

AN INTRODUCTION TO GUARDIANSHIP



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**THE INFORMATION WE ARE PROVIDING
IS NOT TO BE CONSIDERED LEGAL
ADVICE. IF YOU HAVE LEGAL
QUESTIONS, CONTACT YOUR ATTORNEY.**



GUARDIANSHIP BASICS

COMMON QUESTIONS

OVERVIEW

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- WHAT IS A GUARDIAN?
- TYPES OF GUARDIANSHIP
- WHEN IS A GUARDIAN NEEDED?
- WHO CAN BE A GUARDIAN?
- WHAT AUTHORITY DOES A GUARDIAN HAVE?
- HOW IS A GUARDIAN OBTAINED?
- COMMON QUESTIONS
- YOUR QUESTIONS

WHAT IS A GUARDIAN?

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AN INDIVIDUAL OR ORGANIZATION NAMED BY AN ORDER OF THE COURT TO EXERCISE SPECIFIC OR ALL DELEGABLE POWERS AND RIGHTS OVER THE PERSON AND/OR ESTATE OF AN INCAPACITATED PERSON

GUARDIAN OF PERSON

- ▶ Assert the rights and best interests of the incapacitated person
- ▶ Ensure a plan of supportive services to meet needs
- ▶ In general make medical decisions and ensure that the individual is residing in the least restrictive environment

GUARDIAN OF ESTATE

- ▶ Investigate, locate, manage, preserve and/or liquidate assets including real property for present and future needs while maintaining current or future eligibility for medical assistance
- ▶ Apply for and maintain eligibility for all benefits with federal, state and local programs (medicare, medicaid, SSA, pensions, waivers)

A GUARDIAN CAN BE

- ▶ Different individuals or entities serving as guardian of the person and estate
- ▶ More than one individual or entity serving as guardian of the person and estate
- ▶ Appointed for only guardian of the person or estate and not the other

SCOPE OF GUARDIANSHIP

- ▶ Plenary
 - ▶ Guardian has all the authority as described in Chapter 5500
- ▶ Limited
 - ▶ Guardian only has the authority as described in the Court's Order

DURATION

- ▶ Emergency Guardianship - to prevent irreparable harm to the person or estate on a short term basis
 - ▶ Person - 72 hours, can be extended for 20 days
 - ▶ Estate - shall not exceed 30 days
- ▶ Permanent/Final Guardian
 - ▶ Authority is ongoing
 - ▶ Can only be removed by a subsequent court order or death



PLENARY GUARDIAN OF
THE PERSON AND ESTATE ¹¹

LIMITED GUARDIAN OF THE
PERSON AND PLENARY
GUARDIAN OF THE ESTATE

EMERGENCY PLENARY GUARDIAN
OF THE PERSON AND LIMITED
GUARDIAN OF THE ESTATE

**ANY COMBINATION OF
TYPE, SCOPE AND
DURATION**

AN ADULT WHOSE ABILITY TO RECEIVE AND EVALUATE INFORMATION EFFECTIVELY AND COMMUNICATE DECISIONS IN ANY WAY IS IMPAIRED TO SUCH A SIGNIFICANT EXTENT THAT HE IS PARTIALLY OR TOTALLY UNABLE TO MANAGE HIS FINANCIAL RESOURCES OR TO MEET ESSENTIAL REQUIREMENTS FOR HIS PHYSICAL HEALTH AND SAFETY

20 Pa.C.S § 5501

ONLY AN INCAPACITATED PERSON CAN BE APPOINTED A GUARDIAN. HOWEVER NOT ALL INCAPACITATED PERSONS REQUIRE A GUARDIAN

- ▶ Formal Supports -
 - ▶ representative payee
 - ▶ health care agent
 - ▶ financial POA
 - ▶ trust
- ▶ Informal Supports -
 - ▶ family
 - ▶ friends
 - ▶ community/religious



SOME INCAPACITATED PERSONS MAY NOT HAVE SUPPORTS OR THEIR SUPPORTS ARE NOT WILLING, ABLE OR SUITABLE TO SERVE AS A RESPONSIBLE DECISION MAKER

A guardian may be needed if

- ▶ a person does not have any supports
- ▶ the supports are insufficient

ANY QUALIFIED INDIVIDUAL, A CORPORATE FIDUCIARY, A NONPROFIT CORPORATION, A GUARDIANSHIP SUPPORT AGENCY OR A COUNTY AGENCY

- ▶ For residents of state facilities the court may appoint, only as guardian of the estate, the guardian office at the facility
- ▶ The court shall not appoint a person or entity providing residential services for a fee to the incapacitated person or any person whose interests conflict with those of the incapacitated person except if it is clearly demonstrated that no alternative exists
- ▶ Family relationships are not by themselves considered an adverse interest to the incapacitated person
- ▶ If appropriate, the court shall give preference to the nominee of the incapacitated person

WHAT AUTHORITY DOES A GUARDIAN HAVE?

(READ THE COURT ORDER)

WHAT AUTHORITY DOES A GUARDIAN HAVE?

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PLENARY GUARDIAN

Person - It shall be the duty of the guardian of the person to **assert the rights and best interests** of the incapacitated person while respecting their expressed wishes and preferences to the greatest possible extent. Where appropriate, the guardian shall **participate in the development of a plan of supportive services to meet the person's needs** which explains how services will be obtained. The guardian shall also encourage the incapacitated person to participate to the maximum extent of his abilities in all decisions which affect him, to act on his own behalf whenever he is able to do so and to develop or regain, to the maximum extent possible, his capacity to manage his personal affairs.

Estate - The provisions concerning the powers, duties and liabilities of guardians of incapacitated persons' estates shall be the same as those set forth in the following provisions of this title relating to personal representatives of decedents' estates and guardians of minors' estates: **see § 5521b**

WHAT AUTHORITY DOES A GUARDIAN HAVE?

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LIMITED GUARDIAN - THE COURT WILL ISSUE AN ORDER GRANTING POWERS CONSISTENT WITH THE COURT'S FINDINGS OF LIMITATIONS

Person -

- General care, maintenance and custody of the incapacitated person
- Designating the place for the incapacitated person to live
- Ensure that the incapacitated person receives such training, education, medical and psychological services and social and vocational opportunities, as appropriate, as well as assisting the incapacitated person in the development of maximum self-reliance and independence
- Providing required consents or approvals on behalf of the incapacitated person

Estate -

- Specify the portion of assets or income over which the guardian of the estate is assigned powers and duties

LIMITED GUARDIANSHIPS

- ▶ A partially incapacitated person retains all rights except where the limited guardian has power as indicated in the court order

ALL GUARDIANSHIPS

- ▶ The court shall ensure that the person is informed of his right to appeal and to petition to modify or terminate the guardianship

HOW DOES THE COURT DETERMINE IF A GUARDIANSHIP WILL BE LIMITED OR PLENARY?

In all cases the court shall consider and make specific findings of fact concerning the:

- ▶ nature of any condition or disability
- ▶ extent of the individual's capacity
- ▶ need for guardianship services, in light of less restrictive alternatives

SOME AUTHORITY CAN ONLY BE GRANTED AFTER SPECIFIC FINDINGS OF FACT

- ▶ A guardian shall not have the authority to consent to:
 - ▶ abortion, sterilization, psychosurgery, electroconvulsive therapy or remove a healthy body organ
 - ▶ prohibit marriage or consent to divorce
 - ▶ experimental biomedical or behavioral medical procedures or experiments
- ▶ These findings of fact can be done at the original incapacity hearing or at a subsequent hearing
- ▶ The authority must be expressly given in a court order

COURT PERMISSION IS ALSO NEEDED TO

- ▶ sell real estate
- ▶ invade principle
- ▶ establish a burial reserve
- ▶ refuse life sustaining treatment

THE COURT MAY NOT GRANT POWERS TO A GUARDIAN THAT ARE CONTROLLED BY OTHER STATUTES

Including but not limited to:

- ▶ admitting the incapacitated person to an inpatient psychiatric facility or state center for the intellectually disabled
- ▶ relinquish parental rights

**HOW DO YOU OBTAIN A
GUARDIAN FOR AN
INCAPACITATED PERSON?**

John Q. Public



**A GUARDIAN CAN
ONLY BE
APPOINTED BY
THE COURT. A
PETITION MUST
BE FILED WITH
THE COURT.**
Pa.C.S. § 5511

PETITION AND HEARING

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. **The 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 alleged incapacitated person or that the petition is incomplete or fails to provide sufficient facts to proceed.



**NOT EVERY
INCAPACITATED PERSON
NEEDS A GUARDIAN**

**THE PROCESS IS NOT
IMMEDIATE**

**THE HEARING IS
DEPENDENT UPON THE
COURT'S CALENDAR**

ESTABLISHING INCAPACITY AND NEED

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, 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.

ESTABLISHING INCAPACITY

- ▶ Existing documentation
- ▶ Testimony regarding the existing documentation
- ▶ New evaluation from PCP or psychologist
- ▶ Testimony regarding the new evaluation
- ▶ Address the probability of capacity improving

ESTABLISHING INCAPACITY

If the individual is not agreeable to an evaluation and there is sufficient evidence for concern, any interested person, including APS, can petition the orphan's court.

The interested party would have to provide sufficient evidence in the petition and hearing.

The court can order an independent evaluation on its own motion or at the request of the individual.

DETERMINATION OF INCAPACITY AND NEED

In all cases, the court shall consider and make specific findings of fact concerning:

- The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions
- The extent of the individual's capacity to make and communicate decisions.
- 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.
- 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.
- The duration of the guardianship.
- The court shall prefer limited guardianship.

I HAVE A QUESTION!!

Past Audiences

APS RECEIVES AND INVESTIGATES
REPORTS OF NEED FOR ALLEGED
NEGLECT, ABUSE AND EXPLOITATION.

AS PART OF THE INVESTIGATION APS WILL
OBTAIN MEDICAL INFORMATION AND
MAKE OBSERVATIONS ABOUT AN
INDIVIDUAL'S CAPACITY.

WHAT IS THE ROLE OF APS IN
GUARDIANSHIP?

IF THERE IS IMMINENT RISK TO AN APS CONSUMER WHO IS ALLEGED TO BE INCAPACITATED AND NO LESS RESTRICTIVE ALTERNATIVE EXISTS, APS CAN PETITION FOR AN EMERGENCY AND/OR PERMANENT GUARDIAN

IF AN APS CONSUMER HAS AN EXISTING GUARDIAN, APS CAN INVESTIGATE THAT REPORT OF NEED AS THEY WOULD FOR ANY OTHER CONSUMER

CALL THE POLICE AND APS (800-490-8505)

NOTIFY THE COURT - REVIEW HEARING

IF THE GUARDIAN IS A CERTIFIED GUARDIAN YOU CAN APPEAL TO THE CENTER FOR GUARDIANSHIP CERTIFICATION'S DISCIPLINE BOARD

WHAT SHOULD YOU DO IF YOU HAVE CONCERNS ABOUT A GUARDIAN?

IF THE COURT ORDER DOES NOT APPOINT A CO-OR SUCCESSOR GUARDIAN, AN INTERESTED PARTY WILL HAVE TO PETITION AND NOTIFY THE COURT

IT IS POSSIBLE THAT THE PERSON MAY NO LONGER NEED A GUARDIAN, HOWEVER THE COURT HAS TO MAKE THAT DECISION

WHAT HAPPENS IF A GUARDIAN DIES?

REVIEW HEARING

The court may set a date for a review hearing

- in its order establishing the guardianship
- at any time it shall direct

The court **shall** conduct a review hearing promptly if the incapacitated person, guardian or any interested party petitions the court for a hearing for reason of:

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

WHAT HAPPENS WHEN A GUARDIAN AND PROVIDER DON'T AGREE?

PROVIDER REQUESTS CONSENT

Substituted Judgement - The guardian should consider the incapacitated person's pre-incapacity written and known preferences along with their current preferences

Best Interest - When an incapacitated person's preferences are harmful or there is insufficient information to apply the substituted judgement standard a guardian should make decisions based on the incapacitated person's best interest

Guardian will not Consent - If the provider feels that the procedure is in the person's best interest, they can file for a review hearing

GUARDIAN REQUESTS CARE

Provider should cite a valid reason they do not think the care is appropriate for the individual

A guardian is always free to request a second opinion and/or change providers

A GUARDIAN CANNOT REFUSE LIFE SUSTAINING TREATMENT WITHOUT COURT PERMISSION

- ▶ Advance directives (living will, health care POA) are not automatically invalid because there is a guardian
- ▶ If there is documentation of an end stage condition and no applicable advanced directive, the guardian can petition the court for permission to refuse life sustaining treatment

NON MEDICAL DECISIONS

Financial - a guardian may not always be the individual's representative payee. The guardian can review the payee's actions and notify SSA if the guardian feels there should be a change. Guardians are not in charge of an individual's trust, unless also appointed as trustee.

Other - expressed wishes and preferences of the incapacitated person shall be respected to the greatest possible extent.

PA HAS ADOPTED THE "UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDING JURISDICTION ACT" WHICH REQUIRES THAT THE ORDER BE REGISTERED WITH A PA COURT OR JURISDICTION BE TRANSFERRED TO A PA COURT

WITHOUT REGISTRATION THE ORDER IS NOT EFFECTIVE IN PA

ARE GUARDIANSHIP ORDERS FROM OTHER STATES VALID IN PA?

GUARDIANSHIP ORDERS ARE VALID THROUGHOUT THE STATE

JURISDICTION REMAINS IN THE COUNTY WHERE THE GUARDIAN WAS APPOINTED

BY PETITIONING THE COURT, GUARDIANSHIP CAN BE TRANSFERRED TO THE COUNTY WHERE THE INCAPACITATED PERSON NOW RESIDES

ARE GUARDIANSHIP ORDERS FROM OTHER COUNTIES VALID?

IT WOULD BE VALID IN PA UNLESS THE AUTHORITY IS INCONSISTENT WITH PA LAW

PROVIDE THE POA TO YOUR ATTORNEY FOR REVIEW BEFORE RELYING ON IT*

IS A POA FROM ANOTHER STATE VALID IN PA?

READ THE DOCUMENT

DOCUMENT MAY ONLY GRANT HEALTH CARE POWERS OR
FINANCIAL POWERS

PRESENT THE POA TO YOUR ATTORNEY BEFORE RELYING ON IT*

WHAT AUTHORITY DOES A POA HAVE?

I HAVE MORE QUESTIONS!

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