of Interest

One of the most hotly contested issues in many guardianship matters is the question of who should be appointed as a guardian. Frequently this arises as a dispute among children of an older adult who have differing views on where and how a parent should be cared for and how a parent’s money should be spent. It is critical for the court to be alert to allegations of financial exploitation or other allegations that one party has benefitted from gifts or other transfers of assets, to the detriment of the AIP. It is also important when there is family disharmony, not to give total control to one side of the family where they may exclude others from visiting or participating in the AIPs life.

⁴³ *Id.*

BEST PRACTICE: The Court should inquire about a guardian’s training and experience making financial decisions and health care decisions, and may require professional guardians to present evidence of training or certification.

BEST PRACTICE: The Court should inquire whether any proposed guardian has acted in a fiduciary capacity (as an agent under a power of attorney or as a representative payee), and whether they have any conflict of interest with the AIP. Although family relationship alone is not a conflict, a family member may have a conflict of interest if they are dependent upon the AIP’s income.

Tough questions should be posed to all parties seeking to be appointed as guardians, including relatives, about their finances and creditworthiness and any history of criminal charges. Relatives should be asked if they are depending upon the AIP for housing or financial support, and whether this expectation is reasonable given the financial needs of the AIP. Courts must consider whether a proposed guardian has acted properly in any fiduciary roles, such as acting as an agent under a power of attorney, a representative payee for social security benefits, or a fiduciary for veteran’s benefits. In some cases, a court may conclude that a relative who would not be suitable to be appointed guardian of the estate, may nevertheless be the best person to serve as a guardian of the person. However, an inquiry into the person’s understanding of fiduciary responsibility and acting in the best interests of the

AIP will be critical to the court's determination of whether that person can be trusted to be appointed as a guardian.

Requiring Additional Information from Prospective Guardians

A. Criminal background checks:

The Pennsylvania Orphans' Court Rules require a criminal background check for all guardians—family members as well as professionals. The National Probate Court Standards recommends that courts request a national criminal background check on all prospective guardians (other than banks, financial institutions, and other entities that have been subject to criminal background checks to obtain a license or certification).⁴⁴ Local courts may adopt additional requirements. A judge should inquire whether a proposed guardian has been convicted of a crime, or has been found to have committed abuse, neglect or financial exploitation of a child, spouse, or another adult. A judge should also inquire whether a proposed guardian has ever been suspended or disbarred from the practice of law, accounting, or other professional license, or misconduct involving financial affairs or fiduciary matters.

B. Credit-worthiness:

A credit check or testimony about financial stability and credit history of a proposed guardian may be required to establish suitability to be appointed as a guardian of the estate and may also be considered by the court in determining whether, under the circumstances, a guardian shall be required to post bond, or whether bond shall be waived. See Pa. O.C. Rule 14.

C. Certification:

A judge should inquire whether a guardian is certified by the Center for Guardianship Certification or other entity. A judge should also inquire whether a proposed guardian has received any training or education to prepare them to serve as a guardian, to handle the finances of another person, to understand fiduciary responsibilities or to make health care decisions for another person. Some judicial districts in Pennsylvania now require professional guardians (non-family members) to be certified guardians.

⁴⁴ See link to National Probate Court Standards in Appendix.

BEST PRACTICE: A court should take care to ask sufficient questions to determine whether a proposed guardian has a conflict of interest, will not act in the best interests of the IP, or lacks sufficient qualifications and experience to handle the affairs of the IP.

BEST PRACTICE: Courts should ask a prospective guardian questions about any personal bankruptcies, and may require a current credit report, especially where the court is considering waiving the requirement of a bond.

D. History of being removed as a guardian or as a fiduciary:

A judge should inquire whether a proposed guardian has ever been removed as a guardian or removed as a fiduciary for any reason, and inquire about the circumstances. A judge may inquire of the proposed guardian, and may also consult other courts and the Pennsylvania Guardianship Tracking System.

E. Requirement that a guardian of the estate post bond:

The judge has discretion whether to require a bond and in what amount. In those cases where the IP has little or no assets, no bond need be required. However, where a guardian of the estate will be managing substantial assets for the benefit of the IP, a bond should be required to protect the assets of the IP. Note that professional liability insurance in many cases exclude coverage for intentional acts

and therefore will not protect the IP in a case of theft or exploitation.

Recognizing Signs of Elder Abuse, Neglect, and Financial Exploitation

Judges and judicial staff who interact with families and parties interested in a guardianship petition must be alert to signs of elder abuse, neglect, and financial exploitation. Physical abuse may be visible when the older adult is present, in the form of bruises, cuts and other injuries. However it is important to be alert to signs of psychological abuse, such as depression, withdrawal and isolation, and also to signs of financial exploitation and abuse, such as unpaid bills, termination of utilities, checks written to cash, and excessive transfers to family members, caregivers, romantic partners and friends.

Following this chapter you will find an insert listing signs of Physical Abuse, Psychological Abuse, and Financial Exploitation.

RECOGNIZING SIGNS OF ELDER ABUSE AND NEGLECT

Recognizing the signs of elder abuse is the critical first step in stopping the abuse. In this section, some common signs of abuse, including physical abuse, psychological abuse, financial abuse (or exploitation), financial coercion, and scams are discussed. Also included is a warning about the dangers of delaying proceedings, and some of the non-traditional costs of financial exploitation.

A. Signs of Physical Abuse

The National Adult Protective Services Association identifies the following signs of elder abuse and neglect: ¹

1. sudden inability to meet essential physical, psychological, or social needs threatening health, safety, or well-being;
2. disappearing from contact with neighbors, friends, or family;
3. bruising or welts on the skin, especially those appearing on the face or lateral and anterior region of the arms (physically abused elders are much more likely to display bruises than elders injured by accident);
4. fingerprints or handprints visible on the face, neck, arms, or wrists;
5. burns from scalding, cigarettes, or in shapes of objects such as an iron;
6. cuts, lacerations, or puncture wounds;
7. sprains, fractures, or dislocations;
8. internal injuries or vomiting;
9. appearing with torn, stained, or bloody clothing;
10. appearing disheveled, in soiled clothing, or inappropriately attired for climate.

B. Signs of Psychological Abuse

In her 2008 publication Devious Damage: Elder Psychological Abuse ², Bloomsburg University Professor Margie Eckroth-Bucher, PhD, identifies the following signs of elder psychological abuse:

1. passivity, withdrawal, or increasing depression;
2. evasiveness or reluctance to talk openly;
3. avoidance of eye contact or verbal contact with a caregiver;
4. cowering in the presence of the abuser;
5. hopelessness, helplessness, anxiety, or feelings of powerlessness;
6. confusion that is unrelated to any medical condition;

¹ Available at, <http://www.napsa-now.org/get-informed/what-is-neglect/>

² Available at, <http://www.todaysgeriatricmedicine.com/archive/101308p24.shtml>

7. change in sleeping or eating habits;
8. missing appointments;
9. social isolation from friends or other family.

C. Signs of Financial Exploitation

The National Adult Protective Services Association identifies the following signs of elder financial abuse:³

1. termination of vital utilities such as telephone, water, electricity/gas, or garbage;
2. unpaid bills and liabilities despite adequate income;
3. oversight of finances surrendered to others without explanation or consent;
4. transferring assets to new “friends” assisting with finances;
5. checks written to “Cash;”
6. does not understand his/her current finances; offers improbable explanations;
7. unexplained disappearance of cash, valuable objects, financial statements;
8. unexplained or unauthorized changes to wills or other estate documents;
9. giving-away money or spending promiscuously;
10. appearance of property liens or foreclosure notices.

D. Signs of Financial Coercion

According to the Nursing Home Abuse Center, the following indicators suggest elder financial coercion:⁴

1. forging the elderly person’s signature on checks or other documents;
2. forcing the elderly person to sign a will, deed, or power of attorney listing the perpetrator as the one who is responsible for the elderly person or who will gain when the individual dies;
3. stealing property or money from the elderly person;
4. promising to give the elderly person lifelong care only if they give them money or their property;
5. using the possessions or property of the elderly person without their permission;
6. perpetrating fraud, which is the use of trickery, false pretenses, deception, or other dishonest acts in order to gain the person’s finances;
7. perpetrating cons or other confidence games in order to gain the trust of the elderly person;
8. perpetrating telemarketing scams in which the elderly person is called and deception, exaggerated claims or scare tactics are used to get the elderly person to send them money;
9. making charges against the elderly person’s credit cards without the authorization of the cardholder.

³ Available at, <http://www.napsa-now.org/get-informed/what-is-financial-exploitation/>

⁴ Available at, <https://www.nursinghomeabusecenter.com/elder-abuse/types/financial-abuse/>

SAMPLE COLLOQUY FOR PROPOSED GUARDIAN OF PERSON AND ESTATE

- 1) What is your educational background?
- 2) What is your mailing address? Email address? Daytime telephone number?
- 3) How are you employed?
- 4) How long have you known the IP and how well?
- 5) Have you ever discussed with the IP his or her wishes regarding end of life care? Do you have knowledge of what he or she would want with respect to medical care?
- 6) Do you have a criminal record? What were the charges and when? (Provide copy of state and FBI criminal background checks).
- 7) Have you ever filed for personal bankruptcy? When and where?
- 8) Do you have any business or financial relationship with the IP? What is the nature of it?
- 9) Do you depend upon the IP's income to pay household expenses?
- 10) Do you own property jointly with the IP, or do you live in property owned by the IP?
- 11) Do you have any conflict of interest with the IP?
- 12) What education, training, or experience do you have, if any, related to caring for an incapacitated adult?
- 13) What education, training, or experience do you have, if any, related to making medical decisions?
- 14) What education, training, or experience do you have, if any, related to applying for medical assistance benefits, veterans benefits, and other financial benefits?
- 15) What education, training, or experience do you have, if any, in managing another person's funds in a fiduciary capacity?
- 16) Do you understand that you must keep accurate financial records and keep the IP's assets separate from your own?
- 17) Do you understand that you may use the IP's assets only for his or her benefit, and that you may expend income for his or her care?
- 18) Do you understand that you may not use the IP's assets for any other person's benefit without court approval?
- 19) Do you understand the difference between principal and income? Family member guardians probably will need to have this explained to them.
- 20) Do you understand that you may only spend income, but that before you spend any principal or pay any attorneys or professional fees or guardian's commissions you must seek court approval?
- 21) Are you aware that you must file an inventory of the IP's property within three months and an annual report each year?
- 22) Are you a National Certified Guardian from the Center for Guardian Certification? Please provide a copy of your certificate.
- 23) For how many incapacitated individuals are you currently appointed as guardian? How do you manage your caseload so that you are able to meet the needs of each individual?

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Presiding Over an Emergency Hearing to Appoint Emergency Guardians of the Person and/or Estate

20 Pa. C.S. § 5513

In some cases, urgent circumstances require that the court entertain a request to adjudicate incapacity and appoint guardians without waiting for the 20-day notice period required under the statute for a full hearing. Where irreparable harm to the AIP is alleged to be imminent, the statute provides for an emergency petition to adjudicate incapacity and appoint an emergency guardian of the person and or an emergency guardian of the estate. 20 Pa.C.S. § 5513.

The urgent circumstances that may require a hearing on an emergency basis include:

- an imminent need to make medical decisions;
- a lack of housing or imminent need for someone capable to provide consent to admission to a hospital, nursing home, or other residential facility; or
- imminent risk to the assets of the AIP from scammers or financial exploitation.

Where there is a genuine and imminent risk of substantial financial loss to the AIP, under circumstances where it is unlikely that the AIP will ever be able to recover such funds, and where the loss of such funds may profoundly affect their well-being, a hearing on an emergency basis and appointment of an emergency guardian of the estate to stop the financial “bleeding” may be appropriate.

BEST PRACTICE: A court should schedule a hearing on an emergency basis whenever it appears that the AIP is at imminent risk of irreparable harm, including severe financial exploitation, as well as medical risk or risk of homelessness.

In some cases, the children or caregivers of an AIP may have an urgent need to access bank account(s) of the AIP to pay medical bills, mortgage payments, and other bills, and may have no power of attorney or other way to secure and access the AIP’s assets.

Similarly, although an AIP may be generally safe in a hospital setting, when they are no longer in need of acute care, continued hospitalization may be exceedingly expensive, or not covered by insurance, and continued hospitalization imposes risks of infection and other health risks, that suggest an emergency hearing to determine who may make decisions about a safe and appropriate discharge of the AIP may be necessary.

How an Emergency Guardianship Matter May Arrive Before the Court

1. An emergency petition is filed with the Clerk of the Orphans’ Court and it is brought to chambers/courtroom for review and scheduling. (Frequently, but not always, the same petition that initiates the emergency guardianship also requests that a plenary guardianship be scheduled to follow the emergency guardianship hearing.)
2. A telephone call may come into the clerk’s office or chambers alerting the court staff to an upcoming emergency petition filing (anywhere from a few moments to a few days hence!). Such calls are sometimes made by hospitals or the area agency on aging.

Options for Hearing When There is an Emergency Petition Filed

1. Judge may review the petition and determine that an emergency hearing is not needed and schedule the matter for a hearing on the request for a plenary guardianship.
2. Judge may direct the scheduling of a hearing after notice is given to AIP and presumptive heirs.
3. Judge may limit notice period to 24 hours (or

BEST PRACTICE: An emergency hearing should be scheduled as promptly as possible to permit the entry of an order to prevent the alleged irreparable harm; frequently courts schedule emergency hearings within 48 or 72 hours.

other length of time in Judge’s discretion) to permit hearing to proceed on an emergency basis.

4. Judge may appoint counsel for the AIP and hold a hearing after counsel has met with AIP; provided that Judge shall consider whether delay is appropriate and feasible, given the imminent harm alleged.

LEGAL REQUIREMENT: An emergency hearing to appoint a guardian is subject to all of the same provisions that govern a plenary hearing, including the right of the IP to request counsel, except when the court finds that a requirement is not feasible in the circumstances.

Burden of Proof

In an Emergency guardianship hearing, there must be **clear and convincing evidence** that the AIP:

1. Lacks capacity (“incapacitated”), meaning an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that they are partially or totally unable to manage their financial

resources or to meet essential requirements for their own physical health and safety.⁴⁵

2. Needs an appointment of guardian of their person and/or financial estate, on an emergency basis and cannot wait for 20 days’ notice; and
3. Failure to make an appointment will result in **irreparable harm** to the person or the estate.

Determining Less Restrictive Alternatives to Guardianship

1. Even when considering an appointment of an emergency guardian, the court must consider whether the AIP has signed a valid power of attorney and/or healthcare directive. This determination may be intertwined with the court’s decision about whether the person lacks capacity, and whether there is any evidence that the condition that causes the lack of capacity already resulted in impairment at the time a document was signed. Even where there is a power of attorney that appears to be valid, there may be questions raised as to whether the named agent is acting in the person’s best interest, or whether the power of attorney is adequate to meet the needs of the AIP. For example, if the AIP attempts to revoke the power of attorney or overrule the actions of the agent, and that AIP’s decisions are not rational and reasoned, even a valid power of attorney may not be adequate to meet the needs of the AIP.
2. The court is required to consider less restrictive alternatives to guardianship, including but not limited to any powers of attorney. The Guardianship Act requires that the court consider whether there is a need for guardianship, “in light of . . . the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.”⁴⁶ The Protective Services Act also includes a definition of less restrictive alternatives, which is helpful to consider and defines least restrictive alternative as: “[t]he appropriate course of action on behalf of the older adult which least intrudes upon the

⁴⁵ 20 Pa.C.S. § 5501.

⁴⁶ 20 Pa.C.S. § 5512.1(a)(3).

personal autonomy, rights and liberties of the older adult in circumstances when an older adult lacks the capacity to decide on matters and take actions essential to maintaining physical and mental health.”⁴⁷

the request to schedule a plenary hearing together with the original emergency petition.)

Scope and Time Periods for an Emergency Decree

- 1) The appointment of an emergency guardian of the person or estate is limited by statute in both scope and time.⁴⁸
 - a) The emergency guardian shall only have and be subject to such powers and duties as the court shall direct in the emergency decree.
 - b) If an emergency guardian **of the person** is appointed, the appointment shall be in **effect for no more than 72-hours**. If the emergency continues beyond the 72-hour period, the appointment may be extended **for no more than 20 days** from the date of the expiration of the original emergency decree. Consider whether a hearing with notice to the AIP (or counsel and any/all presumptive heirs) should be conducted prior to the grant of an extension or whether a stipulation or agreement between petitioner and counsel for AIP may be reached, particularly where the court’s schedule or counsel’s schedule requires that a plenary hearing cannot be scheduled within 23 days of the emergency decree.
 - c) If an emergency guardian **of the estate** is appointed, the appointment shall be in effect **for no more than 30 days**. There is no provision for an extension in the statute; an extension of the order if necessary to accommodate the court’s schedule or counsel’s schedule before a hearing, should be granted only on the basis of a stipulation or agreement of the parties.
- 2) After the expiration of the initial or extended emergency decree a full (non-emergency) guardianship proceeding filed pursuant to 20 Pa.C.S. § 5511 must be initiated. (As noted above, some petitioners will include

Requirements of Due Process for Emergency Hearing

The rights of the AIP with respect to an emergency hearing to adjudicate incapacity and appoint guardians are the same as those for a plenary hearing, as required under 20 Pa.C.S. § 5511. However, the court may make specific findings that any of these due process requirements are not feasible in the emergency circumstances. For example, it is typical that 20 days’ notice is not feasible in the circumstances where a need for emergency appointment of a guardian is alleged, and the court will waive the requirement of 20 days’ notice to the AIP and other parties.

- 1) An emergency petition for adjudication of incapacity and appointment of guardians may be brought with respect to an AIP who is a resident of the Commonwealth of Pennsylvania or a non-resident residing in a residential facility within the Commonwealth. In addition, a guardianship of the estate may be sought for a non-resident of Pennsylvania with property in Pennsylvania, but it is rare that in such circumstances an emergency appointment would be needed.
- 2) Just as in a plenary hearing, the AIP has a right to counsel, and if they cannot afford counsel, one should be appointed by the court. However, the court may find that appointment of counsel is not feasible under the emergency circumstances and may appoint counsel before the plenary hearing but not before the emergency hearing.
- 3) The court may order an independent evaluation sua sponte or if the AIP requests. The court should give due consideration to the evaluator requested by the AIP. This is also something that may or may not be feasible before the emergency hearing, depending upon the nature of the imminent and irreparable harm alleged.
- 4) The petition for an emergency decree adjudicating incapacity shall include the following information:
 - a) Name, age, residence, postal address of AIP.

⁴⁷ 6 Pa.Code § 15.2 (Definition).

⁴⁸ 20 Pa.C.S. § 5513.

- b) Names, addresses (if living), and legal status (living, dead, separated/divorced) of the spouse, parents, and all presumptive heirs.
 - c) Name of the person/institution providing residential services.
 - d) Name and address of all other service providers.
 - e) Name and address of person/entity proposed to be appointed guardian.
 - f) Averment guardian has no interest adverse to the AIP.
 - g) Reasons why emergency guardianship is sought.
 - h) Description of the functional limitations, including the physical and mental conditions of the AIP.
 - i) Steps taken to find the less restrictive alternative to guardianship.
 - j) Whether seeking emergency guardianship of person and/or estate.
 - k) The nature of the imminent and irreparable harm that may occur if the hearing is not scheduled on an emergency basis.
 - l) Gross value of the estate to extent known. (Required for guardianship of the estate only.)
 - m) Net income from all sources to extent known. (Required for guardianship of the estate only.)
 - n) The explanation, if any, for why any of the above information cannot be ascertained on the short notice needed to request and conduct an emergency hearing.
2. When appointing an emergency guardian of the person, consider the currently serving guardian of the estate, if any. When appointing an emergency guardian of the estate, consider the currently serving guardian of the person, if any;
 3. The spouse, unless estranged or an action for divorce is pending;
 4. An adult child;
 5. A parent;
 6. The nominee of a deceased or living parent of an unmarried AIP;
 7. An adult sibling;
 8. An adult grandchild;
 9. Other adult family member;
 10. An adult who has knowledge of the AIP's preferences and values, including, but not limited to religious and moral beliefs, and would be able to assess how the AIP would make decisions; or
 11. Other qualified proposed guardian, including a professional guardian.

Who May Not be Appointed as an Emergency Guardian?

1. Any person or entity providing residential services to the AIP for a fee.
2. Any person with a conflict in interest with the AIP unless there is a clear demonstration no alternative exists. Note that a family relationship between the proposed emergency guardian and the AIP shall not, by itself, be considered an adverse interest.

Who May be Appointed as an Emergency Guardian of the Person or Estate?

1. A person nominated by the AIP in a power of attorney or health care power of attorney to serve as guardian if needed;

Presiding Over a §5511 Plenary Hearing to Adjudicate Incapacity and to Appoint Guardians of the Person and/or Estate

The subject of this Chapter is the plenary hearing under 20 Pa.C.S. § 5511. Procedurally and jurisdictionally, the full § 5511 hearing comes before a Court of Common Pleas in one of two ways.

A full hearing under § 5511 can result following consideration of a petition for emergency guardianship, the procedure for which is dealt with in Chapter EIGHT of this Bench Book. Under the emergency guardian provisions of § 5513, an emergency guardian of the person may be in effect for up to 72 hours. Thereafter, there must be a hearing to determine if the Emergency continues. If the emergency continues, the emergency order may be extended for no more than 20 days from the expiration of the initial emergency order. At the expiration of the extension, if any, a full guardianship proceeding must be initiated pursuant to § 5511 and a full hearing on the question of incapacity and the appointment of guardians must be held. In some cases, the petitioner filing a petition for an emergency hearing will request that a plenary hearing, with the requisite 20-days' notice to the AIP, be scheduled at the same time as the emergency hearing is scheduled.

In a non-emergency situation, a plenary hearing will be scheduled upon the filing of a guardianship petition pursuant to § 5511. CHAPTER TWO of this Bench Book deals with notice, citation and petition practice required to schedule a § 5511 hearing.

BEST PRACTICE: Guardianship hearings should be scheduled as expeditiously as reasonably possible, allowing for 20 days' notice of the citation; preferably within 45 days of the filing of the petition.

Commencing the Hearing

Even when a hearing is not commenced on an emergency basis, courts ideally will schedule a

hearing on a guardianship petition as expeditiously as reasonably possible, allowing for notice of the hearing to be served on the AIP and other interested parties at least 20 days before the scheduled hearing date. Because guardianship hearings often involve vulnerable adults, and frequently people who are ill or require special care, and because the petitioner seeking guardianship often has a need to make decisions relatively promptly, courts should strive to schedule hearings within 25-45 days following the filing of a petition.

A plenary hearing to adjudicate incapacity and to appoint guardians of the person and/or estate is a four-step process.

1. Step one of the hearing is focused on the expert's opinion as to whether the AIP has a condition that causes an incapacity and whether the AIP is therefore unable to make and communicate decisions, and the nature and extent of any such incapacity.
2. Step two concerns the determination of whether there is a need for a guardian or guardians. In step two it is critically important to consider whether there is any less restrictive alternative to guardianship that could meet the needs of the AIP.

BEST PRACTICE: A hearing on a petition for adjudication of incapacity includes four steps: (1) determination of capacity; (2) determination of need for guardianship and consideration of less restrictive alternatives; (3) consideration of whether to appoint a plenary guardian or a limited guardian; and (4) selection of the guardian or guardians.

3. Only if the AIP is adjudged by clear and convincing evidence to be partially or totally incapacitated, and it is established by clear and convincing evidence that there is no adequate less restrictive alternative and therefore a guardian is needed, does the court proceed to step three, which is the determination of whether a guardian to be appointed must be a plenary guardian or may be a limited guardian.
4. Finally, the court moves on to step four, the identification and appointment of an appropriate guardian or guardians to oversee the IP's person and/or estate.

Petitioner, Counsel, Interested Parties, et al.

The § 5511 hearing may be closed to the public at the discretion of the presiding judge and **shall** be closed to the public if the AIP or his or her counsel requests. Due to the private and personal nature of guardianship proceedings, a judge should consider whether it may be best practice to exclude by default the general public.

The court should initially identify who is present for the hearing. The parties present at the hearing will include:

Petitioner, Counsel for Petitioner: Under § 5511, the petitioner may be any person interested in the AIP's welfare.

The AIP, Counsel for AIP: Under § 5511, the AIP shall be present at the hearing, unless excused. The absence of the AIP shall be excused only if:

- (1) the court is satisfied, upon the deposition or testimony of or sworn statement by a physician or licensed psychologist, that their physical or mental condition would be harmed by their presence; or
- (2) it is impossible for them to be present because of their absence from the Commonwealth.

Interested Parties: Any adult who is an intestate heir of the AIP; and any persons or institutions providing residential services (nursing home, group home) or other services to the AIP. These parties must receive notice of the hearing and may appear and participate.

Proposed Guardian: In some cases a professional guardian whose qualifications are known to the court may not need to attend the hearing, but where the proposed guardian is not known to the court, he or she must be present.

Service of Process

The foundation of the § 5511 hearing is service of process. At the hearing, petitioner must establish that process has been properly served. Under § 5511, personal service of the petition shall be made **upon the AIP no less than twenty days** prior to the hearing. Service of the petition in guardianship practice is not simply the delivery of the petition by a process server. To effectuate service, the petition and citation must not only be physically given to the AIP, but the contents and terms of the petition shall be explained to the maximum extent possible in language and terms the individual is most likely to understand. Counsel may need to be reminded by the court that having a process server simply deliver the petition, without reading the required notice and explaining its import, is not sufficient. If the AIP is present, the court should briefly colloquy that individual concerning their understanding of the petition and the proceedings.

The content of the service to be perfected on the AIP is spelled out in detail in § 5511(a):

Notice: Written notice of the petition and hearing shall be given in large type and in simple language to the AIP. The notice shall indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. It shall include the date, time, and place of the hearing and an explanation of all rights, including the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot be afforded. A copy of the petition shall be attached.

Service: Personal service shall be made on the AIP, and the contents and terms of the petition shall be explained to the maximum extent possible in language and terms the individual is most likely to understand.

In addition, notice must be given to all persons having an enumerated interest: first, any adult who would stand to take a portion of the intestate estate

of the AIP; second, persons or institutions providing residential services (nursing home, group home) or other services to the AIP.

An affidavit of service should be filed before the hearing or presented as an exhibit at the beginning of the hearing.

Checklist: Commencing the Hearing

1. Confirm jurisdiction.
2. Confirm who is present at the hearing.
3. Confirm service of process.

Step One: Capacity Evaluation

The court must first determine whether the AIP is a person whose ability to receive and evaluate information effectively and to make and communicate decisions is impaired to such a significant extent that they are partially or totally unable to manage their financial resources or to meet essential requirements for their own physical health and safety.

For a thorough discussion of the evaluation of capacity, incapacity of an AIP, combining the legal standards and a discussion of relevant medical concepts, please see CHAPTER TEN.

Bear in mind that while an AIP is generally expected to be present at the hearing, and has a right to be represented by counsel and a right to be heard if they wish to be heard, they also have a right to decline to testify in a proceeding for adjudication of incapacity.

Step Two: Considering Less Restrictive Alternatives to Appointment of Guardian

Having found by clear and convincing evidence that the AIP has a condition that causes either partial or total incapacity, the court must now turn to step two of the hearing: determining whether the needs of the IP can be met by a less restrictive alternative.

In accordance with the general prescription in § 5502, the court is directed to tailor guardianship appointments “to the maximum extent possible and [to] accomplish[] these objectives through the use of the least restrictive alternative.” Least restrictive

alternatives are more fully discussed in CHAPTER ONE.

Findings of Fact

Sections 5512.1(a)(3)-(6) mandate that the court make specific findings of fact with respect to the appointment of a guardian:

3. The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
4. The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.
5. The duration of the guardianship.
6. The court shall prefer limited guardianship.

Step Three: Determining Whether to Appoint a Limited or Plenary Guardian

Pennsylvania statutes and public policy clearly favor limited guardianship. Under § 5512.1(a)(6), «the court shall prefer limited guardianship.» In order to appoint a plenary guardian, the court must find total incapacity by clear and convincing evidence. A finding of partial incapacity, where there is no less restrictive alternative, will support only the appointment of a limited guardian.

§ 5512.1(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, which may include:

1. General care, maintenance and custody of the IP.
2. Designating the place for the IP to live.
3. Assuring that the IP receives such training, education, medical and psychological services and social and vocational opportunities, as appropriate, as well as assisting the IP in the development of maximum self-reliance and independence.

4. Providing required consents or approvals on behalf of the IP.

The criteria to consider in selecting a guardian of the person or estate for appointing are reviewed in CHAPTER SEVEN.

Step Four: Determining Whom to Appoint as a Guardian

Assuming that the court concludes after step one that the AIP suffers from an incapacity (total or partial) and after step two that a guardian is required and there is no adequate less restrictive alternative, and that the court has determined whether to appoint a plenary guardian or a limited guardian, the court must then decide whom to appoint in each capacity. Remember that different family members of proposed guardians may be better suited, based upon their skills and their rapport with the AIP, to serve as guardian of the person or as guardian of the estate. The court may appoint one person as guardian of the person and a different person as guardian of the estate. The court may also determine that co-guardians of the person or estate will better meet the needs of the AIP than only one guardian.

BEST PRACTICE: The Bill of Rights of an Incapacitated Person (copy in Appendix) should be provided to the IP at the conclusion of the hearing determining the person to be incapacitated.

BEST PRACTICE: The Judge or court staff should routinely provide the newly appointed Guardian(s), particularly lay people appointed as guardians, with oral instructions or written instructions on their duties at the end of the hearing.

Step Five: Determining if a Bond is Required

At the hearing, the judge must decide whether or not the proposed guardian is trustworthy enough not to require that a bond be posted.⁴⁹ The court in its sole discretion may require that the proposed guardian purchase a surety bond of an appropriate size guaranteeing the guardian's faithful discharge of its duties. If the guardian misappropriates property of the IP's estate and is unable to repay, the bonding company will pay the value of the property to the IP's estate. The bonding company would then have a legal claim against the guardian for the value of the misappropriated property. The bond premium may be paid out of the assets of the IP.

Sample Direction if Bond is required: The guardian of the estate is hereby directed to post a bond in the following amount \$_____. The bond may be purchased from any approved corporate surety and must be filed with the Clerk of the Orphans' Court before the Clerk will issue a Guardian's Certificate, which is needed for the guardian of the estate to exercise duties. The cost of the bond may be paid from the assets of the estate of the IP.

⁴⁹ 20 Pa.C.S. § 5515 directs that for bond surety for guardians of incapacitated persons, the applicable law is the same as that for bonding a personal representative or guardian of a minor:

§ 3182 (relating to grounds for removal),

§ 3183 (relating to procedure for and effect of removal),

§ 3184 (relating to discharge of personal representative and surety),

§ 5115 (relating to appointment of guardian in conveyance),

§ 5121 (relating to necessity, form and amount),

§ 5122 (relating to when bond not required),

§ 5123 (relating to requiring or changing amount of bond).

Of particular relevance is § 5122(d), "(d) Other cases. —In all other cases, the court may dispense with the requirement of a bond when, for cause shown, it finds that no bond is necessary.").

CHECKLIST: CONDUCTING A HEARING ON A PETITION FOR ADJUDICATION OF INCAPACITY AND APPOINTMENT OF GUARDIAN

1. Does the evidence demonstrate, by clear and convincing evidence, partial or total incapacity?
2. Has the petitioner demonstrated by clear and convincing evidence that there is no adequate restrictive alternative to the appointment of a guardian? If the petitioner or counsel for the AIP fails to address this subject, the court should inquire of them.
3. Is a Limited or Plenary Guardian required?
4. Who should be appointed as Guardian of the Person or Guardian of the Estate?
5. Should a bond be required or waived?

Evidentiary Questions

To reiterate, Section 5512.1(a) requires the court to examine the evidence and make specific findings of fact, considered above. To assist the court in formulating these findings of fact and conclusions of law, the petition must state “a description of the functional limitations and physical and mental condition of the AIP; the steps taken to find less restrictive alternatives; [and] the specific areas of incapacity over which it is requested that the guardian be assigned powers...”⁵⁰ In addition, clear and convincing evidence of all averments contained in the petition must be established at the evidentiary hearing. Accordingly, counsel- or the court if necessary- must ask questions related to the following:

1. What functional limitations does the AIP have?
2. What physical limitations does the AIP have?
3. What mental limitations does the AIP have?
4. What steps have been taken and what steps are being proposed so as to impose the least restrictive alternatives or limitations upon the AIP?
5. If a limited guardian is requested, over what specific areas of incapacity should the guardian of the **person** have authority?
6. If a limited guardian is requested, over what specific areas of incapacity should the guardian of the estate have authority?
7. What conditions or disabilities does the AIP have which impairs their ability to make decisions? (Mental problems/impairments)
8. What conditions or disabilities does this AIP have which impairs their ability to communicate decisions? (Physical problems/impairments)
9. Is the AIP oriented as to time or place?
10. Does the AIP recognize their family and other persons the AIP should recognize?
11. Are the AIP’s discussions understandable and related to the matter being discussed?
12. Could the AIP satisfactorily conclude the purchase of an item in a retail store?

⁵⁰ 20 Pa.C.S. § 5511(e).

13. Could the AIP satisfactorily pay bills using a checking account and keep accurate records?
14. What family members, friends or other supports have assisted the AIP in making decisions or performing any functions or responsibilities?
15. Are there any family members or friends presently capable and willing to assist the AIP to perform any functions or responsibilities?
16. Can the AIP be maintained in their own home? If no, state why not, i.e., is it the finances and/or the physical or mental limitations which make this a practical impossibility?
17. What type of care does the AIP require?
18. Where is the AIP currently living? If in a care facility, what type of care facility is it?

Determining Capacity

Having established jurisdiction, proper service of process and notice upon the AIP and other interested parties, the court may now turn to the first step in any guardianship proceeding: the determination of capacity. Sections 5512.1 and 5518 govern the court's inquiry into the capacity of the AIP. Bear in mind that all adults are presumed to have legal capacity to make and effectuate their own decisions, unless a lack of capacity is demonstrated by clear and convincing evidence.

Required Findings of Fact

To reach a determination of incapacity the court shall consider and make specific findings of fact concerning:

1. The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
2. The extent of the individual's capacity to make and communicate decisions.
3. The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
4. The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.
5. The duration of the guardianship.
6. The court shall prefer limited guardianship.

20 Pa.C.S. § 5512.1(a).

Evidence of incapacity is governed by 20 Pa.C.S. § 5518 which provides that 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.”

In other words, the petitioner must present expert testimony from an expert familiar with the type of incapacity at issue. The expert need not be a medical doctor, but may be a medical doctor, psychiatrist, psychologist, nurse practitioner, or licensed clinical social worker, provided that the expert has specific expertise relevant to the determination of the capacity in light of the medical issues and causes of the alleged incapacity. In addition, the petitioner must also present evidence regarding:

“the services being utilized to meet essential requirements for the AIP's physical health and safety, to manage the person's financial resources or to develop or regain the person's abilities; evidence regarding the types of assistance required by the person and as to why no less restrictive alternatives would be appropriate; and evidence regarding the probability that the extent of the person's incapacities may significantly lessen or change.”⁵¹

Section 5512.1(a) mandates that the court make specific findings of fact with respect to capacity:

1. The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
2. The extent of the individual's capacity to make and communicate decisions.

Evidence of Incapacity

In support of the court's findings under § 5512.1(a) (1)-(2), § 5518 delineates the nature of the evidence that must be presented in the petition and adduced at the hearing.

§ 5518. Evidence of incapacity.

To establish incapacity, 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,

⁵¹ 20 Pa.C.S. § 5518.

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.

The petition must also present evidence regarding the services being utilized to meet essential requirements for the alleged incapacitated person's physical health and safety, to manage the person's financial resources or to develop or regain the person's abilities; evidence regarding the types of assistance required by the person and as to why no less restrictive alternatives would be appropriate; and evidence regarding the probability that the extent of the person's incapacities may significantly lessen or change.

Burden of Proof: "Clear and Convincing"

[A]ppellate courts have cautioned that a guardianship statute is "a dangerous statute easily capable of abuse...", and have required that the petitioner bear the burden of proving incompetency [now referred to as incapacity] by clear and convincing evidence...⁵²

When presenting evidence, § 5511(a) requires "clear and convincing evidence." The evidence presented must cause the judge to have a firm belief or conviction that the alleged incapacitated individual is incapacitated. The testimony of the witnesses must be positive and unambiguous and cannot be conjecture or speculation, although it is not necessary that the evidence be undisputed.

Expert testimony or a thorough expert report is of great significance as it assists the trial court in determining the nature, severity and consequences of an alleged incompetent's disability. The Pennsylvania Supreme Court had stated in *dicta* that "expert testimony is needed when transactions fall within the penumbra between competence and incompetence, when the light of reason may come and go unbidden."⁵³ However the court may also consider the evidence of lay witnesses. Under the prior statute, the Pennsylvania Supreme Court held that "[t]he testimony of lay witnesses who have observed the alleged incompetent is admissible and highly probative."⁵⁴

⁵² *In re: Estate of Wood*, 533 A.2d 772, 775 (Pa. Super. 1987) (citations omitted).

⁵³ *Hagopian v. Eskandarian*, 153 A.2d 897, 899 (Pa. 1959).

⁵⁴ *Urquhart Estate*, 245 A.2d 141, 146 (Pa. 1968).

Although the testimony of lay witnesses may also be relevant, expert testimony or, upon stipulation, an expert report, is required by the statute. The findings and conclusions of the medical expert testimony must be rendered with a reasonable degree of medical or psychological certainty.

Possible Court Rulings/Outcomes:

1. The court may determine that the proceeding has not been instituted to aid or benefit the AIP or that it does not have jurisdiction over the petition in question. Under these circumstances, the petition should be dismissed.
2. The court may determine that the AIP is able to make and communicate decisions and to receive and evaluate information effectively and therefore that the person is not incapacitated and a guardian is not necessary.
3. The court may determine that a guardian is unnecessary because the person, even if suffering from a cognitive incapacity, has adequate assistance from family and community support, or has appointed a capable agent under a power of attorney, or other supports, and therefore does not require a guardian. Where a guardian is not needed, the court is not required to make a determination of capacity. See *In re Peery*, 727 A.2d 539, 541 (Pa. 1999), holding "[t]he critical fact is whether or not the AIP needs a guardian. If the court finds that a person does not need a guardian, it does not matter whether he is incapacitated—the court cannot proceed to the appointment of a guardian."
4. The court may be persuaded by clear and convincing evidence, that the person is totally or partially incapacitated, and in need of a plenary or limited guardian or guardians.

Expert Report or Expert Testimony

Although many courts once required that an expert testify in person or by deposition, an expert report may be offered by petitioner in writing pursuant to Pa. O.C. Rule 14.3. The petitioner must serve a copy of the proposed expert report on counsel for the AIP and all other counsel of record at least ten days

prior to the hearing. The AIP or their counsel may demand the testimony of the expert and the right to cross-examine the expert. However, where there is a stipulation to the expert report, it is not necessary for the expert to appear in court or for the parties to conduct a formal transcribed deposition prior to the hearing. Pa. O.C. Rule 14.3(a), (b), and (c).

However, expert testimony and cross-examination may be required where there is a dispute about the AIP's capacity, or where the court wishes to consider a limited guardianship and requires expert assistance to determine the limits of the AIP's capacity.

BEST PRACTICE: Where there is no dispute about the expert evidence, a written expert report may be admitted in evidence without the expert attending to testify. Consider whether telephone or video testimony of an expert may be adequate in some cases and avoid the need for a continuance.

Medical Evidence: Assessing Functional Abilities

General principles:

Normal functional abilities—effective adaptations to the demands of living independently—are dependent on normal brain function and are expressed through the voice and the neuro-musculoskeletal systems. Therefore, impairments of brain function (i.e. that result from a form of dementia, a stroke, or other condition) will usually result in abnormal functional abilities and may result in loss of independence.

Evaluations:

Section 5518 permits the court, in lieu of live testimony, to receive evidence of evaluations in the form of a written expert report. The Pennsylvania Supreme Court Orphan's Court Rules Committee has adopted Form G-6 which may be used as an

expert report in matters in which the question of incapacity is uncontested.

Capacity evaluation workflow:

An optimal medical capacity evaluation typically includes the following steps by the evaluator:

- Review medical records with attention to historical trends, medications, medical problems, mental health problems, drug and alcohol use, social support.
- Obtain history from the AIP and/or the AIP's representative.
- Assess Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (iADLs).
- As needed administer questionnaires—MoCA, IQcode, PHQ-9 (explained below).
- Complete physical exam including attention to special senses, mobility, nutrition, hygiene.
- Order tests/studies to better understand stability of current state.
- If indicated, consult PT, OT, neuropsychologist, geriatric psychiatrist.
- Ascertain values and preferences of the AIP.
- Be prepared to render an opinion on safety needs, risks of harm, need for supervision/support, reversibility of conditions, and prognosis.

Concepts, Tests and Instruments Used by Medical and Psychological Professionals to Assess Capacity

Activities of Daily Living (ADLs) are basic life skills that are necessary for self-care and safety in the home. As ADLs decline, personal care needs increase and one's life becomes more restrictive. ADL skills include:

1. Ability to transfer within the home.
2. Ability to use of the toilet.
3. Ability to groom self.
4. Ability to bathe self.
5. Ability to dress self.
6. Ability to feed self.

ADLs can be assessed as: performs independently, needs some help, or totally dependent on others.

As ADLs are lost, personal care needs increase, as do safety concerns when an AIP is left unattended. In cases that are not clear-cut or when interview information is deemed suspect, a physical therapist and occupational therapist can be consulted to observe and evaluate the actual ADL skills.

Instrumental Activities of Daily Living (iADLs) are more complex behaviors that require executive functioning—the ability to plan, initiate, and complete a task or skill. Normal iADLs allow a person to function independently in a community. iADL skills include:

1. Ability to manage medications.
2. Ability to prepare food.
3. Ability to use the telephone.
4. Ability to perform basic housekeeping tasks.
5. Ability to manage finances.
6. Ability to travel outside the home.
7. Ability to shop.

A simplified rating of iADL skills is: performs independently, needs some help, or is totally dependent on others.

iADLs require more advanced executive functioning abilities. As iADLs are lost, one requires help from others in order to remain in the community. In cases that are not clear-cut or when interview information is deemed suspect, an occupational therapist can be consulted to observe and evaluate the actual iADL skills.

The **Informant Questionnaire on Cognitive Decline in the Elderly** (short IQcode by A. F. Jorm) is a questionnaire designed to be answered by a person familiar with the AIP, such as a family member or caregiver, to understand how an AIP's memory, ability to know/learn, and executive functioning has changed. It requires a reliable observer who knows the AIP well. The Rating scale, relative to a ten year period is:

1. Much improved.
2. A bit improved.
3. Not much change.
4. A bit worse.

5. Much worse.

The **Montreal Cognitive Assessment (MoCA)** is one of several tools used to evaluate cognitive function. It is administered to an AIP in an office setting and covers the following mental processes:

1. Visual-spatial perception/executive function
5 points
2. Naming (animal figures)
3 points
3. Attention (immediate)
6 points
4. Language (fluency and word recall)
3 points
5. Abstraction (similarities)
2 points
6. Delayed recall (within minutes)
5 points
7. Orientation
6 points

The maximum score is 30 points and a score suggestive of cognitive impairment is 26 and under. This test can be affected by sub optimally treated medical and mental health conditions.

The **Mini Mental Status Exam (MMSE)** is a rough screening test used by many medical facilities that offers a quick assessment of cognitive status that involves a series of questions and tasks, and results in a maximum score of 30. It includes test of orientation, memory, language, and visual-spatial skills. For a person with a high school education, a score of 25 or below is indicative of some cognitive impairment. For a person with some college education, a score of 26 or below indicates some cognitive impairment. Courts should be familiar with this test, as it is often referred to in testimony, but should be aware that it is only a rough screening test and not a thorough assessment.

The **PHQ-9** is a questionnaire tool to help establish a diagnosis of major depression. It is administered in the office and can be used to quantify the behavioral markers of depression and to document progress with treatment.

Capacity to Make and Communicate Decisions

An AIP's decision-making capacity should be

interpreted in the context of the AIPs historical values and beliefs (for example, a Jehovah's Witness may make a choice to refuse life-saving blood transfusions, while others may consider that choice irrational). An examination to determine decision-making capacity typically involves a face-to-face interview, utilizes open ended questions, and addresses the specific choice the AIP needs to make. Choices associated with high risk of adverse outcomes require a higher standard of decision-making capacity than low-risk decisions. The evaluator must be trained and familiar with the type of incapacity that the AIP is alleged to suffer, and should be able to render an opinion regarding:

1. The AIP's ability to receive information and communicate internal thoughts.
2. The AIP's capacity to make a choice.
3. The AIP's ability to explain the reason for the choice.
4. The AIP's ability to appreciate the consequences of that choice.

BEST PRACTICE: To determine whether an individual is or is not incapacitated, rely upon an expert who evaluates functional behavior. Focus on the individual's ability to meet his/her basic needs.

This examination can be performed by a variety of professionals (doctors, nurse practitioners, psychiatrists, psychologists, social workers, etc.), as the interview skills are not specific to any particular specialty. Validated tools to help the interviewer frame the questions include the *Assessment of Capacity for Everyday Decision making (ACED)* or the *MacArthur Competency Assessment Tool for Treatment (MacCAT-T)*. For difficult cases, a neuro-psychologist or geriatric psychiatrist might be consulted.

Independent Evaluations

Under § 5511(d), in aid of the court's determination

of incapacity, the court may on its own motion or on petition by the AIP for cause shown, order an independent evaluation.

Section 5511(d) Independent evaluation. The court, upon its own motion or upon petition by the AIP for cause shown, shall order an independent evaluation which shall meet the requirements of § 5518 (relating to evidence of incapacity). The court shall give due consideration to the appointment of an evaluator nominated by the AIP.

Qualified Evaluators of Capacity

Primary Care Physicians: Professionals who provide comprehensive, first-contact care. These professionals, through repeated contact over time, have an opportunity to observe trends in a patient's health and functional potential and can integrate social, psychological, and spiritual factors with medical conditions.

Family physicians are medical doctors who care for families and people of all ages, certified through the American Board of Family Medicine.

General internists are medical doctors who care for adults, certified through the American Board of Internal Medicine.

Geriatricians are medical doctors who limit their practice to the elderly (people over 65) and have subspecialty certification through the above-cited boards.

Specialty or Secondary Care Physicians: Professionals with specialized knowledge and skills in diseases of particular organ systems. Typically, these professionals serve consultative roles in the care of patients.

Psychiatrist: Certification through the American Board of Psychiatry. Expertise in the diagnosis and treatment of mental health syndromes.

Geriatric Psychiatrist: Certification through the American Board of Psychiatry. Expertise in the diagnosis and treatment of mental health syndromes common to people over 65.

Neurologist: Certification through the American Board of Neurology. Expertise in the diagnosis and treatment of diseases of the brain and the nervous system.

Palliative Care Specialist: Sub-specialty certification through the American Board of Internal Medicine or the American Board of Family Medicine. Expertise in end-of-life planning

and care, complex symptom management, improving quality of life, and in family/caregiver communication.

Non-physician professionals: Professionals who provide crucial services to the patient and healthcare team:

Psychologist: Licensed professional with masters or doctorate degree. Trained in the diagnosis and non-pharmacologic treatment of behavioral health disorders.

Neuropsychologist: Psychologist with advanced training in cognitive testing. Cognitive testing can help discern the relationship between a person's neurologic (brain) disease and functional and behavioral imitations.

See Sample Expert Report, Orphans' Court Form G-06 in Appendix.

CHECKLIST: FINDING INCAPACITY

1. Expert Evaluator
 - a. Qualifications of evaluator.
 - b. Nature of evaluation.
 - c. Testimony or Expert Report (contested hearing or stipulation to report).
2. Findings of Fact
 - a. The nature of any condition or disability which impairs the AIP's capacity to make and communicate decisions.
 - b. The extent of the AIP's capacity to make and communicate decisions.
 - c. Specific areas or functions over which the AIP has capacity to make own decisions.
3. Conclusions of Law
 - a. If petitioner fails to meet their burden of proof, the petition is dismissed.
 - b. If the burden of proof is met and total or partial incapacity is established, then the court next turns to the questions of whether there is an adequate less restrictive alternative to guardianship.
 - c. If there is no less restrictive alternative, the court determines, based upon the nature and extent of the incapacity proved, whether to appoint a plenary or limited guardian
 - d. Next the court considers the selection of an appropriate guardian[s].

SAMPLE QUESTIONS: PRESIDING OVER A GUARDIANSHIP HEARING

At the commencement of the evidentiary hearing, counsel should be prepared to respond to the following questions posed by the court. The attorney's responses to the below questions, as well as any introductory remarks made by the attorneys, will not be regarded as evidence, but will be utilized only to assist the court in gaining an understanding of the evidence that will be presented.

1. Will the attorney(s) place their names on the record and also indicate on the record whom you represent?
2. Is anyone contesting that the AIP has a condition that causes an incapacity to make and communicate decisions and effectuate those decisions?
3. Do the parties stipulate to the expert report? Does any party wish to examine the expert? Does the AIP wish to request an independent evaluation?
4. Is anyone suggesting there is a less restrictive alternative or contesting the need for a guardian?
5. Is the petitioner requesting a plenary or limited guardian of the PERSON?
 - (a) Who is the petitioner proposing to serve as (plenary/limited) guardian of the PERSON?
 - (b) Is anyone contesting this proposal?
 - (c) What are this person's qualifications to be such a guardian of the PERSON?
6. Is the petitioner requesting a plenary or limited guardian of the ESTATE?
 - (a) Who is the petitioner proposing to serve as (plenary/limited) guardian of the ESTATE?
 - (b) Is anyone contesting this proposal?
 - (c) What are this person's qualifications to be such a guardian of the ESTATE?
7. Has the AIP been personally served with petition, notice and citation and has the notice been read to them? Has an affidavit of service been filed?
8. Have you given notice to the people who would be intestate heirs of the AIP? Have you heard in response to this notice from any such person who wishes to participate in this hearing?
9. Is the AIP present at this hearing? If not, what evidence will be presented to establish that the presence of the AIP would be harmful or that they are out of the Commonwealth?
10. What witnesses will be presented to establish that the AIP is an incapacitated person?
11. What is the gross value of the estate?
12. What is the net income from all sources?
13. Has the AIP signed a durable power-of-attorney? Who is appointed as agent under the durable power of attorney?
14. Has the AIP signed a health care power of attorney or health care directive?

Post-Hearing Proceedings

Review Hearing

During the course of a guardianship, many events may require the court to hold hearings subsequent to its finding on capacity. While it is a joyous moment when the court finds an IP has regained capacity, or is no longer in need of a guardian, many guardianships continue for years and require subsequent court proceedings. Below are the more typical occurrences which bring those previously adjudicated matters before the court for a review hearing:

1) Change in capacity

It is not an unusual occurrence for the court to revisit the issue of capacity, either upon petition of an interested party, or *sua sponte*. Section 5512.2(a) of the PEF Code (Title 20, Pa. C.S.) titled “Review Hearings,” provides that:

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.

At a hearing concerning change of capacity, “the burden of proof, by clear and convincing evidence, shall be on the party advocating continuation of guardianship or expansion of areas of incapacity.”⁵⁵ The court may dismiss a petition for a review hearing that is deemed to be frivolous.

2) Change in need for a guardian

The need for a guardian may be eliminated either because the IP has recovered capacity, or because a less restrictive alternative to guardianship has become available and practical. Thus, the need for guardian services may be the subject of a review hearing pursuant to the mandate to seek the least restrictive alternative under 20 Pa.C.S. § 5512.1(a). In a review hearing the burden falls upon the party seeking to maintain (or increase) the level of guardianship supervision, pursuant to § 5512.2(b).

⁵⁵ 20 Pa.C.S. § 5512.2(b).

3) Questions concerning conduct (or alleged misconduct) of the appointed guardian

A review hearing is the appropriate forum to address concerns of a “guardian’s failure to perform his duties in accordance with the law or act in the best interest of the incapacitated person.”⁵⁶ A review hearing may also be necessary when a guardian has failed to file required annual reports with the court, and if a guardian persists in failing to file reports, consideration should be given to removing and replacing the guardian.

BEST PRACTICE: Courts may schedule periodic review hearings to confirm that there continues to be a need for a guardian and to confirm that the guardian is meeting the needs of the IP. A review hearing may also be necessary when a guardian fails to file required annual reports.

4) Periodic review hearings

In some cases it may be useful to have periodic review hearings or to schedule review hearings on an as needed basis, to determine whether the guardian is still needed, whether the capacity of the IP has improved, or whether the issues that initially required the appointment of a guardian (such as a need to apply for medical benefits) have been resolved. Courts may want to consider periodic review hearings to check in with guardians and confirm that the needs of the IP are being met and that there is no need for a change to the final decree appointing guardians.

⁵⁶ 20 Pa.C.S. § 5512.2(a).

Role of Court-Appointed Counsel After Adjudication

Section 5511 of the PEF code provides in part, “[i]n appropriate cases, counsel shall be appointed to represent the AIP in any matter for which counsel has not been retained by or on behalf of that individual.”⁵⁷ Determining whether the IP needs his or her own counsel after adjudication of incapacity is a decision left to the trial judge. Such a decision would be affected by the nature of the subsequent proceedings, the nature of further loss of rights which may be suffered, request from the guardian or other parties in interest, as well as the IP’s wishes. The decision is one which the court must make after assessing needs of the IP, especially where there is divergence between that person’s desires and those of his or her guardian.

Related is the issue of whether the appearance of counsel appointed prior to the adjudication of incapacity is still effective and ongoing in subsequent proceedings. While the statute is silent, Pa. O.C. Rule 1.7(b) provides that an attorney’s appearance cannot be withdrawn without obtaining the court’s leave or the simultaneous entry of new counsel. Whether a post-adjudication petition should be considered a new matter or a continuation of the original, is a decision in which the court should use its sound discretion and consider the length of time between the prior services and the present matter. The availability of previously appointed counsel to continue with the present matter and any impediments to continued representation should also be considered.⁵⁸ If pre-adjudication counsel is to assume representation, it would appear the better course for the court to issue another decree of appointment.

Petition for Approval of Expenditure of Principal

The court may allow the expenditure of principal from the IP’s estate for cause shown upon petition and with appropriate notice.⁵⁹ The court may require that a petition for approval of expenditure will not be

⁵⁷ 20 Pa.C.S. § 5511(a).

⁵⁸ For example, several Orphans’ Court Divisions, including Philadelphia and Montgomery County, have a usual practice of inquiring about the availability of counsel to continue to serve when first appointed, or specifying in an appointment order that counsel shall continue to serve until granted leave of court to withdraw.

⁵⁹ 20 Pa.C.S. § 5536.

considered, except in unusual circumstances, where the inventory has not yet been filed or where the annual report is overdue.⁶⁰ Though not specifically required by statute, it is a best practice to require notice under Pa. O.C. Rule 3.5(b) on all interested parties, which would include the guardian, the residential care provider (if any), and the intestate heirs of the IP. When a guardian expends principal without prior court approval, the court may entertain requests to approve such expenditures on a nunc pro tunc basis.⁶¹ The court may also consider a proposed budget that contemplates expenditures of principal up to a capped amount in each year.

1) The following are considerations in evaluating requests for expenditure of principal:

a) Evaluating benefit of expenditure to IP’s welfare

Principal may be applied for the IP’s care, maintenance, or education.⁶² The guardian may also expend principal to create an irrevocable burial reserve for the IP.⁶³

Principal may also be applied to care, maintenance, or education of the IP’s spouse or children, or for those whom the IP made such provision before being declared incapacitated, or “for the reasonable funeral expenses of the IP’s spouse, child or indigent parent.”⁶⁴

b) Evaluating proportionality of expenditure to IP’s needs and resources

Any otherwise allowable expenditure of principal for the benefit of an IP must be reasonable in light of the person’s circumstances. The most important consideration is the conservation of the IP’s principal so that sufficient funds will be available to meet the IP’s needs for as long as possible. Where the IP is terminally ill or of extremely advanced age, and assets are more than adequate, the need to conserve principal for future use may weigh less

⁶⁰ For example, Philadelphia has adopted a local rule that provides: “Except in cases of extreme emergency, requests for allowances will not be approved prior to the filing of the inventory or the last required annual report, as the case may be.” Phila. O.C. Rule 14.2D(1)(d)(i). See generally Phila. O.C. Rule 14.2D(1) for the required contents of a petition for allowance in Philadelphia.

⁶¹ See, e.g., *O’Reilly Estate*, 18 Fiduc. Rep. 204 (O.C. Mont. Co. 1968).

⁶² 20 Pa.C.S. § 5536.

⁶³ 20 Pa.C.S. § 5537.

⁶⁴ 20 Pa.C.S. § 5536.

heavily. Similarly, where the IP has very significant assets that are extremely unlikely to be exhausted during the IP's lifetime, the need to conserve assets is of less weight. In cases where the assets of the IP's estate are grossly inadequate compared to the need, the guardian may properly seek court approval to "spend down" the IP's assets so as to qualify for government benefits.

2) The following are among the most common reasons for petitioning for allowance from principal:

a) Guardian's fees

The same rules apply to guardian's fees as to other expenditures, in that court approval is required if they are to be paid from principal. For IPs living in nursing homes, guardian's fees are deductible for Medical Assistance eligibility purposes, but only up to \$100 per month.⁶⁵ Serial petitions may be avoided by the pre-approval by decree of budgets.

b) Attorneys' fees

The court may award attorneys' fees from the principal of an IP's estate either upon a petition for allowance or in the adjudication of the guardianship account, but the fees are subject to a reasonableness analysis, and may be adjusted to a reasonable amount on objection or by the court *sua sponte*. The Pennsylvania Supreme Court has provided the following factors by which to judge the reasonableness of attorney's fees:

[1] the amount of work performed; [2] the character of the services rendered; [3] the difficulty of the problems involved; [4] the importance of the litigation; [5] the amount of money or value of the property in question; [6] the degree of responsibility incurred; [7] whether the fund involved was 'created' by the attorney; [8] the professional skill and standing of the attorney in his profession; [9] the results he was able to obtain; [10] the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, [11] the amount of money or the value of the property in question.⁶⁶

While *LaRocca* concerned attorney's fees in a trust matter, courts have applied the *LaRocca* factors to

⁶⁵ 55 Pa. Code §181.134; Pennsylvania Department of Public Welfare, Long Term Care Handbook: Forms, Operations Memoranda, and Policy Clarifications, § 468.31.

⁶⁶ *In re LaRocca's Trust Estate*, 246 A.2d 337, 339 (Pa. 1968).

other fiduciary matters, including the representation of IPs.⁶⁷

Attorneys' fee requests will be encountered from the following:

i) Court-appointed counsel

Fees for counsel may be allowed from the assets of the estate where the estate is substantial. In some cases, court-appointed counsel may accept appointment on a *pro bono* or partially *pro bono* basis especially where the IP is indigent.⁶⁸ When the IP is indigent and cannot afford the cost of counsel, as shown either through testimony or by the duly filed guardian's inventory, the cost of court-appointed counsel may be paid by the county treasurer and reimbursed by the Commonwealth under Act 24 of 1992, codified at 20 Pa. C.S. § 5511(c).

ii) Counsel for petitioner seeking adjudication of incapacity

When the work of petitioner's counsel inures to the benefit of the IP, even when that work is done before the person is adjudged incapacitated, petitioner's counsel may seek compensation from the IP's estate.⁶⁹

iii) IP's prior counsel

Counsel for the IP who provided legal services prior to the determination of capacity may be entitled to compensation from the IP's estate, even after they are discharged or replaced. As long as the work inures to the sole benefit of the IP, and the amount requested is reasonable under the circumstances, prior counsel is entitled to compensation for reasonable work done on the IP's behalf on a

⁶⁷ See, e.g., *In re: Estate of Kornberg, an Incapacitated Person*, 25 Fiduc.Rep.2d. 203, 205 (O.C. Phila 2005); *In re: Estate of Gregory, an Incapacitated Person*, 27 Fiduc. Rep.2d. 273, 284-85 (O.C. Phila 2006); *LaPaglia Estate*, 7 Fiduc.Rep.2d. 47, 49 (O.C. Allegheny 1986).

⁶⁸ Some courts impose limits on counsel fees for court-appointed counsel. For example, Philadelphia's Orphans' Court Division has a local practice of limiting fees approved for court-appointed counsel to \$2,500, except where exceptional circumstances can be demonstrated.

⁶⁹ *In re Mallalieu, Incompetent (1)*, 9 Fiduc.Rep.2d. 235 (O.C. Ches. Co. 1989) (indicating the rationale for allowing compensation to petitioner's counsel is to encourage others to act for the benefit of the incapacitated person without bearing the financial burden).

quantum meruit basis.⁷⁰

iv) Counsel for an agent under a power of attorney

A person who was named as an agent under a power of attorney retain counsel in that capacity and may be entitled to have their counsel fees paid from the estate, where they were acting properly in their role as a fiduciary. However, care should be exercised in determining whether counsel actually provided services to a fiduciary acting in the interests of the IP or AIP, or whether the person claiming to act under a power of attorney was actually acting in their own individual interest and represented in their individual interest.

v) Counsel representing a party in interest

An attorney representing an interested party to an incapacity proceeding, such as a child or intestate heir of the AIP who seeks unsuccessfully to be appointed guardian, may not usually be paid from the IP's estate after the adjudication of capacity. The exception to this rule is if, while representing the third party's interest, some of counsel's actions inure to the benefit of the IP.⁷¹ In such a case, counsel is entitled to reasonable compensation from the IP's estate, but only for the work actually done for the benefit of the IP or their estate.⁷²

Petition for Approval of Sale of Real Estate

A guardian may, whenever the court finds it to be for the best interests of the IP, upon petition, enter a decree for the sale at public or private sale, upon entry of appropriate security, any real property of the IP.⁷³ The following Orphans' Court Rules govern the particulars of these petitions:

Pa. O.C. Rule 14.10(a) provides that petitions for the public or private sale of real estate of an IP shall conform as far as practicable to the requirements of the rules for personal representatives, trustees, and guardians of minors in transactions of similar type.

Pa. O.C. Rule 5.10 prescribes the requirements for petitions for the public sale of real property. In addition to general requirements for all petitions

⁷⁰ *In re: Weightman's Estate*, 190 A. 552 (Pa. Super. 1937) (finding legal representation of incapacitated person to be "necessaries" which may be paid for out of the estate).

⁷¹ *LaPaglia Estate*, *supra*.

⁷² *Id.* (Citing *LaRocca*, *supra*).

⁷³ 20 Pa.C.S. § 5521(b) (incorporating § 5155).

provided in Chapter III of the rules, petition for the public sale of real property must: (1) set forth the reason for filing the petition; (2) a description, stating the size and location of property to be sold; and (3) the liens and charges to which it is subject. Pa. O.C. Rule 5.10(a). Public notice of the sale must also be given as provided by law and as may be further required by local rule or as the court may order in a particular matter.⁷⁴

Pa. O.C. Rule 5.11 prescribes the requirements for petitions for the private sale of real property. In addition to general requirements for all petitions provided in Chapter III of the Rules, a petition for the private sale of real property must: (1) provide all information required in a petition for the public sale of real property under Pa. O.C. Rule 5.10(a); and (2) provide the name and address of the proposed purchaser and the terms of the proposed sale, and state that the consideration to be received is more than can be obtained at public sale.⁷⁵ Additionally, the petition must be supported by the affidavits of two competent persons setting forth that they have inspected the real property to be sold, that they are not personally interested in the proposed sale, that they are acquainted with the value of real estate in the area, that in their opinion the proposed consideration is more than can be obtained at public sale.⁷⁶

Finally, where the IP opposes the sale of real estate, the guardian must make the court aware of this opposition, and it is advisable for the court to appoint separate counsel for the IP to scrutinize the petition from the point of view of the IP.

Removal of Guardian

1) Grounds for removal

In light of the IP's vulnerability, intervention by the court may be necessary when confronted with a guardian whose conduct is improper, and "[t]he power of the orphans' court to remove a guardian is an inherent right, which will not be disturbed unless there is a gross abuse of discretion."⁷⁷ However, the removal of a fiduciary is a drastic action which should only be taken when the estate or welfare of the IP is endangered and intervention is necessary to

⁷⁴ Pa. O.C. Rule 5.10(b).

⁷⁵ Pa. O.C. Rule 5.11(a).

⁷⁶ Pa. O.C. Rule 5.11(b).

⁷⁷ *In re Estate of Border*, 68 A.3d 946, 959 (Pa. Super. 2013).

protect the IP's welfare or estate.⁷⁸

Section 5515 of the PEF Code, which addresses court removal of a guardian, incorporates Section 3182 (regarding grounds for removal of a personal representative). Section 3182 sets forth the grounds for removal, stating:

The court shall have the exclusive power to remove a [guardian] when [the guardian]:

- (1) is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or

- (3) has become incapacitated to discharge duties of his office because of sickness or physical or mental incapacity and his incapacity is likely to continue to the injury of the estate; or
- (4) has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or
- (4.1) has been charged with voluntary manslaughter or homicide, except homicide by vehicle, as set forth in Sections 3155 ... and 3156 ..., provided that the removal shall not occur on these grounds if the charge has been dismissed, withdrawn or terminated by a verdict of not guilty, or
- (5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.

A guardian's failure to perform such duties in accordance with the law or to act in the best interest of the IP also constitutes grounds for removal.⁷⁹

2) Procedure for removal

Section 5515 of the PEF Code, by incorporation of Section 3183 (regarding the procedure for and effect

⁷⁸ See generally *In re Fraiman's Estate*, 184 A.2d 494, 497 (Pa. 1962).

⁷⁹ See, e.g., 20 Pa.C.S. §§ 5142 (regarding guardian's duty to file the inventory), 5521(a) (regarding the duties of the guardian of the person), 5521(b) (regarding the duties of the guardian of the estate), and 5521(c) (regarding guardian's duty to file Annual Reports), 5521(d) (regarding actions which cannot be taken by guardian without court approval).

of removal of a personal representative) governs the procedure for removal of a guardian. It provides that "the court on its own motion may, and on the petition of any party in interest alleging adequate grounds for removal shall, order the [guardian] to appear and show cause why he should not be removed." The statute mandates that upon the petition or motion of an interested party alleging adequate grounds for removal, the trial court shall conduct a hearing to determine whether the guardian should or should not be removed from his position.⁸⁰ Failure to hold a hearing upon receipt of a petition alleging adequate grounds for removal may constitute reversible error.⁸¹ However, where necessary to protect the interests of the parties, including the IP, the court may summarily remove a guardian. The court is permitted to summarily remove a guardian only when such removal is necessary to protect the rights of creditors and parties in interest, including the IP.⁸²

Pursuant to Section 5512.2, the court is also required to promptly conduct a review hearing upon petition of the IP, guardian or any interested party alleging the guardian has failed to perform his duties in accordance with the law or to act in the best interest of the IP.

Appointment of Successor Guardian

Upon the removal or resignation of a guardian, provided there have been no significant changes in the person's capacity or need for guardianship services, the court, after such notice to parties in interest as it shall direct, may without a hearing appoint a succeeding guardian to fill a vacancy in the office of guardian.⁸³ The court may schedule a hearing if it is necessary to assure that the guardian is a suitable individual and prepared to act in the best interests of the IP. This may also be a reasonable juncture to conduct a review hearing to determine that the guardian continues to be needed. However if the court is satisfied with the information provided, a successor guardian may be appointed without a hearing.

The selection and appointment of a successor guardian lies within the discretion of the court.⁸⁴ However, it is common practice for a party petitioning for the removal of a guardian to provide

⁸⁰ *Estate of Velott*, 529 A.2d 525, 527 (Pa. Super. 1987).

⁸¹ *Id.* at 528.

⁸² 20 Pa.C.S. § 3183.

⁸³ 20 Pa.C.S. § 5514.

⁸⁴ See 20 Pa.C.S. §§ 5511(f), 5512.1.

a nominee for successor guardian in the petition for removal. Where the vacating guardian was a parent who is now deceased, any testamentary nominee of the parent shall be given preference by the court.⁸⁵

Guardian's Power to Engage in Estate Planning, Gifts

A guardian of the estate may petition the court for approval to make gifts to family members or enter into contracts or to make changes to the estate plan of an IP where necessary to modify documents in light of changes to the tax laws.⁸⁶ The court may approve gifts or other transfers only when satisfied that "assets exist which are not required for the maintenance, support and well-being" of IP.⁸⁷ Gifts may be approved if they minimize taxes or carry out a lifetime giving pattern.

Guardian's Power to Make Health Care Decisions

A guardian of the person has the duty to assert the rights and best interests of the IP and to respect the express wishes and preferences of the IP to the greatest extent possible.⁸⁸ In addition to being responsible for the IP's care and custody, the guardian of the person is also responsible for making health care decisions on behalf of the IP.

1) Guardian's power when no advance healthcare directive exists

Section 5521 makes no effort to affirmatively prescribe those health care decisions a guardian is empowered to make. Rather, § 5521 defines the scope of a guardian's power to make health care decisions by listing certain actions that cannot be authorized by a guardian without specific court approval.

Pursuant to Section 5521(d), unless specifically included in the guardianship order after specific findings of fact or otherwise ordered after a subsequent hearing with specific findings of fact, a guardian does not have the power to (1) consent on behalf of the IP to an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ, or (2) consent

on behalf of the IP to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.⁸⁹ Where these issues were not addressed in the original final decree appointing a guardian, requests for any of these procedures should be presented to the court in the form of a specific petition requesting permission for the guardian to consent to the specific procedure on behalf of the IP. Upon receipt of such a petition, the court should schedule a hearing and consider whether counsel should be appointed for the IP. Expert medical evidence on the risks and benefits of any proposed procedure must be presented and considered, although where any emergency exists the court should consider permitting expert testimony by telephone or video.

The most common medical procedure on this list that may result in a hearing is a request for the guardian to consent to electro-convulsive therapy, frequently for a person incapacitated and at imminent risk of death due to untreatable depression.

Additionally, § 5521(f) provides that a guardian does not have the power—nor can the court grant the guardian the power—to admit the IP to an inpatient psychiatric facility or State center for the mentally retarded, or take any action that is forbidden under other statutes.⁹⁰

A guardian is prohibited from refusing life-preserving medical treatment when an IP is suffering from a treatable condition but is not in an end-stage medical condition or permanently unconscious.⁹¹ In such a situation, life-preserving treatment may only be refused by a health care agent appointed in writing by the principal, if authorized to do so by the advanced health care directive or by the principal should he or she regain capacity.⁹²

A guardian who seeks to decline life-sustaining medical treatment on behalf of a patient who is not terminally ill must petition the court for authority to decline the treatment on behalf of the patient. A guardian may also petition the court for authority to decline life-sustaining treatment, to elect hospice services, and to make a finding that the IP is in an end-stage medical condition. Some courts require that the guardian seek approval to elect hospice services and to decline life-sustaining treatment

⁸⁵ 20 Pa.C.S. § 5514.

⁸⁶ 20 Pa.C.S. § 5536.

⁸⁷ *Id.*

⁸⁸ 20 Pa.C.S. § 5521(a).

⁸⁹ 20 Pa.C.S. § 5521(d).

⁹⁰ *See also, In re D.L.H.*, 2 A.3d 505 (Pa. 2010).

⁹¹ *Id.* at 514.

⁹² *Id.*; 20 Pa.C.S. § 5462(c).

to create this record. The guardian seeking such an order must prove to the court by clear and convincing evidence that declining the treatment would be in the patient's best interest.⁹³ In order to establish that death is in an incapacitated patient's best interest, a guardian must, at a minimum, provide reliable medical expert testimony documenting the patient's severe, permanent medical condition and current state of physical or psychological deterioration and pain.⁹⁴ Because many of these hearings occur on an emergency basis, the court may schedule a hearing on the request to decline life sustaining treatment by telephone, on short notice, and may permit a physician or other health care provider to testify by telephone. Ideally the court will appoint counsel to continue to represent the IP's individual interests prior to any hearing to consider end-of-life decisions.

End of life issues can be particularly sensitive and difficult. Judges may have their own strongly held beliefs as to end of life decisions based upon their own religious, philosophical or ethical beliefs or life experiences. Judges must be particularly sensitive in this area to take care that their personal beliefs do not result in an appearance of bias. See extended discussion of this issues in CHAPTER TWELVE.

Rule 1.2 of the Code of Judicial Conduct requires that a judge "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 2.3(A) of the Code requires a judge "perform the duties of judicial office ... without bias or prejudice." Comment [1] to Rule 2.3 states "[a] judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute." And, Rule 2.11(A) of the Code requires a judge "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned".

A judge should consider whether his or her beliefs or involvement in extrajudicial activities would reasonably question the judge's impartiality in presiding over a matter involving an end of life issue. Comment [5] to Rule 2.11 requires a judge "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

⁹³ *In re D.L.H., supra.*

⁹⁴ *Id.*

Ultimately, the persons interested in the case must have confidence that the judge will be fair and impartial, and that the judge's decision will be based upon the religious, philosophical or ethical orientation or life experiences of the IP, if known, and not of the judge. If those factors are not known, then the decision must be based upon an objective determination of the best interests of the IP.

2) Guardian's power when effective advance healthcare directive exists

Section 5460 addresses the relation of a health care agent to a court-appointed guardian in those situations when a principal, prior to being adjudicated incapacitated and having a guardian of the person appointed, has executed a health care power of attorney. In such scenarios, the health care agent is accountable to the guardian as well as to the principal.⁹⁵ The statute further provides that the guardian has the same power to revoke or amend the appointment of a health care agent that the principal would have had if not incapacitated, but that the guardian may not revoke or amend other instructions in the advance health directive absent judicial authorization.⁹⁶

The statute permits a guardian to revoke the appointment of a health care agent but does not confer the power to appoint such an agent in the first instance. The power to revoke the appointment of a health care agent provides an additional layer of protection to IPs, as a health care agent may be deprived of the power to make life-ending decisions by a guardian.⁹⁷

When the person named as health care agent is not appointed as the guardian (for example, where the court has determined that such person is not suitable to act as guardian because of acts against the interest of the IP), the IP may have provided in a health care directive important directives for their health care and end-of-life care. The expressed wishes of the IP, documented in writing at a time when the IP had capacity, should be honored by the court, the guardian and the doctors to the maximum extent possible, unless there is a dispute that makes it impossible to understand the IP's expressed wishes. Guardians of the person should become familiar with any written health care directive of the IP and should seek to follow the provisions of such directive. The guardian of the person has a duty to the IP to allow the IP to participate to the maximum

⁹⁵ 20 Pa.C.S. § 5460.

⁹⁶ *Id.*

⁹⁷ *In re D.L.H., supra.*

extent possible in all decisions, and where the IP has clearly expressed their wishes in writing about their health care, at a time when they had capacity to do so, those wishes should be respected.⁹⁸

⁹⁸ 20 Pa.C.S. § 5521(a).

Ethical Issues in Guardianship Matters

Every citizen has a fundamental right, protected under the United States Constitution, to live their life with autonomy and dignity, and to make his or her own decisions. Guardianship is frequently a means to protect our most vulnerable citizens. This chapter addresses the ethical issues that judges may encounter in seeking to reconcile these two frequently competing interests: protection of the vulnerable and respect for self-determination.

This chapter draws upon ethical guidance in Pennsylvania’s Code of Judicial Conduct (hereinafter the “Code”) and references guidance in Pennsylvania’s guardianship statute. It is axiomatic, as expressed in the Code that “[a] judge shall uphold and apply the law.”⁹⁹

Is the Petitioner Interested in the Welfare of the AIP?

The guardianship statute permits a petition for appointment of a guardian to be brought by any person who is “interested in the welfare” of the AIP. Petitioners and those seeking appointment as guardians will typically allege that they are acting in the interests of the AIP. Because a focus of the court in guardianship proceedings is protection of the AIP, courts may perceive the interests of the AIP to be aligned with those of the petitioner or with an individual seeking appointment as the AIP’s guardian.

However, courts must be mindful that the motives of those who seek appointment of a guardian for a family member or other adult are not always, or solely, the best interests of the AIP. Even when motives for filing a petition for guardianship are benevolent, they may not reflect the AIP’s own understanding of what is in his or her interest. Judges should ensure that the AIP has an opportunity to present his or her own personal choices and concerns to the court.

Ensuring the AIP’s Participation in and Presence at the Hearing

Rule 2.6(A) of the Code provides that “[a] judge shall accord to every person or entity who has a

legal interest in a proceeding, or that person or entity’s lawyer, the right to be heard according to law.” Comment [1] to Rule 2.6 of the Code emphasizes that “[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.” In balancing its dual responsibilities to respect the self-determination of the AIP and to protect an AIP who lacks the capacity to make decisions and manage his or her own affairs, courts should ensure that the interests of the AIP are effectively presented at the guardianship hearing. This not only meets the ethical responsibility of judges set out in the Code but also effectuates the purpose of Pennsylvania’s guardianship law which includes “permit[ting] incapacitated persons to participate as fully as possible in all decisions which affect them.”¹⁰⁰

The most effective way for the AIP to participate in the hearing is for the AIP to be present in the courtroom. This is in keeping with Pennsylvania’s guardianship statute which provides that the AIP is to be present at the hearing except under specified circumstances (i.e., their physical or mental condition would be harmed by their presence at the hearing, or their absence from the Commonwealth). Reasons for proceeding without the AIP being present should be sufficiently weighty to overcome the ethical and legal support for the person’s presence and should be based on the best interests of the AIP. Additionally, courts must make reasonable efforts to accommodate AIPs so that they may attend the hearing and participate, such as by providing hearing amplification. Video conferencing with a nursing home, prison or private locations should be considered where an AIP is physically unable to travel but would be able to participate by video.

Appointing Counsel for the AIP

Appointing counsel to represent the AIP is another means of ensuring that the interests of the AIP are heard by the court. Pennsylvania’s guardianship law provides that that an AIP has “the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot

⁹⁹ Code of Judicial Conduct, Canon 2, Rule 2.2.

¹⁰⁰ 20 Pa.C.S. § 5502.

be afforded.” 20 Pa. C.S. § 5511(a). Although legal representation might ensure that the interests of the AIP are effectively presented to the court, there are a number of reasons why counsel may not be requested by the AIP. For example, explanations of the nature and purpose of the guardianship process given to the AIP by the petitioner may not have adequately made clear to the AIP the nature and purpose of the court proceeding and how his or her rights may be affected by guardianship. The AIP may be intimidated by the court and court proceedings and unable to assert himself or herself sufficiently to ask for counsel. The AIP may refrain from requesting to be represented by counsel out of concern that doing so will impair family relationships or out of a history of reliance on the judgment of family members. The AIP may not know how to go about engaging counsel or may be concerned about the cost of doing so. The AIP may be afraid to prolong the hearing by requesting counsel and enduring a delay.

While the AIP has the right to engage and be represented by his or her own attorney, the appropriateness of appointing counsel for an AIP is within the discretion of the court. In light of the vulnerability of an AIP, the court should ensure that lack of legal representation reflects an informed choice made by the AIP rather than an inability to affirmatively engage or request counsel due to cognitive, psychological, emotional or other factors.

Role of Counsel for the AIP

When the AIP is represented by an attorney, the attorney should seek to maintain the normal attorney-client relationship to the extent possible. The representation should be guided by the client and the client’s interests as defined by the client. As the Pennsylvania Rules of Professional Conduct, Rule 1.14 states, “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” Where the AIP lacks some degree of capacity, there may be a well-intended tendency for the court-appointed counsel for the AIP to seek to determine and advocate for the course that appears to be in the best interests of the AIP. However, a determination of the AIP’s best interests should not supplant the AIP’s right to be heard. Except in cases in which the AIP is incapable of participating with his or her attorney in the representation, the AIP’s attorney should advocate for the AIP’s legal interests in light of the

AIP’s subjective, personal choices, provided the AIP is able to articulate personal choices and provide instructions to counsel. When counsel concludes that there may be a conflict between the subjective wishes of the AIP and a more objective sense of his or her best interests, and it may be helpful to the court to receive an assessment of the AIP’s best interests, the judge may consider appointment of a guardian *ad litem* to provide the court with evidence of the best interests of the AIP. Consistent with Rule of Professional Conduct 1.14(a) counsel for the AIP may also request the appointment of a separate guardian *ad litem*, if appropriate. For example, if the AIP is at risk of serious financial loss or physical harm and does not instruct counsel to defend against the source of that risk, this would be a circumstance in which it would be appropriate for counsel for the AIP to request appointment of a guardian *ad litem*, who would be able to educate the court about the best interests of the AIP, and would not be constrained by the Code.

Ex Parte Communications

As in any judicial proceeding, judges should avoid *ex parte* communications or other communications made outside the presence of the parties to the guardianship proceeding or their counsel. The Code does make an exception when circumstances require *ex parte* communication for scheduling, administrative, or emergency purposes so long as the *ex parte* communication does not address substantive matters and no party will gain a procedural, substantive, or tactical advantage as a result. In the event of such *ex parte* communications, the judge should promptly notify all other parties about the substance of the communication and provide them with an opportunity to respond. Particular care should be taken in guardianship matters as there are often unrepresented family members or other interested parties who may not appreciate the implications of *ex parte* communications.

Confidentiality and Privacy Considerations

Because of the sensitive nature of the personal, medical and financial information involved in a guardianship hearing, the AIP has a strong right to confidentiality in the records and proceedings before the court. The statute provides that “the hearing shall be closed . . . if the person alleged to be

incapacitated or his [or her] counsel so requests.”¹⁰¹ The court also retains the discretion to close the courtroom, provided that the AIP may request that the courtroom be open to the public. In light of these concerns, case records concerning incapacity proceedings are not open for examination by the public at a court facility, nor online, although the docket of the proceedings and any final decree are open to the public. Interested parties, however, may receive copies of court filings and orders.¹⁰²

Capacity Assessments

Judicial determination of capacity is a crucial component of all guardianship proceedings. A capacity assessment provides the basis for the court’s determination whether the appointment of a guardian is warranted and, if so, on the scope of the guardianship ordered. Because of the potential impact such a decision has on the legal rights of the AIP, the court should be confident that the expert or lay witness offering testimonial or documentary evidence regarding the capacity of the AIP has the requisite expertise and experience to properly conduct and accurately interpret such an assessment. As discussed in CHAPTER TEN, the best professional to conduct an assessment may vary depending upon the nature of the illness, disability or injury that is the cause of the incapacity. The capacity assessment should reflect the independent judgment of the person or persons conducting the assessment. Persons performing a capacity assessment should not have, nor be perceived to have, an interest in the determination of capacity or in the outcome of the proceeding. For example, a nursing home administrator who works for the facility providing care to an AIP likely lacks the professional qualifications necessary to make a determination of capacity as an expert and may have a conflict of interest in the outcome of the proceedings. The anecdotal testimony of parties who may have interests of their own in the outcome of the hearing should not – or at least should not alone – provide the basis for the court’s capacity decision. Such witnesses, however, may testify to certain relevant facts, provided that a qualified expert addresses the question of the AIP’s capacity.

Given the importance to an individual’s right of self-determination at stake in a guardianship proceeding, the court should have confidence that

¹⁰¹ 20 Pa.C.S. § 5511(a).

¹⁰² Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

the witnesses testifying in person, providing written testimony and/or offering documentary evidence regarding the AIP’s capacity have the credentials and expertise to make such an assessment. This accords not only with the ethical duties of judges but also with the express requirements of the guardianship law which requires that incapacity be established by individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner.

Independent Judgment

Judges should be alert to situations that present the potential for parties’ and witnesses’ competing interests to affect their independent judgment and thereby the court’s determination of matters affecting the AIP. For example, an ethical question regarding conflict of interest may arise when the attorney for the AIP is retained – and is paid – by a family member of the AIP. An attorney representing the AIP has an obligation of loyalty to the AIP. An attorney engaged by a family member or an agent under a power of attorney, may have a duty to that other person or fiduciary that would prevent the attorney from zealously representing the interests of the AIP. Even where the interests of the family may not be directly adverse to those of the AIP, “a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”¹⁰³ The court should ensure that where counsel for the AIP is retained by the family or other party with an interest in the outcome of the guardianship proceeding, the attorney’s representation of the AIP is not influenced by the attorney’s relationship with any other such person or entity.

Another situation that may have an impact on the ability of a witness or other participant in the guardianship process to exercise independent judgment is the existence of an ongoing relationship with the court. Attorneys, capacity experts, and others who regularly rely upon court appointment in guardianship cases may have divided loyalties and conflicting interests that may influence their judgement and decisions. Judges should be alert to the potential for conflict of interest in these situations.

¹⁰³ Pa.R.P.C. 1.7 Comment [8].

End of Life Decisions

When a guardianship continues in place through the end of the incapacitated adult's life, situations may arise in which decisions regarding the continuation, withdrawal, or withholding of life-sustaining treatment for the IP need to be made. Fewer than 30% of older adults have an advance directive stating their own choices for treatment at the end of life or naming the person whom they would want to make such decisions on their behalf if they are unable to do so. Subject to the terms of the guardianship order, the guardian may be called on to make decisions regarding the provision, withholding or withdrawal of life-sustaining treatment for the IP. When health care providers, family members or others disagree with and choose to challenge the guardian's decision, the issue may come before the court.

The three standards for surrogate decision-making at end of life that now have general acceptance in both law and medical ethics are the clear and convincing evidence standard, the substituted judgment standard, and the best interests standard. The intent of these ethical standards is to carry forward, to the degree possible, the autonomous choices regarding treatment at the end of life of the now-incapacitated individual.

The highest standard, clear and convincing evidence, provides the basis for end-of-life decisions when there are available explicit oral statements made by, or written statements (e.g., advance directive) executed by, the incapacitated individual when they were competent. As defined by Pennsylvania's advance directives for healthcare law, an individual is competent to complete an advance directive if, when presented with appropriate medical information, communication supports and technical assistance, they are able to understand the benefits, risks and alternatives involved in health care decisions, make a decision, and communicate that decision to another person. A guardian's decisions should be consistent with clear and convincing evidence of the IP's choices.

When clear and convincing evidence of an IP's previously expressed choices for treatment is not available, the substituted judgment standard is generally regarded as the next best way to carry the IP's autonomy forward. The central idea of substituted judgment is to determine the decision regarding treatment that the IP would make if they were competent to do so. In exercising substituted judgment, a guardian should consider the IP'S

previously expressed general preferences regarding treatment and the outcomes of treatment in the context of the IP's life story and current illness.

In cases where the appointed guardian did not know the IP prior to their incapacity (e.g., cases in which no family or friend of the AIP was available, willing or appropriate to act as guardian and the individual appointed to act as guardian is a stranger to the IP, end of life decisions should be made in accordance with the best interests standard. The best interests standard is objective; that is, instead of seeking to make a decision regarding end of life treatment from the perspective of the terminally ill IP, the decision regarding the provision, withholding or withdrawal of treatment is based on an assessment of what a reasonable person would choose under the circumstances.

Conclusion

Guardianship places two important ethical values in tension: a society's responsibility to protect its members who are not able to care for themselves and respect for each individual's right to decide for themselves how they will live. In determining whether a guardian should be appointed and the scope of the guardianship that should be ordered, if any, courts are called upon to strike a balance between these values. While perfect balance may not be achievable, being alert to the ethical issues implicated in adjudication of guardianship cases will help ensure that the guardianship process meets the needs of cognitively incapacitated adults while preserving their rights to the greatest extent possible.

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Court Supervision and Monitoring of Guardians

Courts have a responsibility to monitor, supervise and when necessary remove court-appointed guardians. Because a plenary guardian of the person or estate has such broad powers to affect the life, well-being and finances of the IP under their care, courts must take extreme care to review and monitor the activities of guardians to assure that they continue to act in the best interests of the IP.

The primary mechanism for monitoring guardians is the requirement that every guardian of the person or estate file an annual report each year. Guardians of the estate are also required to file an inventory within 90 days of appointment as guardian, to provide a financial baseline to which annual reports are compared.

The court that appointed a guardian has a responsibility to review annual reports and inventories, to assure that they are filed timely, and to assure that the funds of the IP are not being mismanaged or spent improperly, and that the guardian is looking after the well-being of the IP. Annual reports are and must be reviewed promptly, and certain issues may raise concerns that should be addressed by correspondence with the guardian, or by scheduling a review hearing.

The Administrative Office of Pennsylvania Courts developed a new Pennsylvania Guardianship Tracking System (GTS), which has been operating throughout Pennsylvania since December of 2018. This is a web-based application that allows guardians of adult-incapacitated persons to submit

inventories and annual reports through an online portal. Upon the completion of a filing, it will be transmitted to the applicable court for review and entry on the docket.

Each guardian must create a secure account to use the GTS to file reports. The GTS system is designed for tracking and submitting guardianship-related reports online. It will provide the court system with improved data about the nature and number of guardianships, and about the areas in which the court system can continue to improve its supervision and monitoring of guardians.

BEST PRACTICE: In order to encourage timely filing of Inventories and Annual Reports, and recognizing that many IPs have limited assets, Courts are encouraged to be liberal in waiving filing fees for reports, inventories and other petitions upon request. See sample *Petition to Waive Filing Fees* and *Sample Order to Waive Filing Fees* in Appendix.

Court Volunteer Monitoring Program: Consider implementing a court volunteer monitoring program, recruiting and training volunteers to visit IPs and assist the court in assuring that their needs are being met and the appointed Guardians are acting in their best interests.

Inventory (Form G-05)

Within ninety (90) days of the date of appointment, the guardian of the estate must file an Inventory with the court itemizing the financial assets of the IP. The Inventory should contain a list of all real estate, personal property, bank accounts, securities, and any and all other valuable assets belonging to the IP with values stated as of the date of appointment. This document should include a statement of any real or personal assets which the guardian reasonably expects to acquire on behalf of the IP after the date of filing of this Inventory.

If the guardian fails to file an Inventory within three months of the date of appointment, the Clerk of

the Orphans' Court sends a notice to the guardian, allowing thirty (30) days to file the Inventory before the entry of an Order to show cause why the guardian should not appear and be removed as guardian and/or suffer sanctions imposed by the court.¹⁰⁴

Annual Reports: Report of Guardian of the Estate (form g-02) and Report of Guardian of the Person (form G-03)

In addition to the Inventory, the Guardian of the Person and Guardian of the Estate are required to file an Annual Report on or before the first 12 month anniversary of appointment describing in detail the current principal of the Estate and how it is invested, the current income of the Estate, the expenditures of principal and/or income since the date of appointment, and the needs of the IP for which the guardian has provided financially since the date of appointment. Annual reports must be filed on the twelve (12) month anniversary of appointment for each year thereafter of guardianship.

20 Pa.C.S. §5521(c)(1) provides that each guardian of an IP shall file with the court appointing him/her a report, at least once within the first 12 months of his/her appointment and at least annually thereafter, attesting to the following:

- (i) Guardian of the estate:
 - (A) current principal and how it is invested;
 - (B) current income;
 - (C) expenditures of principal and income since the last report; and
 - (D) needs of the IP for which the guardian has provided since the last report.
- (ii) Guardian of the person:

¹⁰⁴ It is recommended best practice for counties to adopt a volunteer monitoring program for guardians. Once a guardian has been appointed, a volunteer monitor will assign a volunteer to make an in person visit to the guardian. In the Orphans' Court Guardianship Program in Chester County, the volunteer submits a report of the visit to the Orphans' Court volunteer monitor. The visits occur once a year unless there is concern that the guardian is overwhelmed by duties and requires more frequent visits from the volunteer.

LEGAL REQUIREMENT:
A Guardian of the Estate is required to file an Inventory (Form G-05) within 90 days following appointment, and is required to file a Report (Form G-02) annually on or before the anniversary of the final decree. A Guardian of the Person is required to file a Report (Form G-03) annually on or before the anniversary of the Final Decree. A Guardian in either capacity must also provide Notice to all persons entitled to notice, whenever these reports or inventory have been filed.
(Form G-07).

- (A) current address and type of placement of the incapacitated person;
- (B) major medical or mental problems of the IP;
- (C) a brief description of the IP's living arrangements and the social, medical, psychological and other support services he is receiving;
- (D) the opinion of the guardian as to whether the guardianship should continue or be terminated or modified and the reasons therefor; and
- (E) number and length of times the guardian visited the IP in the past year.

Firearms

18 Pa. C.S. §6105(a) and (c)(4), the federal statute known as the Uniform Firearms Act, prohibits a person who has been adjudicated an IP from possessing, using, controlling, selling, transferring or manufacturing, or obtaining a license to possess,

BEST PRACTICE: The Court should advise guardians of the estate to inquire about any firearms owned by the IP, and to secure, transfer or sell any firearms. The Court must file a Notification of Mental Health Commitment with the State Police within 7 days after any decree of adjudication of incapacity.

use, control, sell, transfer or manufacture a firearm in the Commonwealth of Pennsylvania. The guardian should inquire about the ownership and/or possession of any firearms by the IP and, within sixty (60) days of the adjudication, should arrange for the sale or transfer of the IP's firearms to another eligible person who is not a member of the prohibited person's household. As well, an IP is not permitted to obtain a license to carry a firearm. Any existing license issued to the IP should be returned to the issuing authority.

Notification of Mental Health Commitment

Within seven (7) days of the adjudication of incapacity, the court shall notify the Pennsylvania State Police of the adjudication. A completed Form SP4-131 must be prepared and filed with the court together with the petition for adjudication, so that the court may notify the State Police as required following adjudication of incapacity.

Notice of Filing (Form G-07)

The guardian is required to file a Notice of Filing with respect to each annual report, and to provide notice to those parties entitled to notice of the annual report, pursuant to the court's direction. See Form G-07, Notice of Filing.

Failure to File Reports

If the guardian fails to file an annual report, the Clerk of the Orphans' Court sends a notice to the guardian, allowing thirty (30) days to file the report before the entry of an order to show cause why the guardian should not appear and be removed as guardian and/or suffer sanctions imposed by the court.

Final Report of the Guardian (Forms G-02 and G-03)

Within sixty (60) days of the death of the IP or an adjudication of capacity and modification of existing orders, or removal or resignation of the guardian, the guardian shall file a final report with the court.

Forms

Pursuant to Pennsylvania Orphans' Court Rule 14.14, the following forms shall be used exclusively and cannot be replaced or supplanted by a local form.

1. Important Notice—Citation with Notice (Form G-01);
2. Report of Guardian of the Estate (Form G-02);
3. Report of Guardian of the Person (Form G-03);
4. Guardian's Inventory for an Incapacitated Person (Form G-05);
5. Expert Report (Form G-06);
6. Notice of Filing (Form G-07); and
7. Petition for Adjudication/Statement of Proposed Distribution Pursuant to Pa. O.C. Rule 2.4 (Form OC-03).

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Guardian’s Fiduciary Duties

All guardians are placed in a fiduciary relationship with the IP they serve.¹⁰⁵ All guardians have special obligations of trust, loyalty, confidence, and the duty to act primarily for the IP’s benefit. Guardians are subject to high standards of care in conducting their responsibilities, and guardians with a higher level of relevant guardianship-care skills are held to the use of those skills.¹⁰⁶ This chapter will discuss the specific duties and responsibilities of a guardian of the estate, and the specific duties and responsibilities of a guardian of the person.

Guardian of the Estate – Management of Finances

The court may decide to appoint someone to handle all the financial affairs of the IP; this person is the guardian of the estate.

Duty: Benefit of the IP

BEST PRACTICE: The Guardian should not commingle funds of the IP with their own funds and should not establish a joint bank account, unless it was in existence prior to appointment and disclosed to the Court.

A guardian of the estate has a fiduciary duty not to mismanage the IP’s money and assets and to use such assets solely for the good of the IP. Basically, the guardian of the estate is merely acting on behalf of the IP by managing their money and property.

- The guardian of the estate is authorized to spend income for the benefit of the IP.

¹⁰⁵ ‘Guardian.’ Means a fiduciary who has the care and management of the estate or person of a minor or an incapacitated person.” 20 Pa.C.S. § 201.

¹⁰⁶ See *National Guardianship Association of Standards of Practice*, Standard 1.IV.

- Any expenditure of principal of the IP (the balance of funds or assets of the IP as of the date on which the guardian was appointed, or that are later acquired, that are not monthly income) may be subject to challenge and review by the court.
- Most sales of assets, real estate, gifts, or transfers, or expenditures of assets, including expenditures to pay attorneys or professional fees, require advance approval by the court;
 - **Exception:** spending income for the routine care and maintenance of the IP.¹⁰⁷

The reasonable fees and commissions for expert services used to manage the estate (e.g. accountant, attorney, etc.) may be charged to the estate of the IP if there are adequate assets to pay the expenses. For example, if the IP holds substantial assets, the guardian may file a petition with the court to authorize estate planning on behalf of the IP. This might include establishing a trust, making gifts, disclaiming interests in property or powers of appointment. Expenditures for such financial services are subject to court approval including a determination whether the professional fees are reasonable under the circumstances. Guardians of the estate must be prepared to file petitions for court approval of such expenditures and to demonstrate that they are in the best interests of the IP.

Duty: Inquiry, Discovery, and Safeguarding of Assets

A guardian of the estate must make reasonable inquiry to try to discover the existence, location, and value of all assets of the IP, including determining their fair market value on the date of the guardian’s appointment.

Once the assets have been discovered, inventoried, and had their values determined, the

¹⁰⁷ The Pennsylvania guardianship statute details a number of matters that may be handled by an appointed guardian of the estate, including: insurance, continuation of a business, investments, and sale of property. See 20 Pa.C.S. § 5521(b); see also 20 Pa.C.S. § 5536 (empowering the court to authorize the expenditure of income or principal from the estate).

BEST PRACTICE: The guardian should not be designated as the beneficiary on any life insurance policy, pension, or benefit plan belonging to the IP, unless such designation was validly made prior to the establishment of the guardianship.

guardian of the estate is under a duty to safeguard and protect them from being dissipated, lost, stolen or destroyed. The guardian of the estate should take all reasonable measures to keep them safe and secure.

Duty: Management of Assets

Guardians of the estate must practice the same reasonable prudence in managing the assets of the estate as they would practice in the care of their own estate.¹⁰⁸ They must not co-mingle the assets of the IP with their own assets. The guardian must also manage the assets to attempt to produce income or have the assets appreciate in value (or maintain value) for the benefit of the IP. Risky investments are not permitted.

The assets of the IP must be used exclusively for the benefit of the IP. Under no circumstances should any assets of the IP be given as gift to the guardian or the guardian's family without advance court approval.

Duty: Payment of Debts and Actions on Claims

In general, guardians of the estate must pay reasonable debts, obligations, and expenses of the IP. The guardian should determine whether the final decree of the court grants this authority or whether the guardian must file a petition seeking

¹⁰⁸ See *In re Estate of Rosengarten*, 871 A.2d at 1256 (Pa. Super. 2016) (indicating that a guardian who charged for services that could have been performed by others free of charge probably violated her duty).

court approval for these expenditures. This includes medical expenses and maintenance (including food and residence) of the IP and may include education if appropriate. As always, spending principal without court approval may subject the guardian to challenge and liability; however, the guardian may avoid this by petitioning the court to seek approval of necessary expenditures from principal.

If it appears that the income alone will not meet the IP's needs, then the guardian must file a petition with the court. The petition should include a budget detailing exactly why and how much money is needed from principal.

The court may approve expenditures from the principal for a specified period of time, such as one or two years, pursuant to the budget. The court may schedule a hearing, or, if there are no objections to the request and notice has been provided to all interested parties, the court may approve the request without a hearing.

The guardian of the estate must:

- use prudent judgment in the management of the assets and income of the IP for his or her benefit only;
- use reasonable inquiry to discover and safeguard assets;
- pay reasonable debts, obligations, and expenses of the IP;
- take reasonable steps on claims the IP has against others;
- handle the IP's money in an honest and unbiased way.

Additionally, the guardian has a duty to take reasonable steps on claims the IP has against others, whether they occurred during or prior to the establishment of the guardianship. This duty

may include filing claims against former guardians, members of the IP's family, or third parties that have caused a loss to the estate. Similarly, the guardian should ensure that the IP is receiving all federal and state benefits to which he or she is entitled. This may include filing for Medicare or Medicaid benefits, Social Security benefits, or disability or other government benefits and taking all steps necessary to ensure that the IP continues to receive these benefits.

The guardian of the estate must not:

- obtain any undue profit or advantage from the position as guardian and may not place themselves in a position where their personal interests are in conflict with those of the IP;
- invest the money of the IP into businesses or corporations owned or controlled by the guardian;
- loan themselves the IP's money for such enterprises;
- ignore the assets of the IP—any idle assets should be prudently placed into productive form;
- sell the IP's real estate without prior authorization from the court;
- co-mingle assets or engage in risky investments with the IP's money;
- perform an act that is contrary to the duty of loyalty or any act that is beyond the scope of the authority granted by the court.

Guardian of the Person – Management of Personal, Residential and Medical Decisions

The guardian of the person should become familiar with the final decree appointing them, which may include specific powers, duties and limitations. The court's final decree may specify that the guardianship is either "plenary" (full) or "limited." If it is limited, the final decree will identify specific limitations. If the guardian's appointment is subject to limitations, the guardian should be careful not to exceed them.

Plan of Supportive Service

Where appropriate the guardian should assist in the development of a plan for supportive services for the IP. The plan should explain how the services will be obtained. Supportive services could include nursing, physical therapy, rehabilitation, education, recreation, meal preparation, cleaning, bathing, and other daily needs of the IP. If the IP resides in a nursing facility, the guardian should participate in all care planning conferences and work with the facility to ensure that the IP receives all care and services necessary to enable them to attain and maintain their highest practicable level of functioning.

Encouragement of IP to Participate in Decisions

The guardian must encourage the IP to participate in making decisions to the maximum extent possible, and to make choices and decisions when possible. The guardian should also encourage and support the IP to develop or regain capacity where possible. For instance, a guardian should assist an incapacitated victim of stroke or head trauma to obtain rehabilitation.

The guardian must ensure that he or she can communicate with the IP and their family where they are limited English proficient, including by using an interpreter and/or Language Line where needed. The guardian should also be responsive to concerns voiced by the IP or their family.

General Care, Maintenance and Custody of the IP

A plenary guardian of the person has a general

responsibility for the care, maintenance and custody of the IP. The guardian's primary guiding principles should be to work with the IP to achieve his or her goals and maximum autonomy where possible. For an IP who is totally incapacitated, the guardian of the person may have to exercise discretion regarding what is in the best interest of the IP. The guardian must avoid any conflict of interest, in determining and acting in the best interests of the IP.

Place for IP to Live

A plenary guardian of the person can select where the IP will live. The guardian should encourage the IP to express their preferences and to participate in this decision to the maximum extent possible. If the IP is unable to participate in making this decision, the guardian should make a decision that the guardian concludes is in the best interests of the IP. The guardian should consider the safety of the IP and the ability of friends and family members to visit the IP when choosing the place where the IP will live. The guardian should select the least restrictive setting that is practicable and should seek to transition an IP who wishes to do so from a nursing home to the community wherever possible.

Visiting the IP

Although there is no specific legal requirement regarding the number or type of visits the guardian should make to the IP, it is generally expected that the guardian would visit in person no less than once every three months, and preferably once each month. In addition to periodic visits, the guardian may need to visit the IP when medical decisions must be made, or to observe any new concerns, behaviors or needs. The guardian is expected to know the needs of the IP and to have a good idea of the IP's health and emotional status, in order to make informed decisions. Therefore, it is important that the guardian see the IP frequently enough to feel comfortable making those decisions.

Responsibility for Training, Education, Medical and Psychological Services of IP

A plenary guardian of the person should assist the IP in developing as much self-reliance as is possible. The court's final decree may give the guardian

specific responsibilities regarding the training, education, medical and psychological services needed by the IP. The guardian should also consider and provide appropriate social and vocational opportunities. The guardian should consider the expressed wishes of the IP and/or his or her family members. The guardian should participate in supportive services to the extent that they can.

Consents/Approvals for IP

The final decree may grant the guardian of the person the authority to provide consent or approval for various medical, surgical, psychological or other treatments for the IP. As always, the guardian should try to follow the express wishes of the IP and family members to the extent that these do not conflict with the best interests of the IP.

Note that no guardian has the authority to admit the IP to an inpatient psychiatric facility or to consent to the relinquishment of parental rights of the IP.

In addition, the guardian may not consent to the following procedures or practices for the IP unless and until a court approves it:

- a) Consent to abortion, sterilization, psychosurgery, electroconvulsive therapy or the removal of a healthy body organ of the IP.
- b) Stop a marriage or consent to a divorce of the IP.
- c) Consent to the performance of or participation in any experimental biomedical or behavioral medical procedure by the IP.

End of Life Decisions

A guardian of the person is often asked to make medical decisions for the IP. In some cases the guardian may be confronted with the need to make decisions about what kind of care the IP should receive at the end of life, including whether to withhold or withdraw life sustaining treatment, whether to enter a Do Not Resuscitate order on the IP's medical chart, and whether to admit the IP to hospice services or request palliative care. If the IP has signed an advance directive for health care or a living will, the guardian must be guided by the principles stated by the IP in this written document.

If the IP made statements to the guardian or to other family members, before becoming

incapacitated, setting forth wishes concerning end of life medical care, the guardian must respect those wishes.

As with any medical decision, the guardian should consult with the doctors involved in order to be informed about the options presented. It is frequently difficult to determine whether the IP has reached an end-stage medical condition. It is also important to inform and involve any available family members in any decision about withholding or stopping life sustaining treatment. A guardian of the person has authority to make decisions about end of life medical care, but only when the IP has a medical condition that is incurable and likely to result in his or her death. In order to determine whether this is an appropriate case for end of life decisions, a court hearing and court approval may be wise, and in some counties may be required. The court hearing will assure that decisions are made carefully and in appropriate cases, with notice to all family members, and with counsel appointed to represent the interests of the IP. The guardian may request a court hearing to determine whether the IP is in an end-stage medical condition, and whether the guardian of the person should be granted the authority to make decisions concerning withholding or withdrawing life sustaining treatment.

Annual Report

Guardians are required to file an Annual Report each year, on the date that is the 12-month anniversary of the guardian's appointment as guardian of the person, and annually thereafter for as long as the guardian remains a guardian.

Final Report

Within sixty (60) days of the death of the IP or if the guardianship is vacated, the guardian is required to file the Final Report. The same form used to file the Annual Report is used to file the Final Report.

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Elder Justice in the Pennsylvania Courts

The Office of Elder Justice in the Courts

The Office of Elder Justice in the Courts (OEJC) was established by the Supreme Court in 2015 to assist the Court in implementing recommendations contained in the 2014 Elder Law Task Force's Report and Recommendations.

The OEJC is committed to protecting Pennsylvania's rapidly growing population of elders from all forms of abuse - whether financial, physical, psychological, or through neglect.

The OEJC educates judges, court staff, attorneys, guardians, the public, and others about the warning signs of elder abuse, and how to respond to suspected elder abuse. The OEJC also promotes best practices addressing elder abuse and neglect, as well as in the area of guardianship and access to justice in the Commonwealth's courts.

In addition to education and best practices, the OEJC actively fosters collaboration with other elder justice entities and branches of government to enhance elder Pennsylvanians' ability to fully participate in legal proceedings.

Advisory Council on Elder Justice in the Courts

The Advisory Council on Elder Justice in the Courts is a multi-disciplinary council with 25 members appointed by the Supreme Court, established in 2015 to advise the OEJC regarding the implementation of the Elder Law Task Force's Report and Recommendations regarding best practices, judicial rules, and legislation to benefit elder citizens of the Commonwealth.

The mission of the Advisory Council on Elder Justice in the Courts is to identify and address elder justice issues affecting the Commonwealth's elders.

The Advisory Council and OEJC exist to identify areas of need and challenges faced by elders, and to improve the ability of Pennsylvania courts to meet those needs. The Advisory Council on Elder Justice in the Courts' Progress Report published in 2019 details the accomplishments of the Advisory Council and OEJC since their creation in 2015.

Elder Law Task Force

In light of the special needs and challenges facing elder Pennsylvanians, in April 2013, the Supreme Court of Pennsylvania established a multi-disciplinary Elder Law Task Force to address issues involving guardianships, elder abuse, and access to justice. The Task Force was chaired by Justice Debra Todd, and was comprised of 36 experts in all areas of elder law, bringing together the diverse and critical perspectives of the myriad stakeholders in the aging network.

In November 2014, the Elder Law Task Force's Report and Recommendations was issued containing over 130 recommendations to enhance the way Pennsylvania elders interact with the Commonwealth's judiciary. <http://media-downloads.pacourts.us/eltf-report.pdf?cb=1570668569231>

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APPENDIX I:
Required Guardianship Forms and Additional Resources

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COURT OF COMMON PLEAS OF

ORPHANS' COURT DIVISION

To: _____

IMPORTANT NOTICE
CITATION WITH NOTICE

A Petition has been filed with this Court to have you declared an Incapacitated Person. If the Court finds you to be an Incapacitated Person, your rights will be affected, including your right to manage money and property and to make decisions. A copy of the Petition which has been filed by _____ is attached.

You are hereby ordered to appear at a hearing to be held in Courtroom No. _____, _____, Pennsylvania on _____, 20____ at _____ .m. to tell the Court why it should not find you to be an Incapacitated Person and appoint a Guardian to act on your behalf.

To be an Incapacitated Person means that you are not able to receive and effectively evaluate information and communicate decisions and that you are unable to manage your money and/or other property, or to make necessary decisions about where you will live, what medical care you will get, or how your money will be spent.

At the hearing, you have the right to appear, to be represented by an attorney, and to request a jury trial. If you do not have an attorney, you have the right to request the Court to appoint an attorney to represent you and to have the attorney's fees paid for you if you cannot afford to pay them yourself. You also have the right to request that the Court order that an independent evaluation be conducted as to your alleged incapacity.

If the Court decides that you are an Incapacitated Person, the Court may appoint a Guardian for you, based on the nature of any condition or disability and your capacity to make and communicate decisions. The Guardian will be of your person and/or your money and other property and will have either limited or full powers to act for you.

To: _____:

If the Court finds you are totally incapacitated, your legal rights will be affected and you will not be able to make a contract or gift of your money or other property. If the Court finds that you are partially incapacitated, your legal rights will also be limited as directed by the Court.

If you do not appear at the hearing (either in person or by an attorney representing you), the Court will still hold the hearing in your absence and may appoint the Guardian requested.

By: _____
Orphans' Court Clerk

COURT OF COMMON PLEAS
_____ COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

REPORT OF GUARDIAN OF THE ESTATE

Estate of: _____, an Incapacitated Person
Name of Incapacitated Person

Case File No: _____

DATE COURT APPOINTED YOU AS GUARDIAN: _____

PART I. INTRODUCTION

1. Name(s) of Guardian(s): _____

2. Is this a limited Guardianship?

Yes

No

3. Report Period

This is the **Report** for the period from _____ to _____
_____ (the "**Report Period**"); or

This is the **Final Report** for the period from _____ to _____
_____ (the "**Report Period**") and is filed for the following reason:

The death of the Incapacitated Person.

Date of Death: _____

Name of Executor/Administrator: _____

The Guardianship was terminated by a court order dated: _____

Transfer of Guardianship to: _____

Date of court order approving transfer: _____

PART II. INCOME

1. List all sources of income received during the **Report Period**:

Did the Incapacitated Person receive any of the following?		Amount During Report Period
Alimony or Support	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Annuity Payments	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Dividends	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Interest Income	<input type="checkbox"/> Yes <input type="checkbox"/> No	
IRA Distributions	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Long Term Care Insurance Benefits	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Pension/Retirement Benefits (for example: 401(k), 403(b), etc.)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Public Assistance	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Rental Property Income	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Royalties (including from mineral and land rights)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Social Security Benefits (Retirement, Disability, SSI)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Tax Refund	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Trust Income	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Veterans Benefits (disability/pension/aid and attendance)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Wages	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Worker's Compensation Benefits	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Other	<input type="checkbox"/> Yes <input type="checkbox"/> No	
	TOTAL	\$ 0.00

PART III. ANNUAL EXPENSES

1. List all payments made for the care and maintenance of the Incapacitated Person during the **Report Period**.

Expense	To Whom Was It Paid?	Total for Report Period
Auto Insurance		
Cable/Satellite/Internet		
Child/Spousal Support/Alimony		
Clothing		
Condo/Co-op Assessments		
Debt (incurred prior to your appointment)		
Entertainment		
Fees/Costs Paid to Guardian		
Food		
Gifts - Personal or Charitable		
Home Health Care/Personal Aide		
Homeowners Insurance		
Home/Property Maintenance & Repair		
Income Taxes		
Life Insurance Premiums		
Medical Insurance Premiums		
Medical Expenses		
Medicine		
Mortgage		
Nursing Home/Assisted Living/Institutionalized Care		
Personal Expenses (including allowance)		
Phone/Cell Phone		
Real Estate Taxes		
Rent		
Utilities		
Other		
	TOTAL	\$ 0.00

2. Does the Incapacitated Person have a credit card(s)? Yes No
 If **yes**, has it been used during this report period? Yes No
 What is the current balance on the credit card(s)? _____

PART IV. COMPARING INCOME AND EXPENSES

1. Total Income (Part II, Question 1 TOTAL): \$ 0.00
 2. Unspent Income from Previous Year (Part IV, Question 5 from Last Year's Report): _____
 3. Add lines 1 and 2 together to calculate this year's TOTAL INCOME: \$ 0.00
 4. Total Expense (Part III, Question 1 TOTAL): \$ 0.00
 5. Subtract line 4 from line 3.
 If amount is positive, enter it here to show UNSPENT INCOME, otherwise enter \$0: \$ 0.00
 6. Subtract line 4 from line 3.
 If amount is negative, enter it here to show PRINCIPAL SPENT, otherwise enter \$0: \$ 0.00
 7. Is line 6, PRINCIPAL SPENT, greater than \$0?
 Yes
 No
 If **yes**, was a court order obtained?
 Yes - Date of Court Order: _____
 No - Explain why court approval was not obtained:

PART V. ASSETS

1. What was the value of the assets reported on the Inventory? _____
 2. List any additional assets received during the **Report Period** (for example: gifts, inheritance, burial account, lawsuit recovery, etc.)

Description/Source	Value at the end of Report Period
TOTAL	\$ 0.00

3. Where are **all** the assets deposited or held at the end of the **Report Period**?

List of Assets: Type and Location	Co-Owners	Value at the end of Report Period
TOTAL		\$ 0.00

4. Does the incapacitated person own a house/condo/co-op?

Yes - Answer Questions a - e No

a. Address of property: _____

b. Does the Incapacitated Person live in the house/condo/co-op? Yes No

c. If purchased during the **Report Period**, what was the purchase price? _____

d. If real property was sold during the **Report Period**, what was the sale price? _____

e. Was a court order obtained if property was purchased or sold?

Yes - Date of Court Order: _____

No - Explain why court approval was not obtained:

5. List any assets transferred to a third party such as a spouse or child.

Asset	Transferred To	Relationship to IP	Amount	Order Date or Reason Not Approved

PART VI. GUARDIAN'S COMPENSATION

1. Did the Guardian receive compensation during the **Report Period**?

Yes - Complete the table below No - Skip to Question 3

Amount	Guardian Name	Is Amount Based on Hourly, Monthly or Annual Fee?

2. Was the compensation approved by the court?

Yes - Date of Court Order: _____

No - Explain why court approval was not obtained:

3. Have you maintained a log of your activities as guardian?

Yes - Attach a copy No

PART VII. ATTORNEY'S FEES

1. Were attorney's fees paid during the **Report Period**?

Yes - Complete the table below No - Skip to Part VIII

Amount	Name of Counsel	Hourly Rate	# of Hours	Order Date or Reason Not Approved

PART VIII. REPRESENTATIVE PAYEE

1a. Social Security Administration (SSA) Benefits

The Incapacitated Person does not receive SSA benefits.

The Guardian acts as the representative payee - attach a copy of the report provided to the SSA during this **Report Period**.

The Guardian is not the representative payee for SSA benefits. The payee is _____.

1b. Veterans Administration (VA) Benefits

- The Incapacitated Person does not receive VA benefits.
- The Guardian acts as the representative payee - attach a copy of the report provided to the VA during this **Report Period**.
- The Guardian is not the representative payee for VA benefits. The payee is _____.

PART IX. SURETY INFORMATION

1. Was a surety bond required?

- Yes - In what amount _____ - and then answer Questions a - b.
- No - The court waived a surety bond, skip to Question 2.

a. Is the surety bond still in effect?

- Yes
- No - Provide an explanation as to why not.

b. Is the value of the estate at the end of the **Report Period** greater than the amount reported at the end of the prior report period?

- Yes
- No

If **yes**, has the amount of the surety bond been increased?

- Yes. To what amount: _____
- No

2. If you are a professional guardian, agency or an attorney serving as guardian, do you have professional/guardian liability insurance that covers theft?

- Yes - Answer Question a and b.
- No - Skip to Part X.
- N/A

a. Are the coverage limits greater than the assets (Part V, Question 3)?

- Yes
- No

b. Describe the deductible and any exclusions.

PART X. GUARDIAN INFORMATION

1. During this **Report Period**, did any guardian participate in guardianship training?

- Yes
 No

If yes, provide the following information:

Guardian Name	Dates of Training		Provider	Training Description
	Starting	Ending		

2. During this **Report Period**, have any judgments been filed against any guardian, or has any guardian filed for bankruptcy protection?

- Yes - Please describe No
Guardian Name *Description*

3. During this **Report Period**, was any guardian charged with or convicted of a crime?

- Yes - Please describe No
Guardian Name *Description*

4. Is there any reason any guardian cannot continue to serve as guardian?

- Yes - Please describe No
Guardian Name *Description*

PART XI. SUMMARY

1. If this is the first annual report, state the value of the assets reported on the Inventory. (Use amount from Part V, Question 1 of <i>this</i> Report.) (principal)	
2. If this is not the first annual report, state the Total Assets (principal) from the prior Report. (Use TOTAL amount from Part V, Question 3 of <i>prior</i> Report.)	
3. What was the total income received during the Report Period ? (Use the amount from Part IV, Question 3 of <i>this</i> Report.)	\$ 0.00
4. What is the total amount of Expenses paid during the Report Period ? (Use the amount from Part III, Question 1 of <i>this</i> Report.)	\$ 0.00
5. What are the Total Assets remaining at the end of the Report Period ? (Use the amount from Part V, Question 3 of <i>this</i> Annual Report.)	\$ 0.00
6. What is the Unspent Income at the end of the Report Period ? (Use the amount from Part IV, Question 5 of <i>this</i> Report.)	\$ 0.00

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this verification is subject to the penalties of 18 Pa.C.S. §4904 relative to unsworn falsification to authorities.

Effective June 1, 2019, I further acknowledge the Notice of Filing must be served within 10 days of the filing of this report pursuant to Pa. O.C. Rule 14.8(b).

Date

Signature of Guardian of the Estate

Name of Guardian of the Estate (type or print)

Address

City, State, Zip

Home Phone Number

Office Phone Number

Cell Phone Number

Email

Date

Signature of Co-Guardian of the Estate

Name of Co-Guardian of the Estate (type or print)

Address

City, State, Zip

Home Phone Number

Office Phone Number

Email

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COURT OF COMMON PLEAS
_____ COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

REPORT OF GUARDIAN OF THE PERSON

Estate of: _____, an Incapacitated Person
Name of Incapacitated Person

Case File No: _____

DATE COURT APPOINTED YOU AS GUARDIAN: _____

PART I. INTRODUCTION

1. Name(s) of Guardian(s): _____

2. Is this a limited Guardianship? Yes No

3. Report Period

This is the **Report** for the period from _____ to _____
_____ (the "**Report Period**"); or

This is the **Final Report** for the period from _____ to _____
_____ (the "**Report Period**") and is filed for the following reason:

The death of the Incapacitated Person.

Date of Death: _____

Name of Executor/Administrator: _____

The Guardianship was terminated by a court order dated: _____

Transfer of Guardianship to: _____

Date of court order approving transfer: _____

IF THIS IS A FINAL REPORT, ONLY COMPLETE PARTS I AND V.

PART II. PERSONAL INFORMATION ABOUT THE INCAPACITATED PERSON

1. Incapacitated Person's date of birth: ____/____/____

2. Incapacitated Person's Current Residence:

3. Residence of the Incapacitated Person

Incapacitated Person's home (with part-time home health care aide *or* 24/7 assistance)

Your home

Relative's home

Relative's Name: _____ Relationship: _____

Domiciliary Care

Facility Name: _____

Personal Care Boarding Home

Facility Name: _____

Is this a Memory Support Facility? Yes No

Assisted Living Facility

Facility Name: _____

Is this a Memory Support Facility? Yes No

Nursing Home Facility

Facility Name: _____

Is this a Memory Support Facility? Yes No

Other: _____

4. The Incapacitated Person has been in the residence noted in question 3 since: _____

5. Has the Incapacitated Person moved during the **Report Period**?

Yes

No

If **yes**, date of move: _____

If **yes**, please provide:

Reason for move: _____

Previous residence/address: _____

PART III. MEDICAL INFORMATION

1. List the medical professionals who have seen the Incapacitated Person during the **Report Period**:

	Name
Medical Doctor	
Dentist	
Eye Doctor	
Ear Doctor	
Psychologist or Psychiatrist	
Physical Therapist	
Occupational Therapist	
Social Worker	
Geriatric Caseworker	
Other	

2. The major medical or psychiatric problems of the Incapacitated Person are as follows:

3. Describe any social, medical, psychological and support services the Incapacitated Person is receiving:

4. Has the Incapacitated Person been hospitalized during the **Report Period**?

Yes

No

If yes, date(s) of hospitalization: _____

5. Has the Incapacitated Person received a mental health assessment during the **Report Period**?

Yes

No

If yes, date(s) of evaluation: _____

PART IV. GUARDIAN'S OPINION

1. Should the guardianship be:

- Continued
- Continued with modifications
- Terminated

2. Provide the reasons for your opinion. List specific recommended modifications.

3. Have you filed a petition for modification or termination?

- Yes
- No

PART V. INFORMATION ABOUT THE GUARDIAN

1. On average, how often did you visit the Incapacitated Person during the **Report Period**?

- I live with the Incapacitated Person
- None
- Quarterly
- Monthly
- Weekly
- Daily

2. What is the average length of a visit?

- Less than 15 minutes
- Between 15 minutes and 1 hour
- Between 1 and 2 hours
- More than 2 hours
- Not applicable

3. Have you maintained a log of your activities as guardian?

- Yes - Attach a copy
- No

4. During this **Report Period**, did any guardian participate in guardianship training?

Yes

No

If **yes**, provide the following information:

Guardian Name	Dates of Training		Provider	Training Description
	Starting	Ending		

5. During this **Report Period**, was any guardian charged with or convicted of a crime?

Yes - Please describe

No

Guardian Name

Description

6. During this **Report Period**, was a Protection from Abuse Order or Protection from Sexual Violence or Intimidation Order entered against any guardian?

Yes - Please describe

No

Guardian Name

Description

7. Is there any reason any guardian cannot continue to serve as guardian?

Yes - Please describe

No

Guardian Name

Description

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this verification is subject to the penalties of 18 Pa.C.S. §4904 relative to unsworn falsification to authorities.

Effective June 1, 2019, I further acknowledge the Notice of Filing must be served within 10 days of the filing of this report pursuant to Pa. O.C. Rule 14.8(b).

Date

Signature of Guardian of the Person

Name of Guardian of the Person (type or print)

Address

City, State, Zip

Home Phone Number

Office Phone Number

Cell Phone Number

Email

Date

Signature of Co-Guardian of the Person

Name of Co-Guardian of the Person (type or print)

Address

City, State, Zip

Home Phone Number

Office Phone Number

Cell Phone Number

Email

COURT OF COMMON PLEAS
 _____ COUNTY, PENNSYLVANIA
 ORPHANS' COURT DIVISION

GUARDIAN'S INVENTORY FOR AN INCAPACITATED PERSON

Estate of: _____, an Incapacitated Person
Name of Incapacitated Person

Case File No: _____

DATE COURT APPOINTED YOU AS GUARDIAN: _____

PART I: INTRODUCTION

Inventory type:

Initial

Amended

PART II: ASSETS (PRINCIPAL)

1. List all bank accounts, real estate, burial accounts, and other personal property below. If the property is owned by both the incapacitated person and others, indicate in the last column the name of the co-owner.

Asset	Value	Name of Co-Owner(s)
TOTAL	\$ 0.00	

2. Is any property (specifically bank accounts or real estate) co-owned by the Incapacitated Person and the guardian?

Yes

No

If **yes**:

a. On what date was the property acquired? _____

b. On what date was the guardian's name added? _____

c. The guardian is:

an individual having access or control over the account

an owner of the account

3. Does the Incapacitated Person have a homeowners insurance policy for real property?

Yes (Copy of policy to be provided upon request)

No

If **yes**:

a. Carrier: _____

b. Coverage period: _____

4. Does the Incapacitated Person have an automobile insurance policy?

Yes (Copy of policy to be provided upon request)

No

If **yes**:

a. Carrier: _____

b. Coverage period: _____

5. Does the Incapacitated Person have a safe deposit box?

No

Yes, in sole name

Yes, in joint name(s). List the name(s) of joint owner(s): _____

If **yes**:

a. Location of safe deposit box: _____

b. Are there plans to inventory the contents?

Yes

No

PART III: ANNUAL INCOME

1. List all sources of income for the Incapacitated Person:

Does the Incapacitated Person receive any of the following as income?		Specify Amount
Alimony or Support	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Annuity Payments	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Dividends	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Interest Income	<input type="checkbox"/> Yes <input type="checkbox"/> No	
IRA Distributions	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Long Term Care Insurance Benefits	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Pension/Retirement Benefits (for example: 401(k), 403(b), etc.)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Public Assistance	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Rental Property Income	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Royalties (including from mineral and land rights)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Social Security Benefits (Retirement, Disability, SSI)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Tax Refund	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Trust Income	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Veterans Benefits (disability/pension/aid and attendance)	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Wages	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Workers' Compensation Benefits	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Other	<input type="checkbox"/> Yes <input type="checkbox"/> No	
	TOTAL	\$ 0.00

PART IV: LIABILITIES/DEBTS

1. List all debts the Incapacitated Person owes, including mortgages, loans, credit card debt, etc.

Liabilities/Debts	Lender	Value
	TOTAL DEBTS:	\$ 0.00

PART V: GUARDIAN COVERAGE

1. Was a surety bond required by the decree appointing you as guardian?

Yes (Please attach a copy of the bond)

No

2. Are you a professional guardianship agency or an attorney serving as a guardian?

Yes

No

If **yes**, do you have professional liability coverage?

Yes (Please attach a copy of the insurance policy)

No

If **no**, explain: _____

PART VI: PERSONAL CARE PLAN

1. Can the Incapacitated Person remain in his or her current residence with assistance, or in the home of a relative?

- Yes
- No
- N/A - The Incapacitated Person is already in a supervised residential setting.

If yes:

a. List the name of the responsible family member:

b. What services does the Incapacitated Person require?

- Services from local Area Agency on Aging
- Private Companion/Assistance Service
 - Number of days per week: _____
 - Number of hours per week: _____
- Assistance from family members
 - Will compensation be provided?
 - Yes
 - No
 - If yes, indicate compensation amount: _____

2. Will the Incapacitated Person be moved into a supervised residential setting?

- Yes
- No
- N/A - The Incapacitated Person is already in a supervised residential setting.

If yes:

a. Indicate the type of supervised residential setting:

- Domiciliary Care
- Personal Care
- Boarding Home / Group Home
- Assisted Living Facility
- Nursing Home
- Other: _____

b. Describe the steps that are being taken to move the Incapacitated Person into a supervised residential setting.

5. Prior to the appointment of a guardian, has an agent under a Power of Attorney been serving?

- Yes
- No

If **yes**, has an accounting ever been requested or filed with the Orphans' Court?

- Yes
- No

If **yes**, was the agent the same person as the guardian?

- Yes
- No

PART VIII: MEDICAL INFORMATION

1. Is a "no-code" (Do Not Resuscitate) provision in place for the incapacitated person?

- Yes
- No

2. When still capacitated, did the Incapacitated Person execute a durable power of attorney for health care or some other health care directive (including, but not limited to, a POLST, a living will, or a mental health care power of attorney)?

- Yes
- No

If **yes**, identify the authorized agent for making health care decisions:

3. Are you aware of any will or trust executed by the Incapacitated Person, or any funeral or burial wishes of the Incapacitated Person?

- Yes
- No

If **yes**, please explain:

Has a burial account been established for the Incapacitated Person?

- Yes
- No

If **yes**, what is the value of the burial account? _____

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. §4904 relative to unsworn falsification to authorities.

Effective June 1, 2019, I further acknowledge the Notice of Filing must be served within 10 days of the filing of this report pursuant to Pa. O.C. Rule 14.8(b).

Date

Signature of Guardian of the Estate

Name of Guardian of the Estate (type or print)

Address

City, State, Zip

Home Phone Number

Office Phone Number

Cell Phone Number

Email

Date

Signature of Co-Guardian of the Estate (if applicable)

Name of Co-Guardian of the Estate (type or print)

Address

City, State, Zip

Home Phone Number

Office Phone Number

Cell Phone Number

Email

INSTRUCTIONS FOR SUBMITTING AN EXPERT REPORT

To establish incapacity, the petitioner must present testimony from an individual qualified by training and experience in evaluating persons with incapacities of the type alleged by the petitioner. As an accommodation to such expert witnesses, the court may accept a complete and legible expert report in accordance with the attached form in lieu of expert testimony, whether in person or by deposition, unless otherwise required by rule or order of court.

COURT OF COMMON PLEAS OF
_____ COUNTY PENNSYLVANIA
ORPHANS' COURT DIVISION

EXPERT REPORT

RE: _____
An Alleged Incapacitated Person (AIP)

No. _____

PART I: PROFESSIONAL BACKGROUND (You may attach your curriculum vitae, if it provides answers to Questions 1 through 5. Please answer those questions not covered by curriculum vitae.)

1. Name: _____ Title: _____

2. Professional Address: _____

3. Complete education information:

	Name of Institution	Type of Degree Received	Date Completed
Undergraduate			
Graduate			
Post-Graduate			

4. Do you have any active professional licenses? Yes No

If yes, indicate in what state or states you are licensed as well as the date(s) issued.

List any board certifications: _____

5. An Incapacitated Person is legally defined as: 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/she is partially or totally unable to manage his/her financial resources or to meet essential requirements for his/her physical health and safety.

Do you have experience evaluating whether or not an individual is incapacitated? Yes No

If yes, indicate the basis of your experience:

PART II: ALLEGED INCAPACITATED PERSON (AIP)

6. a. Have you treated, assessed, or evaluated the AIP?

Yes No

b. Indicate the date(s) and location of any treatment, assessment, or evaluation you have provided or made over the last two (2) years:

c. If 6a. is yes, what tests have you or others administered, e.g., mini mental status exam (MMSE), Montreal Cognitive Assessment (MOCA), St. Louis University Mental Status Exam (SLUMS), etc.? List dates administered and the score. (Attach test results, not just the score.)

7. What is the present condition of the AIP? List all known medical and psychiatric diagnoses and current symptoms. (You may attach a list from your records.)

<u>Diagnosis</u>	<u>Symptoms/Manifestations</u>

8. List all known medications, including over-the-counter, that the AIP is taking. For each known medication, indicate, if known, the prescribing physician and the diagnosis for which the medication was prescribed or the reason for taking. (You may attach a list from your records.)

<u>Medication</u>	<u>Diagnosis/Reason Taken</u>	<u>Prescribing Physician</u>

9. Indicate the AIP’s ability to perform the following functions:

	Unimpaired	Needs Some Help (Explain in #10)	Totally Impaired	Not Assessed or Not Enough Information
Receiving and evaluating information effectively	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Communicating decisions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ability to give informed consent	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Short-term memory	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Long-term memory	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Activities of daily living	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Managing finances (including paying bills, making deposits, withdrawals and working with financial institutions)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Managing health care (including following doctor’s orders and managing/taking medications)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Providing for physical safety	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Responding to emergency situations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ability to resist scams	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. For any response in Question 9 where the AIP “needs some help,” please describe the type and extent of assistance needed.

11. What recommendations have you made or would you make concerning services necessary to meet the essential requirements for the AIP’s physical health and safety?

12. What recommendations have you made or would you make concerning management of the AIP's finances?

13. As indicated in Question 5, an Incapacitated Person is legally defined as: 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/she is partially or totally unable to manage his/her financial resources or to meet essential requirements for his/her physical health and safety.

In your expert opinion, within a reasonable degree of professional certainty and based on your knowledge, skills, experience, and education, is the AIP incapacitated?

- Yes, totally impaired Yes, partially impaired No

14. In your opinion, the most appropriate, least restrictive living situation for the AIP is (check one):

- The AIP can be left alone without supervision
 Home (with part-time home health aide or 24/7 assistance)
 Independent living facility (room and board provided, emergency services readily available)
 Assisted living facility (room and board provided, assistance with some activities of daily living)
 Secure facility (Alzheimer's/Mental Health for safety and basic needs)
 Skilled nursing facility

15. If your responses in Question 9 indicated that the AIP is totally impaired or "needs some help", do you expect the AIP's abilities in the next 6 months to (Check best estimate):

- Stay the same Improve Decline

Please explain:

PART III: GUARDIANSHIP AND SERVICES

16. Are you aware of any circumstances, medical or otherwise, that create a need for the appointment of an emergency guardian for the AIP?

- Yes No

If yes, indicate reasons:

17. The AIP is required to be at the hearing, absent circumstances that could cause harm to the AIP. Putting aside whether the court proceeding may be moderately upsetting to, confusing to or not understood by the AIP, do you believe that the AIP's presence at the hearing would cause harm to the AIP's physical or mental condition?

Yes No

Indicate reason for response:

18. Please provide any additional information that could assist the court in determining incapacity.

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature

Name (type or print)

Address

City, State, Zip

Telephone

Email

COURT OF COMMON PLEAS OF

COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

NOTICE OF FILING

ESTATE/GUARDIANSHIP OF _____,
AN INCAPACITATED PERSON

_____, GUARDIAN

No. _____

I certify that on _____ I filed the following documents:

- | | |
|---|---|
| <input type="checkbox"/> Inventory | <input type="checkbox"/> Amended Inventory |
| <input type="checkbox"/> Annual Report - Guardian of the Person | <input type="checkbox"/> Annual Report - Guardian of the Estate |
| <input type="checkbox"/> Final Report | |

A copy of this Notice of Filing is being served on the following person(s) designated by court order and in the following manner:

1. _____

- By mail By fax By personal delivery By e-mail if requested

2. _____

- By mail By fax By personal delivery By email if requested

3. _____

- By mail By fax By personal delivery By email if requested

4. _____

- By mail By fax By personal delivery By email if requested

Submitted by:

Date

Signature

Name (print or type)

Address

City, State, Zip

Telephone

Email

Instructions for Document Access

If you are one of the individuals noted above to whom this notice of filing was sent, you may access and view the documents filed by presenting this notice of filing along with proper identification to the Clerk of the Orphans' Court in the county listed on the previous page.

GUARDIANSHIP OF INCAPACITATED PERSON

COURT OF COMMON PLEAS OF

ORPHANS' COURT DIVISION

ESTATE OF _____, AN INCAPACITATED PERSON,

ACCOUNT OF _____ GUARDIAN

No. _____

PETITION FOR ADJUDICATION / STATEMENT OF PROPOSED DISTRIBUTION PURSUANT TO Pa. O.C. Rule 2.4

This form shall be used in all cases involving the Audit or Confirmation of the Account of a Guardian of the Estate of an incapacitated person. If space is insufficient, riders may be attached. Attach the papers required under items 2, 3, and 5, as applicable, and any additional decree or instrument pertinent to the adjudication.

INCLUDE ATTACHMENTS AT THE BACK OF THIS FORM.

Name of Counsel: _____

Supreme Court I.D. No.: _____

Name of Law Firm: _____

Address: _____

Telephone: _____

Fax: _____

Email: _____

Estate of _____, An Incapacitated Person

1. Name(s) and address(es) of Petitioner(s):

Petitioner: Name: _____ Address: _____ _____	Petitioner: Name: _____ Address: _____ _____
---	---

Identify any Guardians of the Estate who have not joined in the Petition for Adjudication/Statement of Proposed Distribution and/or the Account and state reason:

2. Judicial District or County issuing Adjudication of Incapacity: _____

Date of Adjudication of Incapacity: _____

Date of Appointment as Guardian: _____

Attach copy of Decree(s).

3. A. Explain the reason for filing this Account (if incapacitated person has died, state date of death, name and address of personal representative and of his or her counsel, and attach a Short Certificate if available. If incapacitated person has been adjudged to have regained capacity, state date of Decree and attach a copy. If Account is filed for any other reason, state address of incapacitated person):

B. Is this the first accounting for this estate? Yes No

If not, identify prior accountings, the accounting periods covered, and the dates of adjudication of the prior accountings.

4. A. Identify each unpaid claim against the incapacitated person or the incapacitated person's estate and describe each in detail (*if none, so state*):

Estate of _____, An Incapacitated Person

B. Describe in detail any questions requiring adjudication and state the position of the Petitioner(s) as to each question:

C. If guardian or attorney fees are being claimed, state amount and the period covered for the requested fees:

5. Written Notice of the Account's filing as required by Pa. O.C. Rule 2.5 has been or will be given to all interested parties listed in item 6 below. In addition, notice of any known unpaid claim not admitted, all questions requiring adjudication and any requested fees as discussed in item 4 above has been or will be given to all persons affected thereby.

A. If Notice has been given, attach a copy of the Notice as well as a list of the names and addresses of the parties receiving such Notice.

B. If Notice is yet to be given, a copy of the Notice as well as a list of the names and addresses of the parties receiving such Notice shall be submitted at the Audit or filed before the date of the last day for filing objections in counties without separate Orphans' Court Divisions together with a statement executed by a Petitioner or counsel certifying that such Notice has been given.

C. If any such interested party is not *sui juris* (e.g., minors or incapacitated persons), Notice of the Account's filing has been or will be given to the appropriate representative on such party's behalf as required by Pa. O.C. Rule 4.2.

Estate of _____, An Incapacitated Person

6. List all parties of whom Petitioner(s) has/have notice or knowledge, having or claiming any interest in the estate, including the incapacitated person's heirs at law. This list shall:

A. State each party's relationship to the incapacitated person and the nature of each party's interest(s):

<i>Name and Address of Each Interested Party</i>	<i>Relationship and Comments, if any</i>	<i>Interest</i>

B. Identify each party who is not *sui juris* (e.g., minors or incapacitated persons). For each such party, give date of birth, the name of each Guardian, and how each Guardian was appointed. If no Guardian has been appointed, identify the next of kin of such party, giving the name, address, and relationship of each.

C. State why a Petition for Guardian/Trustee *Ad Litem* has or has not been filed (see Pa. O.C. Rule 5.5).

7. If prescribed by local rule as permitted by Pa. O.C. Rule 2.9, is the Court being asked to direct the filing of a Schedule of Distribution? Yes No

Estate of _____, An Incapacitated Person

Wherefore, your Petitioner(s) ask(s) that distribution be awarded to the parties entitled and suggest(s) that the distributive shares of income and principal (residuary shares being stated in proportions, not amounts) are as follows:

A. Income:

<i>Proposed Distributee(s)</i>	<i>Amount/Proportion</i>
_____	_____
_____	_____

B. Principal:

<i>Proposed Distributee(s)</i>	<i>Amount/Proportion</i>
_____	_____
_____	_____

Submitted By:
(All petitioners must sign. Place additional signatures on attachment if necessary):

Corporate Fiduciary (if applicable)

Name of Corporate Fiduciary

Name of Petitioner

Name of Representative and Title

Signature of Petitioner

Signature of Officer/Representative

Name of Petitioner

Signature of Petitioner

Estate of _____, An Incapacitated Person

(Verification must be by **at least one** petitioner.)

Verification for Individual Petitioner

The undersigned hereby verifies that the averment of facts set forth in the foregoing Petition for Adjudication/Statement of Proposed Distribution which are within the personal knowledge of the Petitioner are true, and as to facts based on the information of others, the Petitioner, after diligent inquiry, believes them to be true; and that any false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date

Signature of Petitioner

Verification for Corporate Petitioner

The undersigned hereby verifies that *he/she* _____ is
title _____ of the above-named *name of corporation* _____ and that the averment of facts set forth in the foregoing Petition for Adjudication/Statement of Proposed Distribution which are within the personal knowledge of the Petitioner are true, and as to facts based on the information of others, the Petitioner, after diligent inquiry, believes them to be true; and that any false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date

Signature of Representative for
Corporate Petitioner

Certification of Counsel

The undersigned counsel hereby certifies that the foregoing Petition for Adjudication/ Statement of Proposed Distribution is a true and accurate reproduction of the form Petition authorized by the Supreme Court, and that no changes to the form have been made beyond the responses herein.

Date

Signature of Counsel for Petitioner

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 20__-X_____

IN RE: [INCAP NAME],
AN INCAPACITATED PERSON

FINAL DECREE APPOINTING PLENARY GUARDIANS

AND NOW, this _____ day of _____, 2019, based upon the evidence received and the record, following a hearing, this Court finds, by clear and convincing evidence that [*Incap Name*] is adjudged a totally incapacitated person.

The Court finds that [*Incap Name*] suffers from [*condition(s) rendering incapacity*], a condition that totally impairs his capacity to receive and evaluate information effectively and to make and communicate decisions concerning management of his financial affairs or to meet essential requirements for his physical health and safety.

GUARDIAN OF ESTATE

[*Guardian Name*] of [*Guardianship Agency Name*] is hereby appointed Plenary Permanent Guardian of the ESTATE of [*Incap Name*]. [Bond is waived.] OR [Bond shall be posted in the following amount: \$_____.] – *choose one*] The Guardian of the ESTATE shall file an inventory within three months of the date of this decree of the incapacitated person's real and personal property, pursuant to 20 Pa. C.S.A. § 5521(b). In addition, the Guardian of the ESTATE shall file a report annually on or before the anniversary of the date of this Final Decree, containing the information required in 20 Pa. C.S.A. § 5521(c)(1)(i).

The Guardian of the ESTATE shall have authority and responsibility to manage and use the incapacitated person's property for his benefit in accordance with 20 Pa. C.S.A. §5536(a). The

Guardian of the ESTATE is permitted to spend INCOME for the incapacitated person without the Court's written approval. [Furthermore, in this matter, the Court determines that INCOME is insufficient to meet the continuing costs of care and therefore the Guardian of the ESTATE is authorized to expend PRINCIPAL as well for the care, residence and maintenance of [*Incap Name*].] – *remove if Judge does not wish to include*) The Guardian of the ESTATE shall have the authority to expend principal up to \$16,000 or the maximum allowable amount to establish an appropriate burial reserve or irrevocable burial fund. Any other expenditure of principal not authorized in this Final Decree shall require Court approval.

Financial Institutions

All financial institutions in possession of assets of [*Incap Name*] shall provide immediate access to the Guardian of the ESTATE of [*Incap Name*] to all assets owned by [*Incap Name*] in the possession of that institution, and to all financial records. Failure to provide timely access to those accounts, assets, records, and benefits upon proof of the guardian's appointment and to any benefits to which [*Incap Name*] is entitled may be considered contempt of this Court's order and may subject the financial institution to sanctions upon application to the court and hearing.

The Guardian of the ESTATE shall have the authority to implement a freeze on any bank account, investment account or other form of investment, including any joint account in which [*Incap Name*] has an interest and shall have the authority to freeze access to any joint safe deposit box.

Financial Powers of Attorney

Because [*Guardian Name*] has now been appointed Guardian of the ESTATE of [*Incap Name*], this Court hereby exercises the authority granted under 20 Pa. C.S.A. §5604(c)(3) of the PEF Code to rescind any and all financial durable powers of attorney heretofore executed by the incapacitated person. Therefore, any said power(s) are hereby deemed to be null and void.

GUARDIAN OF PERSON

[*Guardian Name*] of [*Guardianship Agency Name*] is hereby appointed Plenary Permanent Guardian of the PERSON of [*Incap Name*]. The Guardian of the PERSON shall file a Report on the social, medical and other relevant conditions as required by 20 Pa.C.S.A. § 5521(c)(ii) annually on or before the anniversary of the date of this Final Decree.

The Guardian of the PERSON shall have authority and responsibility to decide where [*Incap Name*] shall live and how meals, personal care, transportation and recreation will be provided.

Health Care Decisions

The Guardian of the PERSON shall also have the authority to authorize and consent to medical treatment and surgical procedures necessary for the well-being of [*Incap Name*]. For purposes of HIPAA, the Guardian of the PERSON shall be considered to be a “personal representative” with the authority to review, receive and discuss all protected health information related to [*Incap Name*].

[The incapacitated person has executed a/an [insert name of document: advance directive for health care/living will/health care power of attorney] dated [*date of document*] which expresses his wishes and preferences regarding health care and which shall remain valid and shall be honored by the Guardian of the PERSON and all health care providers, notwithstanding any other provision of this Final Decree.] – *remove if not applicable*

GENERAL GUARDIANSHIP

Payment to Guardian

In the event the Guardian applies for Medical Assistance benefits the guardian may be paid a \$750 fee for application services and thereafter shall be paid a commission of \$100 per month from income or the highest amount allowed by the Pennsylvania Department of Human Services.

The Guardian may petition the Court for approval of payment of a reasonable guardian's commission from principal of the incapacitated person's estate, based upon hours worked and services provided.

Budget

The Guardian of the PERSON and the Guardian of the ESTATE shall cooperate to prepare a budget to cover the cost of providing for the health, maintenance and residence of [*Incap Name*]. Neither the Guardian of the PERSON nor the Guardian of the ESTATE shall have authority to enter a safe deposit box in the name of [*Incap Name*] (individually or jointly) without written Court authorization.

Appeal and Review Hearings

An appeal from this Final Decree may be taken by filing a Notice of Appeal within thirty (30) days from the entry of this Final Decree. See Pennsylvania Rules of Appellate Procedure 902 and 903. The incapacitated person, or any other interested party, may request a review hearing at any time pursuant to 20 Pa. C.S.A. 5512.2, asserting a change in capacity, a change in the need for a guardian or a failure of the guardian to perform duties. The incapacitated person has the right to be represented by counsel to file a notice of appeal or to seek a review hearing or to seek modification or termination of any guardianship granted. The rights of the incapacitated person to file an appeal and to request a review hearing have been explained to the incapacitated person at the conclusion of the hearing.

The aforementioned judicial determinations have taken into consideration the matters required by 20 Pa. C.S.A. §5512.1. The Court's findings of fact and conclusions of law have been placed on the record at the evidentiary hearing.

BY THE COURT:

[JUDGE NAME], [A.] J.

Copy of above Hand Delivered/E-Filed _____ to:

Judicial Court Clerk

This page has been intentionally left blank.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 20__-X____

**IN RE: [INCAP NAME],
AN INCAPACITATED PERSON**

FINAL DECREE APPOINTING LIMITED GUARDIANS

AND NOW, this ____ day of _____, 2019, based upon the evidence received and the record, following a hearing, this Court finds, by clear and convincing evidence that [*Incap Name*] is adjudged a totally incapacitated person.

The Court finds that [*Incap Name*] suffers from [*condition(s) rendering incapacity*], a condition that totally impairs her capacity to receive and evaluate information effectively and to make and communicate decisions concerning management of her financial affairs or to meet essential requirements for her physical health and safety.

LIMITED GUARDIAN OF ESTATE

[*Guardian Name*] of [*Guardianship Agency Name*] is hereby appointed Limited Guardian of the ESTATE of [*Incap Name*]. [Bond is waived.] OR [Bond shall be posted in the following amount: \$____.] – *choose one*] The Limited Guardian of the ESTATE shall file an inventory within three months of the date of this decree of the incapacitated person's real and personal property, pursuant to 20 Pa. C.S.A. § 5521(b). In addition, the Limited Guardian of the ESTATE shall file a report annually on or before the anniversary of the date of this Final Decree, containing the information required in 20 Pa. C.S.A. § 5521(c)(1)(i).

[The Limited Guardian of the ESTATE shall have authority and responsibility to obtain copies of all financial records of [*Incap name*] including records of any benefits, Social Security,

VA benefits and any pension, and shall have the authority to apply for Medical Assistance, Long Term Care benefits and any benefits to which she may be entitled.] – *EXAMPLE – insert specifics of limited guardianship here*

[The Limited Guardian of the ESTATE shall have authority and responsibility to manage and use the incapacitated person's property for her benefit in accordance with 20 Pa. C.S.A.

§5536(a). The Limited Guardian of the ESTATE is permitted to spend INCOME for the incapacitated person without the Court's written approval. [Furthermore, in this matter, the Court determines that INCOME is insufficient to meet the continuing costs of care and therefore the Limited Guardian of the ESTATE is authorized to expend PRINCIPAL as well for the care, residence and maintenance of [*Incap Name*].] – *remove if Judge does not wish to include* The

Limited Guardian of the ESTATE shall have the authority to expend principal up to \$16,000 or the maximum allowable amount to establish an appropriate burial reserve or irrevocable burial fund.

Any other expenditure of principal not authorized in this Final Decree shall require Court approval.

] – *Leave this in if limited guardian has authority over accounts*

Financial Institutions

All financial institutions in possession of assets of [*Incap Name*] shall provide immediate access to the Limited Guardian of the ESTATE of [*Incap Name*] to all assets owned by [*Incap Name*] in the possession of that institution, and to all financial records. Failure to provide timely access to those accounts, assets, records, and benefits upon proof of the guardian's appointment and to any benefits to which [*Incap Name*] is entitled may be considered contempt of this Court's order and may subject the financial institution to sanctions upon application to the court and hearing.

The Limited Guardian of the ESTATE shall have the authority to implement a freeze on any bank account, investment account or other form of investment, including any joint account in which

[*Incap Name*] has an interest and shall have the authority to freeze access to any joint safe deposit box.

Financial Powers of Attorney

Because [*Guardian Name*] has now been appointed Limited Guardian of the ESTATE of [*Incap Name*], this Court hereby exercises the authority granted under 20 Pa. C.S.A. §5604(c)(3) of the PEF Code to rescind any and all financial durable powers of attorney heretofore executed by the incapacitated person. Therefore, any said power(s) are hereby deemed to be null and void.

GUARDIAN OF PERSON

[*Guardian Name*] of [*Guardianship Agency Name*] is hereby appointed Plenary Permanent Guardian of the PERSON of [*Incap Name*]. The Guardian of the PERSON shall file a Report on the social, medical and other relevant conditions as required by 20 Pa.C.S.A. § 5521(c)(ii) annually on or before the anniversary of the date of this Final Decree.

The Guardian of the PERSON shall have authority and responsibility to decide where [*Incap Name*] shall live and how meals, personal care, transportation and recreation will be provided.

Health Care Decisions

The Guardian of the PERSON shall also have the authority to authorize and consent to medical treatment and surgical procedures necessary for the well-being of [*Incap Name*]. For purposes of HIPAA, the Guardian of the PERSON shall be considered to be a “personal representative” with the authority to review, receive and discuss all protected health information related to [*Incap Name*].

[The incapacitated person has executed a/an [insert name of document: advance directive for health care/living will/health care power of attorney] dated [*date of document*] which expresses her wishes and preferences regarding health care and which shall remain valid and shall be honored

by the Guardian of the PERSON and all health care providers, notwithstanding any other provision of this Final Decree.] – *remove if not applicable*

GENERAL GUARDIANSHIP

Payment to Guardian

In the event the Guardian applies for Medical Assistance benefits the guardian may be paid a \$750 fee for application services and thereafter shall be paid a commission of \$100 per month from income or the highest amount allowed by the Pennsylvania Department of Human Services.

The Guardian may petition the Court for approval of payment of a reasonable guardian's commission from principal of the incapacitated person's estate, based upon hours worked and services provided.

Budget

The Guardian of the PERSON and the Limited Guardian of the ESTATE shall cooperate to prepare a budget to cover the cost of providing for the health, maintenance and residence of [*Incap Name*]. Neither the Guardian of the PERSON nor the Limited Guardian of the ESTATE shall have authority to enter a safe deposit box in the name of [*Incap Name*] (individually or jointly) without written Court authorization.

Appeal and Review Hearings

An appeal from this Final Decree may be taken by filing a Notice of Appeal within thirty (30) days from the entry of this Final Decree. See Pennsylvania Rules of Appellate Procedure 902 and 903. The incapacitated person, or any other interested party, may request a review hearing at any time pursuant to 20 Pa. C.S.A. 5512.2, asserting a change in capacity, a change in the need for a guardian or a failure of the guardian to perform duties. The incapacitated person has the right to be represented by counsel to file a notice of appeal or to seek a review hearing or to seek modification or termination of any guardianship granted. The rights of the incapacitated person to file an appeal

and to request a review hearing have been explained to the incapacitated person at the conclusion of the hearing.

The aforementioned judicial determinations have taken into consideration the matters required by 20 Pa. C.S.A. §5512.1. The Court's findings of fact and conclusions of law have been placed on the record at the evidentiary hearing.

BY THE COURT:

[JUDGE NAME], [A.] J.

Copy of above Hand Delivered/E-Filed _____ to:

Judicial Court Clerk

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IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

20 -X

ESTATE OF []
AN ALLEGED INCAPACITATED PERSON]
PETITION FOR A REVIEW HEARING
(Pursuant to 20 PA C.S.A. §5512.2)

I, _____, ("*Petitioner*"), hereby request that the Court schedule a review hearing concerning _____, who was adjudged to be an Incapacitated Person by Final Decree dated _____. My relationship to the Incapacitated Person is as follows:

- Self
- Court-Appointed Guardian
- Relative (*state relationship*)
- Other (*state relationship*)

I asked for this review hearing because (*check all that apply*):

There has been a significant change in the capacity of _____ (*name of Incapacitated Person*). The nature of the change is as follows:

_____ no longer requires the appointment of Plenary Permanent Guardians of his/her Person and Estate, because:

The Guardian of the Person or Estate appointed by this Court has failed to perform his/her duties or has failed to act in the best interests of the Incapacitated Person. Specifically, the Guardian of the Person or Estate has failed in his/her duties by taking or failing to take the following actions:

I am sending a copy of this Petition for a review hearing to the following interested parties, including the Guardian of the Person, the Guardian of the Estate:

I make these statements subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.

Signature

Name:

Address:

Telephone Number:

Email Address:

Date:

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20 -X

ESTATE OF [],
AN ALLEGED INCAPACITATED PERSON

**PETITION FOR APPROVAL OF EXPENDITURE
FROM THE ESTATE OF AN INCAPACITATED PERSON**
(Pursuant to Montgomery Orphans' Court Rule 14.2B)

SECTION A. General Information

1. I, _____, hereby Petition this Court to approve an expenditure of principal from the Estate of the Incapacitated Person.

2. If Petitioner is Guardian:

a. I am the Limited Plenary Guardian of the Estate and/or Person:
_____ (Name of Incapacitated Person).

b. On _____ (Date of Appointment), I was appointed Guardian over the Estate and/or Person of _____ (Name of Incapacitated Person).

c. I am still no longer serving in this capacity.

3. If Petitioner is not the Guardian:

a. I am am not related to the Incapacitated Person.

b. If Petitioner is related—my relationship to the Incapacitated Person is:

(provide a brief description of your relationship to the Incapacitated Person).

c. If Petitioner is not related—the nature of my interest is as follows:

(provide a brief description of why you are filing this Petition).

SECTION B. Inventory, Assets, Income, and Expense

1. An inventory of the Incapacitated Person's Estate has has not been filed.

2. The initial inventory was filed on _____ (date), and listed a total Estate value of \$ _____.

3. The present value of the principal on hand of the Estate is \$ _____.

4. The monthly expenses of the Incapacitated Person is \$ _____.

5. The known monthly expenses of the Incapacitated Person are \$ _____.

SECTION C. Dependents

1. Please provide the names and addresses of any dependents of the Incapacitated Person:

	NAME OF DEPENDENT	ADDRESS OF DEPENDENT
1		
2		
3		
4		

SECTION D. Creditors

1. Please list all known claims of the Incapacitated Person’s Creditors:

SECTION E. Previous Distributions

1. Please list all previous requested distributions (*payments*) from the principal Estate of the Incapacitated Person allowed by the Court:

SECTION F. Amount/Reason for Request

1. I am requesting approval of an expenditure from the principal of the Estate of the Incapacitated Person in the amount of \$ _____.
2. Please state the reason(s) for the request and please attach any receipts or bills as exhibits:

Signature of Petitioner or Attorney

Name:

Address:

Telephone Number:

Email Address:

Date:

VERIFICATION

(Please choose one paragraph and cross out the other)

- I, _____, verify that I am the Petitioner filing this Petition, or an authorized representative of the Petitioner, familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.
- I, _____, verify that I am not the Petitioner filing this Petition, but that I am familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. The Petitioner is unavailable to sign this Verification because:

I make these statements subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.

Signature of Petitioner or Attorney

Name:

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 2019-X----

IN RE: ESTATE OF _____,
AN ALLEGED INCAPACITATED PERSON

**ORDER APPOINTING COUNSEL FOR ALLEGED INCAPACITATED
PERSON**

AND NOW, this day of _____, 201_, the Court hereby appoints
_____ as legal counsel to represent the alleged incapacitated person,
_____ at a hearing scheduled for _____ in Courtroom
__, One Montgomery Plaza, Norristown, Pennsylvania.

Counsel shall represent the alleged incapacitated person before and during the hearing on the Petition for Adjudication of Incapacity and for Appointment of a Guardian or Guardians, and in any subsequent related proceedings, including but not limited to, any petition seeking approval of expenditures, the sale of real estate, any review hearing, and in any appeal, unless and until counsel petitions the Court and the Court grants leave to withdraw as counsel.

Counsel for the alleged incapacitated person shall file a petition seeking approval of attorneys' fees following the initial hearing, provided that in those cases in which a guardian of the estate has been appointed, the petition for approval of attorneys' fees shall be filed after the inventory has been filed. Subsequent petitions for approval of attorneys' fees may be filed thereafter if additional attorneys' fees are incurred.

BY THE COURT:

[Name], Judge

This Order e-filed on _____

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20 -X

ESTATE OF []
AN ALLEGED INCAPACITATED PERSON
CONSENT TO SERVE AS GUARDIAN

I, _____, agree to serve as Guardian of the Person for _____, an Incapacitated Person. I agree to act in the best interests of the Incapacitated Person, to assert his/her rights to the best of my ability and to respect his/her wishes to the greatest extent possible. If appropriate, I will participate in the development of a plan of supportive services to meet the Person's needs. I will also encourage him/her to participate to the maximum extent of his/her abilities in all decisions which affect him/her.

I, _____, agree to serve as Guardian of the Estate for _____, an Incapacitated Person. I agree to keep his/her Assets separate from my own, to spend his/her income only for his/her benefit, to seek Court approval if required and to handle his/her financial affairs in an honest and trustworthy manner.

Respectfully submitted,

Signature

Name:

Business Name:

Address:

Telephone Number:

Email Address:

Date:

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COMMONWEALTH OF PENNSYLVANIA
NOTIFICATION OF MENTAL HEALTH COMMITMENT

The Uniform Firearms Act, 18 PA C.S.A. §6105(c)(4) specifies that it shall be unlawful for any person adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under Section 302, 303, or 304 of the Mental Health Procedures Act of July 9, 1979 (P.L.817, No. 143) to possess, use, manufacture, control, sell or transfer firearms. This would include adjudication of incapacity pursuant to 20 PA C.S.A. §5501. Pursuant to the Pennsylvania Mental Health Procedures Act, Section 109, notification shall be transmitted to the Pennsylvania State Police by the judge, mental health review officer or county mental health and mental retardation administrator within **SEVEN** days of the adjudication, commitment or treatment by first class mail to the **Pennsylvania State Police, Attention: PICS Unit, 1800 Elmerton Avenue, Harrisburg, PA 17110. NOTE: The envelope shall be marked "CONFIDENTIAL."**

Place a check on either Involuntary Commitment and indicate 302, 303, 304, or Adjudication of Incapacity

Involuntary Commitment 302 303 304 **Adjudication of Incapacity**

Date of Commitment or Date Adjudicated Incapacitated:

County of Commitment: Montgomery County

Individual Information - Individual Involuntarily Committed or Adjudicated Incapacitated

Last Name: _____ First Name: _____ Middle Name: _____
Jr., Etc.: _____ Maiden Name: _____ Alias: _____
Date of Birth: _____ Social Security Number: _____
Sex: Male Female Race: _____ Height: _____ Weight: _____ Hair: _____ Eyes: _____
Address:

Physicians Certification (302 Commitment Requirement)

Physician Certifying Necessity of Involuntary Commitment:
(Required in accordance with Section 6105(c)(4) of the Uniform Firearms Act) *(Print Name)* *(Signature)*

Hospital/Facility Providing Treatment:

Address:

Notification By: *(Please Print Name, Address, Area Code, and Phone Number of Agency or County Court)*

MH/MR Administrator/Review Officer: Phone: _____

Judge's Authorization of Commitment, Case Number & Order Date (303 & 304 Requirement)

Judge:

Case # 20 -X Date of Court Order:

Signature of Notifying Official: _____ Date: _____

Notification of Physician's Determination That No Severe Mental Disability Exists

The physician shall provide signed confirmation of the lack of severe mental disability following the initial examination under Section 302(b) of the Mental Health Procedures Act and pursuant to the Uniform Firearms Act, Section 6111.1 (g)(3). Notice shall be transmitted by physician to the Pennsylvania State Police through the county mental health and mental retardation administrator or mental health review officer.

Name of Physician *(Please Print)*:

Signature of Physician: _____ Date: _____

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IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NOTICE OF RIGHT TO APPEAL
Pursuant to 20 PA C.S.A. §5512.1(H)

In Re: _____, Incapacitated

Case # 20 -X

TO: _____, Respondent:

1. You have been found to be an Incapacitated Person, and a (Limited) (Plenary) Guardian has been appointed for your (Estate) (Person). The Guardian is _____ for your Estate and _____ for your Person.
2. The powers of the Guardian are set forth in the Final Order dated _____, a copy of which accompanies this notice.
3. If you wish to appeal from that Decree, you have thirty (30) days from the date of the Decree to do so. If you choose to appeal, you must file a Notice of Appeal with the **Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404**. The Appeal will be sent to the Superior Court of Pennsylvania. You should obtain a copy of the Pennsylvania Rules of Appellate Procedure as a guide. The Clerk of the Orphans' Court can provide your with the address of the Superior Court.
4. You may also petition the Court at any time to modify or terminate the Guardianship, on the grounds that your situation has changed enough to justify a change in or termination of my Order.
5. You have the right to be represented by an Attorney if you file a Post-Trial Petition or an appeal. If you need the assistance of counsel and cannot afford an Attorney, please inform the Court and an Attorney will be appointed to represent you free of charge.

Judge

I acknowledge being advised of the above rights.

Respondent

OR

I, _____, attest that I read this notice in person to
(Respondent) on _____.

Signature

This form must be filed with the Clerk of the Orphans' Court **within 10 days** of the respondent's receipt of the Final Order
Clerk of the Orphans' Court • PO Box 311 • Norristown, PA 19404-0311

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IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY,
PENNSYLVANIA ORPHANS' COURT DIVISION

20 -X

ESTATE OF [_____],
AN ALLEGED INCAPACITATED PERSON

**PETITION FOR ADJUDICATION OF INCAPACITY
AND APPOINTMENT OF EMERGENCY AND PLENARY
GUARDIANS OF THE PERSON AND ESTATE**

(Pursuant to 20 PA C.S.A. §5511 and §5513)

I, _____, (“*Petitioner*”), petition the Court to appoint Emergency and Plenary Permanent Guardian(s) of the Person and Estate of _____, the “*Alleged Incapacitated Person.*”

1. I am a person interested in the welfare of the Alleged Incapacitated Person.
2. The Alleged Incapacitated Person currently resides at _____
(*address*) and has a mailing address (*if different*) of _____
Because the Alleged Incapacitated Person resides in Montgomery County, Pennsylvania, this Court has jurisdiction pursuant to 20 PA C.S.A. §5512(a).
3. The birthdate of the Alleged Incapacitated Person is: _____
4. The Alleged Incapacitated Person has the following spouse, parents, adult children and other adult heirs: (*list name and address of each known heir; write “none” or “unknown” if appropriate*)

5. The following residential care facility or other services providers are currently providing services to the Alleged Incapacitated Person:

6. The Alleged Incapacitated Person’s Income and Assets are as follows:
(*list all known property, such as a residence, bank accounts, investment accounts as well as all known income including Social Security, etc., along with value of each*)

7. The Alleged Incapacitated Person’s longtime physician is Dr. _____
(*name, address and phone*).
8. CHECK the appropriate paragraphs:
I am unaware of any Powers of Attorney, Health Care Powers of Attorney or Advance Health Care Directives which have been executed by the Alleged Incapacitated Person.
The Alleged Incapacitated Person signed a Power of Attorney on the filing date _____ (*date*)
naming as agent _____ . A copy is attached as Exhibit _____ .
The Alleged Incapacitated Person signed a Health Care Power of Attorney on _____ (*date*)
naming as agent _____ . A copy is attached as Exhibit _____ .
The Alleged Incapacitated Person signed a Health Care Directive and/or Living Will on _____ (*date*)
A copy is attached as Exhibit _____ .
9. The Alleged Incapacitated Person has been diagnosed with (*insert conditions as diagnosed by a physician*):

and as a result s/he requires (*insert type of care or assistance required or nature of impairment*):

10. As a result of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to attend to or participate in the following activities and responsibilities:
11. Because of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to manage his/her financial affairs and is unable to make and communicate any decisions relating to those affairs and appointment of a Plenary Permanent Guardian of the Estate is necessary.
12. Because of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to make or communicate decisions concerning his/her person, residence, or medical care and appointment of a Plenary Permanent Guardian of the Person is necessary.
13. I have taken the following steps to consider alternatives to Guardianship:

However, the condition of the Alleged Incapacitated Person requires Plenary Guardianships for both his/her Person and Estate and no less restrictive alternative is available or adequate.
14. The severity of his/her condition requires that an Emergency Guardian be appointed to manage the Alleged Incapacitated Person's Estate and that an Emergency Guardian of his/her person be appointed to make medical and residential decisions.
15. An Emergency Guardian should be appointed because if no one is appointed the Alleged Incapacitated Person is likely to suffer irreparable injury to his/her person and/or his/her property. The reason an Emergency Guardian is needed is *(fill in reasons emergency action is needed)*:
16. The Proposed Emergency and Plenary Guardian of the Person is *(name and address of guardian)*:
17. The Proposed Emergency and Plenary Guardian of the Estate is *(name and address of guardian)*:
18. The Proposed Guardian(s) has/have no interests in conflict with the alleged incapacitated and agreed to become the Guardian if the Court approves.
19. No Court has ever assumed jurisdiction in any proceeding to determine the capacity of the Alleged Incapacitated Person and no person has previously been appointed Guardian of the Estate or Person of the Alleged Incapacitated Person.

WHEREFORE, Petitioner respectfully requests this Honorable Court issue a Citation directed to *(name)*, _____, the Alleged Incapacitated Person, to demonstrate whether or not he/she should be adjudged to be a totally Incapacitated Person and have Emergency and Plenary Guardians appointed, and whether *(name of Proposed Guardian(s))* should be appointed Emergency and Plenary Permanent Guardian of his/her Person and Estate.

Respectfully submitted,

Signature of Petitioner or Attorney

Name:

Address:

Telephone Number:

Email Address:

VERIFICATION

(Please choose one paragraph and cross out the other)

- I, [REDACTED], verify that I am the Petitioner filing this Petition, or an authorized representative of the Petitioner, familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.
- I, [REDACTED], verify that I am not the Petitioner filing this Petition, but that I am familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. The Petitioner is unavailable to sign this Verification because:
[REDACTED]

I make these statements subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.

Signature of Petitioner or Attorney

Name:

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20 -X

ESTATE OF []
AN ALLEGED INCAPACITATED PERSON]

**PETITION FOR ADJUDICATION OF INCAPACITY
AND APPOINTMENT OF PLENARY GUARDIANS
OF THE PERSON AND ESTATE**
(Pursuant to 20 PA C.S.A. §5511)

I, _____, ("*Petitioner*"), petition the Court to appoint Plenary Permanent Guardian(s)
of the Person and Estate of _____, the "*Alleged Incapacitated Person.*"

1. I am a person interested in the welfare of the Alleged Incapacitated Person.
2. The Alleged Incapacitated Person currently resides at _____
(*address*) and has a mailing address (*if different*) of _____
Because the Alleged Incapacitated Person resides in Montgomery County, Pennsylvania, this Court has jurisdiction pursuant to 20 PA C.S.A. §5512(a).
3. The birthdate of the Alleged Incapacitated Person is: _____
4. The Alleged Incapacitated Person has the following spouse, parents, adult children and other adult heirs: (*list name and address of each known heir; write "none" or "unknown" if appropriate*)

5. The following residential care facility or other services providers are currently providing services to the Alleged Incapacitated Person:

6. The Alleged Incapacitated Person's Income and Assets are as follows:
(*list all known property, such as a residence, bank accounts, investment accounts as well as all known income including Social Security, etc., along with value of each*)

7. The Alleged Incapacitated Person's longtime physician is Dr. _____
(*name, address and phone*).
8. CHECK the appropriate paragraphs:
I am unaware of any Powers of Attorney, Health Care Powers of Attorney or Advance Health Care Directives which have been executed by the Alleged Incapacitated Person.
The Alleged Incapacitated Person signed a Power of Attorney on the filing date _____ (*date*)
naming as agent _____ . A copy is attached as Exhibit _____ .
The Alleged Incapacitated Person signed a Health Care Power of Attorney on _____ (*date*)
naming as agent _____ . A copy is attached as Exhibit _____ .
The Alleged Incapacitated Person signed a Health Care Directive and/or Living Will on _____ (*date*)
A copy is attached as Exhibit _____ .
9. The Alleged Incapacitated Person has been diagnosed with (*insert conditions as diagnosed by a physician*):

and as a result s/he requires (*insert type of care or assistance required or nature of impairment*):

10. As a result of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to attend to or participate in the following activities and responsibilities:
11. Because of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to manage his/her financial affairs and is unable to make and communicate any decisions relating to those affairs and appointment of a Plenary Permanent Guardian of the Estate is necessary.
12. Because of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to make or communicate decisions concerning his/her person, residence, or medical care and appointment of a Plenary Permanent Guardian of the Person is necessary.
13. I have taken the following steps to consider alternatives to Guardianship:

 However, the condition of the Alleged Incapacitated Person requires Plenary Guardianships for both his/her Person and Estate and no less restrictive alternative is available or adequate.
14. The Proposed Plenary Guardian of the Person is *(name and address of guardian)*:
15. The Proposed Plenary Guardian of the Estate is *(name and address of guardian)*:
16. The Proposed Guardian(s) has/have no interests in conflict with the Alleged Incapacitated Person and agreed to become the Guardian if the Court approves.
17. No Court has ever assumed jurisdiction in any proceeding to determine the capacity of the Alleged Incapacitated Person and no person has previously been appointed Guardian of the Estate or Person of the Alleged Incapacitated Person.

WHEREFORE, Petitioner respectfully requests this Honorable Court issue a Citation directed to *(name)*, _____, the Alleged Incapacitated Person, to demonstrate whether or not he/she should be adjudged to be a totally incapacitated person and have Plenary Guardians appointed, and whether *(name of Proposed Guardian(s))* should be appointed Plenary Permanent Guardian of his/her Person and Estate.

Respectfully submitted,

Signature of Petitioner or Attorney

Name:

Address:

Telephone Number:

Email Address:

VERIFICATION

(Please choose one paragraph and cross out the other)

- I, _____, verify that I am the Petitioner filing this Petition, or an authorized representative of the Petitioner, familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.
- I, _____, verify that I am not the Petitioner filing this Petition, but that I am familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. The Petitioner is unavailable to sign this Verification because:

I make these statements subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.

Signature of Petitioner or Attorney

Name:

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20 -X

ESTATE OF [_____],
AN ALLEGED INCAPACITATED PERSON

**PETITION FOR ADJUDICATION OF INCAPACITY
AND APPOINTMENT OF LIMITED GUARDIANS
OF THE PERSON AND ESTATE**
(Pursuant to 20 PA C.S.A. §5511)

I, _____, ("*Petitioner*"), petition the Court to appoint Limited Permanent Guardian(s)
of the Person and Estate of _____, the "Alleged Incapacitated Person."

1. I am a person interested in the welfare of the Alleged Incapacitated Person.
2. The Alleged Incapacitated Person currently resides at _____
(*address*) and has a mailing address (*if different*) of _____
Because the Alleged Incapacitated Person resides in Montgomery County, Pennsylvania, this Court has jurisdiction pursuant to 20 PA C.S.A. §5512(a).
3. The birthdate of the Alleged Incapacitated Person is: _____
4. The Alleged Incapacitated Person has the following spouse, parents, adult children and other adult heirs: (*list name and address of each known heir; write "none" or "unknown" if appropriate*)

5. The following residential care facility or other services providers are currently providing services to the Alleged Incapacitated Person:

6. The Alleged Incapacitated Person's Income and Assets are as follows:
(*list all known property, such as a residence, bank accounts, investment accounts as well as all known income including Social Security, etc., along with value of each*)

7. The Alleged Incapacitated Person's longtime physician is Dr. _____
(*name, address and phone*).
8. CHECK the appropriate paragraphs:
I am unaware of any Powers of Attorney, Health Care Powers of Attorney or Advance Health Care Directives which have been executed by the Alleged Incapacitated Person.
The Alleged Incapacitated Person signed a Power of Attorney on the filing date _____ (*date*)
naming as agent _____ . A copy is attached as Exhibit _____ .
The Alleged Incapacitated Person signed a Health Care Power of Attorney on _____ (*date*)
naming as agent _____ . A copy is attached as Exhibit _____ .
The Alleged Incapacitated Person signed a Health Care Directive and/or Living Will on _____ (*date*)
A copy is attached as Exhibit _____ .
9. The Alleged Incapacitated Person has been diagnosed with (*insert conditions as diagnosed by a physician*):

and as a result he/she requires (*insert type of care or assistance required or nature of impairment*):

10. As a result of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to attend to or participate in the following activities and responsibilities:

11. Because of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to manage his/her financial affairs and is unable to make and communicate any decisions relating to those affairs and appointment of a Limited Permanent Guardian of the Estate is necessary, provided that the duties and responsibilities of the Limited Guardian of the Estate should be as follows:

12. Because of the conditions mentioned in Paragraph 9 above, the Alleged Incapacitated Person is unable to make or communicate decisions concerning his/her person, residence, or medical care and appointment of a Limited Permanent Guardian of the Person is necessary, provided that the duties and responsibilities of the Limited Guardian of the Person should be as follows:

13. I have taken the following steps to consider alternatives to Guardianship:

 However, the condition of the Alleged Incapacitated Person requires Limited Guardianships for both his/her person and estate and no less restrictive alternative is available or adequate.

14. The proposed Limited Guardian of the Person is *(name and address of guardian)*:

15. The proposed Limited Guardian of the Estate is *(name and address of guardian)*:

16. The Proposed Guardian(s) has/have no interests in conflict with the alleged incapacitated and agreed to become Guardian if the Court approves.

17. No Court has ever assumed jurisdiction in any proceeding to determine the capacity of the Alleged Incapacitated Person and no person has previously been appointed Guardian of the Estate or Person of the Alleged Incapacitated Person.

WHEREFORE, Petitioner respectfully requests this Honorable Court issue a Citation directed to *(name)*, _____, the Alleged Incapacitated Person, to demonstrate whether or not he/she should be adjudged to be a totally Incapacitated Person and have Limited Guardians appointed, and whether *(name of Proposed Guardian(s))* should be appointed Limited Permanent Guardian of his/her Person and Estate.

Respectfully submitted,

Signature of Petitioner or Attorney

Name:

Address:

Telephone Number:

Email Address:

VERIFICATION

(Please choose one paragraph and cross out the other)

- I, _____, verify that I am the Petitioner filing this Petition, or an authorized representative of the Petitioner, familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.
- I, _____, verify that I am not the Petitioner filing this Petition, but that I am familiar with the facts alleged in the Petition, and that the facts alleged are true and correct to the best of my knowledge and belief. The Petitioner is unavailable to sign this Verification because:

I make these statements subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.

Signature of Petitioner or Attorney

Name:

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IN THE COURT OF COMMON PLEAS MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

20 -X

ESTATE OF [] ,
AN ALLEGED INCAPACITATED PERSON

PETITION TO APPOINT SUCCESSOR GUARDIANS

I, _____, ("*Petitioner*"), hereby request that the Court appoint a successor guardian for _____, who was adjudged to be an Incapacitated Person by Final Decree dated _____. My relationship to the Incapacitated Person is as follows:

- Self
- Court-Appointed Guardian
- Relative (*state relationship*)
- Other (*state relationship*)

1. The current Court-appointed Guardian of the Person or Guardian of the Estate, _____ is unable to continue to serve because:
2. The following individual or individuals have qualified to serve and has/have signed a Consent to serve as follows:

Guardian of the Person

(*Name*)

(*Address*)

(*Phone number*)

(*Email address*)

Guardian of the Estate

(*Name*)

(*Address*)

(*Phone number*)

(*Email address*)

3. On the date indicated below, I am sending a copy of this Petition to appoint a substitute Guardian via first class mail to the following interested parties, including the current Guardian of the Person and the Guardian of the Estate and the Proposed Guardian of the Person and Guardian of the Estate, the Incapacitated Person, any Counsel for the Incapacitated Person, and the other family members and interested parties:

I certify that the above statements are true and correct to the best of my knowledge and are made subject to the penalties of 18 PA C.S.A. §4904 relating to unsworn falsification to authorities.

Signature

Name:

Address:

Telephone Number:

Email Address:

Date:

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION

In the matter of:

An Incapacitated Person
[Respondent]

Case No: _____

Uniform Adult Guardianship and
Protective Proceedings
Jurisdictional Act

Petition for Transfer of Guardianship to Another State

Name of Incapacitated Person

Address

Date of Birth

City, State, Zip

Name of Guardian/ Co-Guardian

Address

Date(s) of Appointment as Guardian(s)

City, State, Zip

I _____, hereby petition the Court of Common Pleas of
Montgomery County, Pennsylvania, Orphan's Court Division to issue an order provisionally
granting a transfer of this guardianship matter from Montgomery County jurisdiction to:

Location transferred: _____
County/ Court State

The reason for transfer: _____

Please feel free to attach further documentation

Signature

Date

Additionally, provide the Name(s), Address(es) and proof of Notice for all other parties involved.
*Notice must be given to all persons entitled to notice of a petition for the appointment of a
guardian.*

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#20 IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

CASE #: 2014- xxxx

ESTATE OF [*NAME*]
AN ALLEGED INCAPACITATED PERSON

PETITION TO WAIVE FILING FEES

(Pursuant to 20 PA.C.S.A 5511)

1. I, _____ (your name) am requesting a waiver of filing fees for the
Petition for Adjudication of Incapacity and Appointment of Guardian for
_____ (name of Alleged Incapacitated Person).

2. I am a (check as many as apply):

_____ family member
_____ friend
_____ neighbor
_____ doctor
_____ other professional working with Alleged Incapacitated Person
_____ other (please specify) _____

3. Availability of assets: _____ (name of Alleged Incapacitated Person)
_____ has assets
_____ does not have assets
_____ I do not know if he/she has assets that are available to pay the filing fee.

4. I am requesting a waiver of the fee because (please insert detailed reason):

I hereby certify under pain of perjury that the statements above are correct to the best of my
knowledge.

Signature

Date

Name

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
CASE #: 2014- xxxx

ESTATE OF [*NAME*]
AN ALLEGED INCAPACITATED PERSON

ORDER WAIVING FILING FEES

AND NOW, this _____ day of _____, 201_, it is hereby **ORDERED** and **DECREED** that the all filing fees due the Clerk of the Orphans' Court of Montgomery County for the filing of all reports and Petitions of the Guardian of the Estate and Guardian of the Person of _____, an incapacitated person, are hereby **WAIVED**.

BY THE COURT:

[Name], JUDGE

Copy of above mailed to:
[] (xxx-xxx-xxxx)

Secretary

APPENDIX II:
Checklists/Sample Colloquies

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MONTGOMERY COUNTY COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

CHECKLIST FOR GUARDIANSHIP PROCEEDINGS

Alleged Incapacitated Person's (AIP's) Name:

Petitioner's Name:

Attorney:

Attorney/Pet. Phone Number:

Case # 20 -X

Attorney's/Petitioner's Email:

1. Petition for Adjudication of Incapacity must contain:

a. All of the following are required per 20 PA C.S.A. 5511(e) & PA O.C. Rule 14.2:

- Name, age, residence and mailing address of AIP
- Name and address of spouse, parents and adult heirs of AIP
- Name and address of residential facility
- Name and address of Proposed Guardian(s)
- Statement that Proposed Guardian(s) has/have no interest adverse to AIP
- Name and address of any individual appointed under a Power of Attorney or Health Care Power of Attorney
- Description of functional limitations and physical and mental condition of AIP
- Steps taken to consider less restrictive alternatives to guardianship
- Specific areas of incapacity for which Guardian is to be assigned powers
- Any areas of capacity for which AIP should retain authority
- Qualifications of Proposed Guardian
- Gross Value of Estate (*assets*) of AIP and monthly income of AIP
- Information about whether a pre-paid Burial Account exists
- Statement that no other Guardian has been appointed and no other Court has assumed jurisdiction over this AIP

b. Verification signed by Petitioner

c. Consent signed by Proposed Guardian(s)

d. Pennsylvania State Police criminal record check

e. Out-of-state criminal record check if guardian has lived outside of Pennsylvania in last 5 years

f. Guardianship Certification (required for professional guardians only)

g. Attorney entry of appearance if applicable

h. Forms:

- Completed Expert Report
- Doctor's Affidavit if AIP cannot attend hearing
- Form SP-4-131 (*Notice of no firearms*)
- Proposed Orders

2. Venue (20 PA C.S.A. §5512):

- AIP is domiciled in or resides in Montgomery County or resides in a long-term care facility within Montgomery County.
- AIP is not a resident of Montgomery County, but is a beneficiary of an Estate or Trust in Montgomery County or has Real Property in Montgomery County.

3. Other items due at least 7 days before scheduled Plenary Hearing:

Forms:

- Affidavit of Service upon Alleged Incapacitated Person
Service of the Petition, Citation and Notice must be made by Personal Service upon the Alleged Incapacitated Person, at least 20 days before the scheduled hearing, and the contents of the Petition must be explained to the maximum extent possible in terms the person is most likely to understand.
- Affidavit of Service upon adult heirs, care providers and agents under any Power of Attorney (*as the Court may direct, generally by first class mail at least 20 days before hearing*)
- Notice of Retention/Non-Retention of Counsel for AIP

CHECKLIST OF REQUIRED AVERMENTS FOR PETITION FOR ADJUDICATION OF INCAPACITY

Pa. O.C. Rules 14.2(a) and (b)

- 1) The name, age, address (and if different, mailing address), and relationship to the AIP of the petitioner.
- 2) The name, age, and address (and if different, mailing address), of the AIP.
- 3) The names, addresses, and relationship to the AIP of all interested parties including:
 - a) All presumptive heirs (close relatives including the spouse, children, parents, and other close relations such as siblings) of the AIP (it should be stated whether these individuals are *sui juris* or non *sui juris*).
 - b) Any person or institution providing residential services to the AIP.
 - c) Any other service provider. (It should also be listed what the nature of the service provided is.)
 - d) Any person designated to act as agent of the AIP, in writing, under either an executed healthcare power of attorney, a power of attorney, or any other writing giving such authorization.
 - e) Any person the petitioner proposes should receive notice of the filing of guardianship reports.
 - f) The person or entity the petitioner seeks to nominate as guardian. The proposed guardian's qualifications and relationship to the AIP should be listed as well. If the guardian is an entity, the name of the person who will have direct responsibility over the AIP, as well as the name of the organization, should be given.
- 4) The reason the guardianship is sought. A description of functional limitations, as well as the physical and mental state of the AIP should be included.
- 5) Whether the petitioner requests the appointment of:
 - a) A limited or plenary guardian of the estate;
 - b) A limited or plenary guardian of the person; or
 - c) Co-guardianship in any capacity.
- 6) If the guardianship being sought is limited or not plenary in nature, the areas of incapacity over which a guardian should be given authority need to be specified.
- 7) If a guardianship of the estate is sought (whether limited or plenary), the petition should include:
 - a) The gross value of the assets of the AIP to the extent known by the petitioner;

- b) The net income of the AIP to the extent known to the petitioner; and
 - c) Whether there exists a prepaid burial account to the extent known to the petitioner.
- 8) If a prior incapacity hearing concerning the AIP has occurred. If so the name of the court, date of the hearing, and that court's findings (and whether or not the court's ruling is still in effect) should be listed.
 - 9) An explanation of the efforts made to employ a less restrictive alternative rather than seeking appointment of a guardian and why these alternatives will not or did not work.
 - 10) The likelihood of improvement with regard to the mental and physical condition of the AIP.
 - 11) The veteran status of the AIP and whether the AIP is receiving benefits from the USVA on behalf of themselves or through a spouse.
 - 12) A representation that each proposed guardian has no adverse relationship to the AIP.
 - 13) The availability and ability of the proposed guardian to visit or confer with the AIP.
 - 14) If the proposed guardian has completed any guardianship training the following information should be included:
 - a) Name of the program;
 - b) Length of the program; and
 - c) The date of completion.
 - 15) Whether the proposed guardian is a certified guardian and the current status of any certification and or any disciplinary action against the guardian.
 - 16) If the guardian is or was in any other guardianships. If so, the number of the active guardianships they are involved in should be listed.
 - 17) Whether petitioner seeks to nominate different guardians for the person and the estate.

CHECKLIST OF REQUIRED EXHIBITS TO PETITION FOR ADJUDICATION OF INCAPACITY AND APPOINTMENT OF GUARDIANS

Pa. O.C. Rule 14.2(c)

- 1) A verification by the petitioner, as with any petition.
- 2) A consent to serve signed by each proposed guardian.
- 3) A proposed Preliminary Decree with Citation.
- 4) A proposed Final Decree.
- 5) All durable powers of attorney and health care powers of attorney, if available to the petitioner.
- 6) The certified response to Pennsylvania State Police criminal record check for each proposed guardian.
- 7) If the guardian has resided outside of Pennsylvania within the five years before the petition was filed, and was over the age of 18 at such time, a certified criminal record check from the state or states where the guardian resided.
- 8) A consent to serve as guardian signed by any proposed guardian or guardians.

Additional documents may be filed with the petition, or presented to the court before or at the hearing:

- 1) Expert report signed by a health care provider attesting to the provider's opinion regarding the capacity and functional limitations of the AIP. (See expert report form G-6 in Appendix).
- 2) If the AIP is not expected to attend the hearing, the court should receive an affidavit of a physician or psychologist stating that attendance at the hearing by the AIP may be harmful to his or her physical or mental condition.
- 3) A proposed Form SP-4-131 Firearms Notice is required to be filed with the Clerk of the Orphans' Court so that the Clerk may file it with the State Police following any order determining incapacity.
- 4) Affidavits of Service of the required notices (discussed in CHAPTER FOUR).

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SAMPLE COLLOQUY FOR PROPOSED GUARDIAN OF PERSON AND ESTATE

- 1) What is your educational background?
- 2) What is your mailing address? Email address? Daytime telephone number?
- 3) How are you employed?
- 4) How long have you known the IP and how well?
- 5) Have you ever discussed with the IP his or her wishes regarding end of life care? Do you have knowledge of what he or she would want with respect to medical care?
- 6) Do you have a criminal record? What were the charges and when? (Provide copy of state and FBI criminal background checks).
- 7) Have you ever filed for personal bankruptcy? When and where?
- 8) Do you have any business or financial relationship with the IP? What is the nature of it?
- 9) Do you depend upon the IP's income to pay household expenses?
- 10) Do you own property jointly with the IP, or do you live in property owned by the IP?
- 11) Do you have any conflict of interest with the IP?
- 12) What education, training, or experience do you have, if any, related to caring for an incapacitated adult?
- 13) What education, training, or experience do you have, if any, related to making medical decisions?
- 14) What education, training, or experience do you have, if any, related to applying for medical assistance benefits, veterans benefits, and other financial benefits?
- 15) What education, training, or experience do you have, if any, in managing another person's funds in a fiduciary capacity?
- 16) Do you understand that you must keep accurate financial records and keep the IP's assets separate from your own?
- 17) Do you understand that you may use the IP's assets only for his or her benefit, and that you may expend income for his or her care?
- 18) Do you understand that you may not use the IP's assets for any other person's benefit without court approval?

- 19) Do you understand the difference between principal and income? *Family member guardians probably will need to have this explained to them.*
- 20) Do you understand that you may only spend income, but that before you spend any principal or pay any attorneys or professional fees or guardian's commissions you must seek court approval?
- 21) Are you aware that you must file an inventory of the IP's property within three months and an annual report each year?
- 22) Are you a National Certified Guardian from the Center for Guardian Certification? Please provide a copy of your certificate.
- 23) For how many incapacitated individuals are you currently appointed as guardian? How do you manage your caseload so that you are able to meet the needs of each individual?

CHECKLIST: CONDUCTING A HEARING ON A PETITION FOR ADJUDICATION OF INCAPACITY AND APPOINTMENT OF GUARDIANS

- 1) Does the evidence demonstrate, by clear and convincing evidence, partial or total incapacity?
- 2) Has the petitioner demonstrated by clear and convincing evidence that there is no adequate restrictive alternative to the appointment of a guardian? If the petitioner or counsel for the AIP fails to address this subject, the court should inquire of them.
- 3) Is a Limited or Plenary Guardian required?
- 4) Who should be appointed as Guardian of the Person or Guardian of the Estate?
- 5) Should a bond be required or waived?

EVIDENTIARY QUESTIONS

To reiterate, Section 5512.1(a) requires the court to examine the evidence and make specific findings of fact, considered above. To assist the court in formulating these findings of fact and conclusions of law, the petition must state "a description of the functional limitations and physical and mental condition of the AIP; the steps taken to find less restrictive alternatives; [and] the specific areas of incapacity over which it is requested that the guardian be assigned powers..."¹ In addition, clear and convincing evidence of all averments contained in the petition must be established at the evidentiary hearing. Accordingly, counsel- or the court if necessary- must ask questions related to the following:

- 1) What functional limitations does the AIP have?
- 2) What physical limitations does the AIP have?
- 3) What mental limitations does the AIP have?
- 4) What steps have been taken and what steps are being proposed so as to impose the least restrictive alternatives or limitations upon the AIP?
- 5) If a limited guardian is requested, over what specific areas of incapacity should the guardian of the **person** have authority?
- 6) If a limited guardian is requested, over what specific areas of incapacity should the guardian of the **estate** have authority?

¹ 20 Pa.C.S. § 5511(e).

- 7) What conditions or disabilities does the AIP have which impairs their ability to make decisions? (Mental problems/impairments)
- 8) What conditions or disabilities does this AIP have which impairs their ability to communicate decisions? (Physical problems/impairments)
- 9) Is the AIP oriented as to time or place?
- 10) Does the AIP recognize their family and other persons the AIP should recognize?
- 11) Are the AIP's discussions understandable and related to the matter being discussed?
- 12) Could the AIP satisfactorily conclude the purchase of an item in a retail store?
- 13) Could the AIP satisfactorily pay bills using a checking account and keep accurate records?
- 14) What family members, friends or other supports have assisted the AIP in making decisions or performing any functions or responsibilities?
- 15) Are there any family members or friends presently capable and willing to assist the AIP to perform any functions or responsibilities?
- 16) Can the AIP be maintained in their own home? If no, state why not, i.e., is it the finances and/or the physical or mental limitations which make this a practical impossibility?
- 17) What type of care does the AIP require?
- 18) Where is the AIP currently living? If in a care facility, what type of care facility is it?

FINDING INCAPACITY CHECKLIST

1. Expert Evaluator
 - a. Qualifications of evaluator.
 - b. Nature of evaluation.
 - c. Testimony or Expert Report (contested hearing or stipulation to report).

2. Findings of Fact
 - a. The nature of any condition or disability which impairs the AIP's capacity to make and communicate decisions.
 - b. The extent of the AIP's capacity to make and communicate decisions.
 - c. Specific areas or functions over which the AIP has capacity to make own decisions.

3. Conclusions of Law
 - a. If petitioner fails to meet their burden of proof, the petition is dismissed.
 - b. If the burden of proof is met and total or partial incapacity is established, then the court next turns to the questions of whether there is an adequate less restrictive alternative to guardianship.
 - c. If there is no less restrictive alternative, the court determines, based upon the nature and extent of the incapacity proved, whether to appoint a plenary or limited guardian
 - d. Next the court considers the selection of an appropriate guardian[s].

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PRESIDING OVER A GUARDIANSHIP HEARING: SAMPLE QUESTIONS

At the commencement of the evidentiary hearing, counsel should be prepared to respond to the following questions posed by the court. The attorney's responses to the below questions, as well as any introductory remarks made by the attorneys, will not be regarded as evidence, but will be utilized only to assist the court in gaining an understanding of the evidence that will be presented.

1. Will the attorney(s) place their names on the record and also indicate on the record whom you represent?
2. Is anyone contesting that the AIP has a condition that causes an incapacity to make and communicate decisions and effectuate those decisions?
3. Do the parties stipulate to the expert report? Does any party wish to examine the expert? Does the AIP wish to request an independent evaluation?
4. Is anyone suggesting there is a less restrictive alternative or contesting the need for a guardian?
5. Is the petitioner requesting a plenary or limited guardian of the PERSON?
 - (a) Who is the petitioner proposing to serve as (plenary/limited) guardian of the PERSON?
 - (b) Is anyone contesting this proposal?
 - (c) What are this person's qualifications to be such a guardian of the PERSON?
6. Is the petitioner requesting a plenary or limited guardian of the ESTATE?
 - (a) Who is the petitioner proposing to serve as (plenary/limited) guardian of the ESTATE?
 - (b) Is anyone contesting this proposal?
 - (c) What are this person's qualifications to be such a guardian of the ESTATE?
7. Has the AIP been personally served with petition, notice and citation and has the notice been read to them? Has an affidavit of service been filed?
8. Have you given notice to the people who would be intestate heirs of the AIP? Have you heard in response to this notice from any such person who wishes to participate in this hearing?

9. Is the AIP present at this hearing? If not, what evidence will be presented to establish that the presence of the AIP would be harmful or that they are out of the Commonwealth?
10. What witnesses will be presented to establish that the AIP is an incapacitated person?
11. What is the gross value of the estate?
12. What is the net income from all sources?
13. Has the AIP signed a durable power-of-attorney? Who is appointed as agent under the durable power of attorney?
14. Has the AIP signed a health care power of attorney or health care directive?

APPENDIX III:
Bill of Rights

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The following information should be provided to the Alleged Incapacitated Person, as well as any family members or concerned parties, at the time the petition is served.

Bill of Rights of An Alleged Incapacitated Person

A. Before a Guardianship Hearing occurs, YOU HAVE THE RIGHT TO:

1. Nominate in writing the person or persons you would like to serve as your guardian.¹
2. Employ less restrictive alternatives to guardianship, where appropriate, including:²
 - a. Creating a Power of Attorney;
 - b. Executing a Living Will;
 - c. Designating a representative payee to manage your benefits (e.g., Social Security); and
 - d. Requesting services through Area Agencies on Aging.
3. Receive Notice:³
 - a. You must be notified that a guardianship petition has been filed at least 20 days prior to the hearing;
 - b. You must be provided with the hearing date;
 - c. The petition must be given to you and explained to you in person; and
 - d. You should be notified of your rights that can be lost if a guardian is appointed for you.

B. YOU HAVE THE RIGHT TO challenge the appointment of a guardian, and:

1. If you do not have or cannot afford an attorney, you may request that the court appoint an attorney for you;³
2. You have a right to be present at all hearings, unless a physician or licensed psychologist states that such attendance would be harmful to you;⁴
3. If you wish to attend the hearing but are not able to attend, you may request a hearing at your residence;³
4. You may ask to have an independent evaluation of your alleged incapacities;⁵
5. You and/or your attorney may cross-examine witnesses;⁶
6. You may request that the hearing be closed to the public and kept private;³
7. You may request a trial by jury;³ and
8. You may appeal the rulings of the court.⁷

C. If a guardian is appointed, YOU HAVE THE RIGHT TO:

1. Receive prudent financial management of your property to the extent possible;
2. Have access to training, education, medical, psychiatric, and social services;
3. Have access to the courts;
4. Receive visitors and communicate with others;
5. Receive notice of all proceedings related to determination of capacity and guardianship; and

YOU ARE ENTITLED TO:

All of the rights granted by law as a resident in a setting such as a nursing home, personal care home, assisted living residence, or hospital.

D. Unless the appointment is for a "Limited Guardian," THE FOLLOWING RIGHTS WILL BE RESTRICTED BY THE COURT:⁸

1. To enter into a contract;
2. To sue and defend lawsuits;
3. To apply for government benefits;
4. To manage property or to make any gift or disposition of property;
5. To determine your residence;
6. To consent to medical treatment; and
7. To make decisions about your social environment or other social aspects of life.

1. 20 Pa.C.S. § 5604(c)(2), 5511(f).

2. 20 Pa.C.S. § 5502, 5511(e), 5518.

3. 20 Pa.C.S. § 5511(a).

4. 20 Pa.C.S. § 5511(a)(1)-(2).

5. 20 Pa.C.S. § 5511(d).

6. 20 Pa.C.S. § 5518.1.

7. 20 Pa.C.S. § 5512.1(h).

8. 20 Pa.C.S. § 5512.1(g).

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The following information should be provided to the Guardian of the Incapacitated Person at the time of the appointment AND to the Incapacitated Person, as well as any family members or concerned parties.

Bill of Rights of An Incapacitated Person

An Incapacitated Person under Guardianship HAS THE RIGHT TO:¹

1. Have his or her expressed wishes and preferences respected to the greatest possible extent;²
2. Develop or regain, to the maximum extent possible, the capacity to manage his or her personal affairs by petitioning the court for a review hearing;³
3. Have an annual review of the guardianship by the court via the required annual guardianship report filed by the guardian;⁴
4. Appeal the court's determination of incapacity;⁵
5. Petition the court to modify or terminate the guardianship;⁵
6. Have his or her intentions, whether testamentary (relating to a will) or inter vivos (relating to a gift) regarding his or her estate planning considered by the court;⁶

In Limited Guardianship Matters, A Partially Incapacitated Person Shall:

1. Retain all legal rights except those designated to the guardian by court order;⁷
2. Be assured that training, education, medical and psychological services, and social and vocational opportunities will be available, as appropriate, to develop or enhance maximum self-reliance and independence.⁸

1. For purposes of this Report, the duties and responsibilities of the court and of the appointed guardian which are set forth in Pennsylvania statutes are construed by the Pennsylvania Elder Law Task Force to codify the rights of the

incapacitated person under guardianship. Additional rights may be provided, in addition to those listed herein.

2. 20 Pa.C.S. § 5511(a).
3. 20 Pa.C.S. § 5512.2.
4. 20 Pa.C.S. § 5521(c).

5. 20 Pa.C.S. § 5512.1(h).

6. 20 Pa.C.S. § 5536 (b).

7. 20 Pa.C.S. § 5512.1(g).

8. 20 Pa.C.S. § 5512.1(b)(3).

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ADDITIONAL RESOURCES

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I. Links to Statutes and Rules

Incapacitated Person Act, 20 Pa.C.S.A. § 5501 et seq. (Chapter 55):

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&tli=20&div=0&chpt=55>.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, 20 Pa.C.S.A. § 5901, et seq. (Chapter 59):

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&tli=20&div=0&chpt=59>.

Health Care Act, 20 Pa.C.S.A. § 5421, et seq. (Chapter 54):

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&tli=20&div=0&chpt=54>.

Mental Health Care Act, 20 Pa.C.S.A. § 5801, et seq. (Chapter 58):

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&tli=20&div=0&chpt=58>.

The Pennsylvania Older Adults Protective Services Act, 35 P.S. § 10225.101, et seq.:

https://www.legis.state.pa.us/cfdocs/legis/CH/PUBLIC/ucons_pivot_pge.cfm?session=1987&session_ind=0&act_nbr=0079.&pl_nbr=0381

Pennsylvania Supreme Court Orphans' Court Rules (under Pennsylvania Code Title 231, Part II):

www.pacodeandbulletin.gov

II. Links to Additional Resources

American Bar Association Commission on Law and Aging

https://www.americanbar.org/groups/law_aging/

American Psychological Association's Medical Conditions Affecting Capacity

<https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>

National Probate Court Standards

<https://ncsc.contentdm.oclc.org/digital/collection/spcts/id/240/>

III. Links to Key Statutes (for further reference):

20 Pa.C.S.A. § 5511(d). Petition and Hearing; independent evaluation

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?%20txtType=HTM&tli=20&div=0&chpt=55&sctn=11&subsctn=0>

42 Pa.C.S. § 4412. Appointment of Interpreter

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?%20txtType=HTM&tli=42&div=0&chpt=44>

42 Pa.C.S. § 4432. Appointment of Interpreter for the Hearing Impaired

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?%20txtType=HTM&tli=42&div=0&chpt=44>

Pa. Const. Art. 1, § 26. Right of access to individuals to enjoyment of civil rights and participation in court proceedings

<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?%20txtType=HTM&tli=00&div=0&chpt=1&sctn=26&subsctn=0>

Title II ADA (42 U.S.C. § 126). Obligation of courts to accommodate those with disabilities (Applies to courthouses and court hearing access)

<https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter126&edition=prelim>

IV. Links to Judicial Canons (for further reference):

<https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/207/chapter33/subchapAtoc.html&d=reduce>

Judicial Canon 1: A Judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Judicial Canon Rule 1.1: Compliance with the Law

Judicial Canon Rule 1.2: Promoting Confidence in the Judiciary

Judicial Canon 2: A Judge shall perform the duties of judicial office impartially, competently, and diligently.

Judicial Canon Rule 2.2: Impartiality and Fairness

Judicial Canon Rule 2.3: Bias, Prejudice, and Harassment

Judicial Canon Rule 2.4: External Influences on Judicial Conduct

Judicial Canon Rule 2.6: Ensuring the Right to Be Heard

Judicial Canon Rule 2.9: Ex Parte Communications

Judicial Canon Rule 2.11 Disqualification