

CONSENT, CAPACITY, AND SUBSTITUTE DECISION-MAKING



CONSENT, CAPACITY, AND SUBSTITUTE DECISION-MAKING

- CHAPTER 1: DECISION-MAKING BY PEOPLE WITH INTELLECTUAL DISABILITIES: THE IMPORTANCE OF SELF-DETERMINATION
- CHAPTER 2: CONSENT AND CAPACITY TO MAKE DECISIONS
- CHAPTER 3: TYPES OF SUBSTITUTE DECISION-MAKING
- CHAPTER 4: HEALTH CARE DECISION-MAKING
- CHAPTER 5: CAPACITY, SEXUALITY AND FAMILY LIFE
- CHAPTER 6: MENTAL HEALTH ADVANCE DIRECTIVES
- CHAPTER 7: FINANCIAL POWERS OF ATTORNEY
- CHAPTER 8: EDUCATIONAL DECISION-MAKING UNDER THE IDEA

CHAPTER 9: SUBSTITUTE DECISION-MAKING
THROUGH TRUSTS

CHAPTER 10: GUARDIANSHIP IN PENNSYLVANIA

CHAPTER 11: GLOSSARY OF IMPORTANT TERMS

CHAPTER 12: RESOURCES

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CHAPTER 10: GUARDIANSHIP IN PENNSYLVANIA

I.	ALTERNATIVES TO GUARDIANSHIP	1
II.	GUARDIANSHIP PROCEEDINGS	4
	A. Starting A Guardianship Proceeding	6
	B. The Guardianship Petition	7
	C. Respondent's Presence At the Hearing	8
	D. Right to Counsel	9
	E. Right to an Independent Evaluation	10
III.	DETERMINING WHETHER TO APPOINT A GUARDIAN	10
IV.	POWERS OF A LIMITED GUARDIAN	13
V.	DUTIES OF A GUARDIAN OF THE PERSON	14
VI.	DUTIES OF A GUARDIAN OF THE ESTATE	16
VII.	INFORMATION THE COURT MUST PROVIDE IF IT APPOINTS A GUARDIAN	17

VIII.	APPOINTMENT OF AN EMERGENCY GUARDIAN	17
IX.	REPORTS A GUARDIAN MUST FILE	19
X.	APPOINTMENT OF A SUCCESSOR GUARDIAN	20
XI.	TERMINATING A GUARDIANSHIP ORDER OR REMOVING A GUARDIAN	21
XII.	CONCLUSION	22

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When an individual reaches the age of 18, regardless of any functional limitations or disabilities, s/he has the legal right to make decisions on his or her own behalf. Guardianship is one means by which a **substitute decision-maker** can act on behalf of an adult who lacks **capacity** to make some decisions. Only a court, after a legal proceeding, may judge an individual to be **incapacitated** and appoint a **guardian** for him or her. This chapter provides some basic information about alternatives to guardianship and about Pennsylvania's guardianship procedures.

I. ALTERNATIVES TO GUARDIANSHIP

While the appointment of a guardian for a person with limited or impaired mental functioning may in some cases be unavoidable in order to protect the individual's well-being, guardianship proceedings can be costly legal procedures that may be inconsistent with the goal of maximizing a person's independence. Alternatives to guardianship may prove equally effective at a substantially lower emotional and financial cost. The majority of persons with disabilities live in the community with the assistance of their families or a system of support services without the need for guardians. Before

initiating guardianship proceedings, it is advisable to fully explore the alternatives.

Many people who cannot independently manage their finances seek the help of family or friends for money management. These voluntary relationships can often avoid the need for legal guardians. Additionally, habilitation programs can increase the degree to which people with disabilities can manage their finances, either independently or with assistance of others. Public benefits, such as Social Security Disability and Supplemental Security Income (SSI), can be managed without a guardian through the appointment of a **representative payee**. Advance planning by families can usually avoid the need for a guardian to manage gifts, inheritances, or other assets.

Many people with disabilities are able to make decisions concerning many or all of the non-monetary aspects of their lives without the assistance of a guardian. In some cases, family, friends, or service providers can assist in this decision-making process. Guardianship may be unnecessary even if a person is unable to make decisions with the assistance of others. Often

existing laws and practices aid in substitute decision-making. For example, medical providers routinely provide medical treatment at the request of families on behalf of persons with disabilities, even when there is a question of whether the individual understands the medical procedure to be undertaken. A family member or friend also can serve as a "**health care representative**" who can make medical decisions. 20 Pa. Cons. Stat. Ann. § 5461. If no family is available, the Mental Health and Intellectual Disability Act of 1966 permits service providers to **consent** to certain medical treatment on behalf of persons in group homes or other residential facilities. 50 Pa. Cons. Stat. Ann. § 4417(c).¹

¹ This statute states: "The director of any facility may in his discretion and with the advice of two physicians not employed by the facility, determine when elective surgery should be performed upon any mentally disabled person admitted or committed to such facility where such person does not have a living parent, spouse, issue, next of kin, or legal guardian as fully and to the same effect as if said director had been appointed guardian and had applied to and received the approval of an appropriate court therefore." 50 Pa. Cons. Stat. Ann. § 4417(c). This provision has been construed to apply to health care decisions that involve procedures other than "elective surgery." This statute, however, does not permit substituted consent by providers for medical treatment in all cases. For example, it would not permit consent to psychiatric treatment (which is governed by the Mental Health Procedures Act, 50 Pa. Cons. Stat. Ann. § 7101 et seq.), to AIDS/HIV testing (which is governed by 35 Pa. Cons. Stat. Ann. § 7605), or to medical treatment when an individual is refusing treatment. A service provider also cannot consent to the cessation of life-preserving treatment (*i.e.*, treatment to save the life of a person who is not

There are circumstances when the appointment of a guardian is unavoidable. Guardianship proceedings should be started, however, only after a problem has been identified for which there is no alternative solution. It is generally not advisable to initiate guardianship proceedings simply because a service provider or other professional recommends guardianship or suggests that guardianship is routinely needed for persons with severe disabilities or persons living in residential facilities.

II. GUARDIANSHIP PROCEEDINGS

A Pennsylvania court may appoint a "guardian of the person" for an individual who lives in Pennsylvania and a "guardian of the estate" for a person who has property in Pennsylvania if it determines after a hearing that the individual is "**incapacitated**" (previously referred to as "**incompetent**"). An incapacitated person is:

[A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his

in an end-of-life situation). As of the publication of this chapter, the law was unclear regarding whether a service provider may consent to the cessation of **life-sustaining treatment** (*i.e.*, treatment to merely sustain the life of some in an end-of-life situation).

financial resources or to meet essential requirements for his physical health and safety.

20 Pa. Cons. Stat. Ann. § 5501.²

Any qualified individual, corporate fiduciary, non-profit corporation, or county agency may serve as guardian. 20 Pa. Cons. Stat. Ann. § 5511(f).

If no other person is willing or qualified to serve, a guardianship support agency may be appointed by the court. 20 Pa. Cons. Stat. Ann. § 5553(a).

If appropriate, the court shall give preference to a person suggested by the incapacitated person. *Id.*; *Estate of Haertsch*, 649 A.2d 719, 720 (Pa.

Super. Ct. 1994). The guardian must not have interests that conflict with those of the incapacitated person unless no alternative exists. 20 Pa.

Cons. Stat. Ann. § 5511(f); *see also Wilhelm v. Wilhelm*, 657 A.2d 34, 49 (Pa. Super. Ct. 1995) (son of incapacitated person may be inappropriate

guardian where son stands to benefit from money remaining in bank account upon father's death and where there is history of hostile

relationship between children and **parents**). For persons residing in state facilities, the guardianship offices located at such facilities may be

² The fact that a person is institutionalized does not create a presumption of incapacity. 20 Pa. Cons. Stat. Ann. § 5512.1(f).

appointed guardian of the estate. 20 Pa. Cons. Stat. Ann. § 5511(f).³ In addition, unless no alternative exists, residential service providers and their employees will not be appointed as guardian. *Id.*

A. Starting A Guardianship Proceeding

An interested person may file a petition in the Court of Common Pleas, Orphans Court Division for the appointment of a guardian of a person or the person's estate. The person who files the petition (the "petitioner") must personally serve the individual person for whom a guardian is sought (the "respondent") with a copy of the petition and written notice of the time, date, and place of the proposed hearing at least 20 days prior to the hearing. The notice must be in large type and simple language. The notice must explain the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. The notice also must inform the

³ As a result of the decision in *Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), 426 F. Supp. 1297 (E.D. Pa. 1977), *aff'd*, 558 F.2d 150 (3d Cir. 1977), *cert. denied*, 434 U.S. 943 (1977), it is the routine practice of the Commonwealth to seek guardianship over the finances of many people living in state-operated facilities in order to assure that the Commonwealth receives payment for its services. This process can be avoided if an alternate representative payee, such as a family member, can be identified.

respondent of his or her right to request the appointment of counsel and to have paid counsel appointed, if approved by the court. The petition also must give notice to other interested parties, such as family members. 20 Pa. Cons. Stat. Ann. § 5511(a).

B. The Guardianship Petition

All guardianship petitions must be written in plain language and must include the following information:

- the name, age, residence, and post office address of the respondent;
- the names and addresses of the respondent's spouse, parent(s), and presumptive adult heirs;
- the name and address of the person or institution providing residential services to the respondent;
- the names and addresses of other persons or entities that provide services to the respondent;
- the name and address of the person or entity whom the petitioner asks to be appointed as the guardian;
- a statement that the proposed guardian has no interest that is adverse to the respondent;
- the qualifications of the proposed guardian;
- the reasons why guardianship is sought;
- a description of the functional limitations and physical and mental condition of the respondent;

- the steps taken to find less restrictive alternatives; and,
- the specific areas of incapacity over which the petitioner requests that the guardian be assigned powers.

20 Pa. Cons. Stat. Ann. § 5511(e).

If the petitioner seeks appointment of a guardian of the estate, the petitioner must include (in addition to the information listed above), the gross value of the respondent's estate and net income from all sources to the extent known. 20 Pa. Cons. Stat. Ann. § 5511(e).

C. Respondent's Presence At the Hearing

The respondent must be present at the hearing unless either (a) a physician or psychologist states (under oath) that the person would be harmed by being present, or (b) it is impossible for him or her to be present due to his absence from Pennsylvania. At the request of the respondent or his or her counsel, the hearing may be held at the respondent's residence.

20 Pa. Cons. Stat. Ann. § 5511(a).

D. Right to Counsel

A respondent may hire counsel to represent him or her in a guardianship proceeding. The petitioner has an obligation to determine whether counsel has been retained by or for the respondent and, if the respondent does not have counsel, the petitioner must notify the court at least seven days prior to the hearing. The court, "in appropriate cases," may appoint counsel at no cost to the respondent if counsel has not otherwise been retained to represent the respondent, 20 Pa. Cons. Stat. Ann. § 5511(a), but the statute does not explain what constitutes an "appropriate case" for appointment of counsel. Residents of state psychiatric hospitals and state intellectual disability centers must have counsel appointed to represent them in guardianship proceedings. 204 Pa. Code §§ 29.41-29.42 (provides, in accordance with Pennsylvania Supreme Court orders, that special masters will be appointed to hear guardianship petitions for persons in state psychiatric hospitals and state intellectual disability centers; that such hearings will be held at the institutions; and that the respondent shall be represented by counsel).

E. Right to an Independent Evaluation

The respondent may petition the court for the appointment of an expert to perform an independent evaluation as to his or her capacity. The court will order such an evaluation for "cause." The guardianship law does not explain what constitutes "cause," and a judge will decide each request on a case-by-case basis. If the court chooses to order an independent evaluation, it must give due consideration to the evaluator nominated by the respondent. 20 Pa. Cons. Stat. Ann. § 5511(d); see also *In re Hyman*, 811 A.2d 605, 609 (Pa. Super. Ct. 2002) (holding that the court did not err in refusing the petitioner's request to appoint an independent evaluator where the court found that there was no need for guardianship).

III. DETERMINING WHETHER TO APPOINT A GUARDIAN

Under the guardianship statute, "[t]he court has the power to place total control of a person's affairs in the hands of another. This great power creates the opportunity for great abuse." *In re Hyman*, 811 A.2d 605, 608 (Pa. Super. Ct. 2002) (quoting *Estate of Haertsch*, 609 A.2d 1384, 1386 (1992)). As such, the petitioner must establish by clear and convincing evidence that the respondent is incapacitated. 20 Pa. Cons. Stat. Ann. §

5511(a). In determining whether the respondent is incapacitated, the court must consider, among other things, the nature of the respondent's disability and the extent of his or her capacity to make or communicate decisions. 20 Pa. Cons. Stat. Ann. § 5512.1(a). To prove incapacity, the petitioner must present testimony from an individual qualified by training and experience in evaluating individuals with the respondent's alleged incapacities that establishes the nature and extent of the respondent's incapacities and disabilities; the respondent's mental, emotional, and physical condition; the respondent's adaptive behavior; and the respondent's social skills. 20 Pa. Cons. Stat. Ann. § 5518. In addition, the petitioner must present evidence regarding:

- the services being used to meet the essential requirements for the respondent's physical health and safety;
- the services being used to manage the respondent's financial resources;
- the services being used to develop or regain the respondent's abilities;
- the types of assistance required by the respondent;
- why no less restrictive alternative to guardianship would be appropriate; and,
- the probability that the extent of the person's incapacities may significantly lessen or change.

20 Pa. Cons. Stat. Ann. § 5518.

In determining whether a person is incapacitated, the court must also make specific findings concerning the respondent's need for guardianship services in light of existing alternatives, such as the availability of family, friends, and other supports to assist the individual in making decisions, and in light of the existence of any advance directives such as durable powers of attorney or **trusts**. 20 Pa. Cons. Stat. Ann. § 5512.1(a)(3); see also *In re Peery*, 727 A.2d 539, 541 (Pa. 1999) (a person cannot be incapacitated and in need of guardianship services if his impairment is counterbalanced by assistance from friends and family or other supports).

If the court determines that the respondent is incapacitated and needs guardianship services, it must then determine:

- whether the guardianship should be "limited" based upon the nature of the respondent's disability and his capacity to make and communicate decisions; and,
- the duration of the guardianship.

20 Pa. Cons. Stat. Ann. § 5512.1(a)(4)-(5).

The court will prefer to appoint a "limited guardian" if the respondent is partially incapacitated, but needs guardianship services. 20 Pa. Cons. Stat. Ann. § 5512.1(a)(6) The court may appoint a "plenary guardian" of the person and/or estate only upon specific findings that the person is totally incapacitated and in need of plenary guardianship services. 20 Pa. Cons. Stat. Ann. §§ 5512.1(c), 5512.1(e).

IV. POWERS OF A LIMITED GUARDIAN

If the court appoints a limited guardian, it must identify the powers of the guardian and those powers must be consistent with the court's finding of the respondent's limitations. 20 Pa. Cons. Stat. Ann. §§ 5512.1(b) 5512.1(d). The partially incapacitated person retains all legal rights other than those designated by the court's order as areas over which the limited guardian has power. 20 Pa. Cons. Stat. Ann. § 5512.1(g).

The powers of a limited guardian of the person may include:

- providing general care, maintenance, and custody of the partially incapacitated person;
- designating the partially incapacitated person's place of residence;

- assuring, as appropriate, that the partially incapacitated person receives appropriate training, education, medical and psychological services, and social and vocational opportunities;
- assisting the partially incapacitated person in the development of maximum self-reliance and independence; and,
- providing the required consents or approvals on behalf of the partially incapacitated person.

20 Pa. Cons. Stat. Ann. § 5512.1(b).

In appointing a limited guardian of the estate, the court (in addition to outlining the guardian's specific powers and authority) must specify the portion of assets or income over which the limited guardian of the estate has assigned powers or duties. 20 Pa. Cons. Stat. Ann. § 5512.1(d).

V. DUTIES OF A GUARDIAN OF THE PERSON

The duties of any guardian of the person include: (1) assertion of the rights and interests of the incapacitated person; (2) respect for the wishes and preferences of the incapacitated person to the greatest extent possible; (3) participation, where appropriate, in the development of a plan of supportive services to meet the person's needs; and (4) encouragement of the incapacitated person to participate to the maximum extent of his or her abilities in all decisions that affect him or her, to act on his or her behalf

when he or she is able to do so, and to develop or regain his or her capacity to manage his or her personal affairs to the maximum extent feasible. 20 Pa. Cons. Stat. Ann. § 5521(a); see also *Estate of Rosengarten*, 871 A.2d 1249, 1254-55 (Pa. Super. Ct. 2005) (holding that the guardian violated her duties by disregarding the expressed wishes of incapacitated person).

There are certain powers that a guardian of the person -- even a plenary guardian -- cannot exercise unless specifically authorized to do so by the court after a separate hearing. These are:

- consenting on behalf of the incapacitated person to sterilization, psychosurgery, electroconvulsive therapy, or removal of a healthy body organ;
- prohibiting the marriage or consenting to the divorce of the incapacitated person; and
- consenting on behalf of the incapacitated person to any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.

20 Pa. Cons. Stat. Ann. § 5521(d).

There are certain other powers that a guardian of the person cannot exercise and cannot be authorized by any court to exercise. These are:

- consenting to the incapacitated person's admission to an inpatient psychiatric facility or a state institution for persons with intellectual disabilities;
- consenting to the relinquishment of the incapacitated person's parental rights;
- withholding or refusing to authorize the provision of **life-preserving treatment** for an incapacitated person who does not have an **end-stage medical condition** or is not **permanently unconscious**; and,
- forcing an incapacitated person to consent to an abortion except in an emergency situation.

20 Pa. Cons. Stat. Ann. § 5521(f); 18 Pa. Cons. Stat. Ann. § 3206(g); *In re D.L.H.*, 2 A.3d 505, 515 (Pa. 2010).

VI. DUTIES OF A GUARDIAN OF THE ESTATE

The Pennsylvania guardianship statute details a number of matters that may be handled by a **guardian** of the estate, including insurance, continuation of a business, investments, and sale of personal property. 20 Pa. Cons. Stat. Ann. § 5521(b). In exercising those duties, a guardian of the estate must use the standard of care that a person of ordinary prudence would practice in the care of his own estate. *Estate of Rosengarten*, 871 A.2d at 1256 (indicating that a guardian who charged for services that could have been performed by others free of charge probably violated her duty).

A guardian must manage the estate exclusively for the benefit of the incapacitated person and is not permitted to obtain any undue profit or advantage from his position and may not place himself in a position in which his personal interests are in conflict with those of the incapacitated person. *In re Adler*, No. 1144IC, 2003 WL 22053309 at *3 (Pa. Com. Pl. 2003).

VII. INFORMATION THE COURT MUST PROVIDE IF IT APPOINTS A GUARDIAN

If the court determines that the respondent is incapacitated and appoints a guardian, it must assure that the respondent is informed of his or her right to appeal and his or her right to petition to modify or terminate the guardianship. 20 Pa. Cons. Stat. Ann. § 5512.1(h).

VIII. APPOINTMENT OF AN EMERGENCY GUARDIAN

A person may file a petition for appointment of an "emergency guardian" for persons who are present in Pennsylvania and who need the immediate appointment of a guardian. 20 Pa. Cons. Stat. Ann. § 5513. The court will appoint an emergency guardian if, after a hearing, it finds by clear and convincing evidence that (1) the respondent is incapacitated; (2) the

respondent needs a guardian; and (3) failure to appoint a guardian will result in irreparable harm to the respondent's person or estate. *Id.* The court must specify the powers, duties, and liabilities of that guardian in its order. *Id.*

The appointment of an emergency guardian of the person can be in effect no longer than 72 hours. 20 Pa. Cons. Stat. Ann. § 5513. If the emergency continues, the order may be extended for 20 days from the date of the expiration of the initial emergency order. *Id.* After the expiration of the extension, the petitioner must institute a full guardianship proceeding in order to continue the guardianship. *Id.* An emergency guardianship of the estate may not exceed 30 days, at which time the petitioner must initiate a full guardianship proceeding. *Id.*

The court must, to the extent feasible under the circumstances, adhere to all of the procedures outlined above -- including those relating to the appointment of counsel for the respondent -- in a proceeding for the appointment of an emergency guardian. 20 Pa. Cons. Stat. Ann. § 5513.

IX. REPORTS A GUARDIAN MUST FILE

Within one year of the appointment and at least once annually thereafter, a guardian of the person must file with the court a report attesting to the following:

- the current address and type of placement of the incapacitated person;
- any major medical or mental problems experienced by the incapacitated person;
- a brief description of the incapacitated person's living arrangements and the social, medical, psychological and other support services he is receiving;
- the opinion of the guardian as to whether the guardianship should continue, be terminated or modified, and the reasons for that opinion; and,
- the number and length of times the guardian visited the incapacitated person during the past year.

20 Pa. Cons. Stat. Ann. § 5521(c)(1)(ii).

A guardian appointed for an incapacitated person's estate must file with the court within one year of his appointment and on an annual basis thereafter a report attesting to the following:

- the incapacitated person's current **principal** and how it is invested;
- the incapacitated person's current income;
- the expenditures of principal and income since the prior report; and,
- the needs of the incapacitated person for which the guardian has provided since the last report.

20 Pa. Cons. Stat. Ann. § 5521(c)(1)(I).

X. APPOINTMENT OF A SUCCESSOR GUARDIAN

If the court-appointed guardian dies or is otherwise no longer able or willing to serve as the individual's guardian, the court will appoint a new guardian.

20 Pa. Cons. Stat. Ann. § 5514. Before doing so, the court will give notice to interested parties. *Id.*

If the vacating guardian was the parent of the individual and he or she has died, the court, in selecting a new guardian, will give preference to a person nominated by the deceased parent in his or her will to act as the successor guardian. 20 Pa. Cons. Stat. Ann. § 5514. Moreover, although it is not required by law, the court is also likely to consider the nomination in a will of a successor guardian by any guardian who has died, regardless of whether

he or she was the individual's parent. Accordingly, if you are a court-appointed guardian for an individual, you should consider who you would want to succeed you as the individual's guardian and to identify that person as the proposed successor guardian in your will.

XI. TERMINATING A GUARDIANSHIP ORDER OR REMOVING A GUARDIAN

An incapacitated person, the guardian, or any interested person may petition the court for a review hearing, or a court on its own may decide to hold a review hearing. 20 Pa. Cons. Stat. Ann. § 5512.2(a). A review hearing may be used to: (1) assert that there has been a significant change in the person's capacity so that guardianship is no longer necessary (or a more limited guardianship order is appropriate); (2) assert that the guardian has failed to perform his or her duties; or (3) assert that the guardian has not acted in the incapacitated person's best interests, including not respecting his or her preferences to the fullest extent possible.

Id.; *Estate of Rosengarten*, 871 A.2d at 1254-56.

In a review hearing, the incapacitated person has all of the rights he would have at an initial guardianship hearing (including the right to be present and

to seek appointed counsel). 20 Pa. Cons. Stat. Ann. § 5512.2(b). The incapacitated person may also be represented by counsel of his or her choosing at any review hearing. *Estate of Rosengarten*, 871 A.2d at 1257.

A person need only prove by a fair preponderance of the evidence that he or she has regained capacity so as to no longer need guardianship while the party advocating continued guardianship has the heavier burden of showing by clear and convincing evidence that the person remains incapacitated. 20 Pa. Cons. Stat. Ann. § 5512.2(b); *Estate of Rosengarten*, 871 A.2d at 1255.

XII. CONCLUSION

Pennsylvania's guardianship law is designed to: (1) permit incapacitated persons to participate as fully as possible in all decisions that affect them; (2) assist such individuals to meet the essential requirements for their physical health and safety, to protect their rights, to manage their financial resources, and to develop or regain their abilities to the maximum extent possible; and (3) to accomplish these objectives through the use of the least restrictive alternative. 20 Pa. Cons. Stat. Ann. § 5502. The two most important features of the Pennsylvania guardianship law are: (1) that it

permits the appointment of limited guardians to ensure that only those restrictions necessary in the particular circumstances are imposed, and (2) that it provides for certain procedural safeguards to prevent the unwarranted appointments of guardians. Despite these features, **guardianship should be viewed as the option of last resort and used only if other alternatives do not provide an adequate solution.**