

OVERVIEW OF INCAPACITY from a legal perspective

Pennsylvania law was amended in 1992 to revise the judicial treatment of persons who require either assistance or complete management of their personal and financial affairs.

Under the act, an "Incapacitated person" is defined as an adult whose ability to receive and evaluate information effectively and to communicate decisions in any way is impaired to such a significant extent that he or she is partially or totally unable to manage his or her financial resources or to meet essential requirements for his or her physical health and safety. This definition relates to incapacity as to matters of a person's estate (finances) and person (medical treatment, residential placement, travel, *etc.*)

This revision to the prior definition and treatment of "Incompetents" is a result of a long-sought change in the previous process which indiscriminately imposed an uncompromising and inflexible plenary guardianship for persons who have vastly different needs and abilities.

The Legislature, in recognition of the differences among persons and needs, changed the law to promote the general welfare of all needy citizens by establishing a system which permits allegedly incapacitated persons to participate as fully as possible in all decisions which affect them and tailors solutions to fit their particular needs.

The guardianship process helps these persons meet the essential requirements for their physical health and safety, protect their rights, manage their financial resources and develop or regain their abilities to the maximum extent possible through the use of the least restrictive alternative to the imposition of a guardianship whenever possible.

The law also recognizes that when a guardianship is necessary, it is important that the courts have access to persons and organizations

qualified and willing to serve as limited or plenary guardians.

A guardianship proceeding may be commenced by any person interested in the well-being of the alleged incapacitated person, including but not limited to, a family member, a social service provider, clergy or a friend.

A guardian may be any person or a guardianship support agency who does not have any interest that conflicts with the interests of the alleged incapacitated person.

The act sets forth specific, stringent standards to be met to establish incapacity and to define the extent and duration of the proposed guardianship.

The act also requires that the person who has suggested the need for a guardian provide clear and convincing evidence to support each of the criteria rather than merely stating general allegations of incapacity or need. The clear and convincing evidence standard is the highest standard of proof in the civil legal system. The obvious need for such a heightened standard of proof is clear when weighing the potential loss of rights and liberties that can occur in a guardianship.

Evidence of the following factors must be presented to support the appointment of a guardian:

- 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, social services, a power of attorney, any advance directive for health care, and other supports to assist the individual in making decisions.
- 4) The type of guardian needed, either limited or plenary, and of the person or estate,

5) The proposed duration of the guardianship.

To establish incapacity, the person who petitions the court for the guardianship must present testimony in person or by deposition from individuals qualified by training and experience in evaluating individuals with the conditions which afflict the alleged incapacitated person.

In Allegheny County, the practice is to require testimony from a medical doctor or psychologist. The testimony must clearly establish the nature and extent of the incapacities and disabilities and the individual's mental, emotional and physical condition, adaptive behavior and social skills.

The proponent of the guardianship must also present: evidence regarding the services being utilized to meet essential requirements for the alleged incapacitated person's physical health and safety and to help him or her manage financial resources or to develop or regain abilities; evidence regarding the types of assistance required by the alleged incapacitated person; evidence that no less restrictive alternative to a guardianship is available or appropriate; and evidence regarding the probability that the extent of the alleged incapacitated person's incapacities may significantly lessen or change and over what period of time.

The court is required to show a preference for a limited guardianship in every case where the need for guardianship is established. A plenary guardian whose authority to act on behalf of his or her ward is subject to only minor exceptions, may also be appointed when appropriate.

In all cases, a guardian is required to file regular reports to the court regarding the incapacitated person's health, general care and financial status.

In the instance where a guardian is sought to provide informed consent for medical treatment, the standards of proof to establish incapacity are the same but scope of the inquiry into the

incapacity at issue is limited to whether or not the alleged incapacitated person is capable of receiving and evaluating information relating to the risks and benefits of proposed medical or surgical treatment, the availability and appropriateness of alternatives to the proposed treatment and the consequences of refusing the treatment.

Also included within the scope of an informed consent incapacity proceeding is the alleged incapacitated person's ability to communicate a health care decision, whether to provide an informed consent to, or a refusal of, a proposed procedure or treatment.

For a specific class of medical procedures a guardian, even one with plenary power, must obtain an order of court following a hearing on the issue of medical necessity and the appropriateness of the proposed treatment. These special circumstance procedures include abortion, removal of a healthy organ, sterilization, psycho-surgery, electro-convulsive therapy and experimental biomedical or behavioral procedures.

While the Orphans' Court handles guardianships and civil commitments (under the Mental Health Procedures Act), those two styles of proceedings relating to a person's mental and physical health have separate and distinct procedures and goals. The inception of a civil commitment proceeding may supersede or delay a guardianship proceeding. The existence of a guardian or the pendency of a guardianship proceeding may or may not preclude a civil commitment proceeding

Please feel free to contact our office with any questions.

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MEDICAL TESTIMONY AT A HEARING OR DEPOSITION

Introduction of attorney taking deposition and his or her client

Introduction of opposing counsel, if present.

Introduction of court reporter.

Description of purpose of deposition.

All answers must be verbal

Court reporter administers oath to witness

1. Name?
2. Business Address?
3. What is your profession?
4. Are you licensed to practice in PA?
 - a. When did you acquire your license?
5. In what type of practice do you work?
 - a. Practice Form
 - b. Name of Practice
 - c. Address
 - d. How long with practice
 - e. If less than three years, prior practice
6. Please provide your education background, starting with:
 - a. Undergraduate
 - i. Graduation Date
 - b. Post-graduate
 - c. Medical School
 - i. Graduation Date

- d. Internship
 - e. Residency
 - f. Continuing medical education
7. Do you specialize in any field or fields?
- a. Which?
8. Are you Board certified?
- a. Which board(s)?
 - b. When were you certified?
9. Are you Board eligible for any other specialties?
- a. Which?
10. Are you affiliated with any hospitals?
- a. If so, in what capacity?
 - b. For how long?
11. Are you affiliated with any other medical facilities?
- a. If so, which?
 - b. In what capacity?
 - c. For how long?
12. Are you affiliated with any residential care or rehabilitation facilities?
- a. If so, which?
 - b. In what capacity?
 - c. For how long?
13. Do you see other patients with conditions similar to the AIP?
- a. How many?

- b. How often?
- c. What percentage of your practice?

14. Have you testified as an expert in prior guardianship or other cases in which mental or physical capacity was an issue?

- a. How often?

OFFER FOR CROSS AS TO QUALIFICATIONS (If opposing counsel present)

IF NO OBJECTION, OFFER AS AN EXPERT WITNESS (If opposing counsel present)

15. When did you first meet the alleged incapacitated person (“AIP”)?

16. Where did you first meet the AIP?

17. When did you last see the AIP?

18. How often have you seen the AIP between those dates?

19. Where are the AIP’s medical records maintained?

20. When did you last review his or her chart or medical records?

21. Why was the AIP admitted to the facility at which you performed your examination?

22. When was the AIP admitted to the facility in which the AIP is currently residing?

23. What type of facility is the AIP residing in? *e.g.*, SNF, Assisted Living, PCH

24. What has been the AIP’s general course of treatment since admission or since you last saw him or her?

- a. Testing
- b. Surgery
- c. Therapy, *e.g.*, PT, OT, etc.
- d. Medications

- e. Other treatment or procedures
25. Have you personally performed any tests or evaluations on the AIP?
- a. What tests?
 - b. When and where?
 - c. Describe each test.
 - d. How did the AIP perform on each test?
 - e. How did the AIP's performance on each test compare to standards?
26. When you last saw the AIP, was he or she oriented as to
- a. time?
 - b. place?
 - c. identity?
27. What is your diagnosis of the AIP's current mental condition?
28. What is your prognosis of the AIP's current mental condition?
29. What is your diagnosis of the AIP's physical condition?
30. What is your prognosis of the AIP's current physical condition?
31. Please describe your assessment of the AIP's short term and long term memory.
32. Can the AIP independently manage his or her own activities of daily living, such as
- a. Eating
 - i. Food preparation
 - ii. Self-feeding
 - b. Bathing
 - c. Dressing
 - d. Ambulating

- e. Toileting
 - f. Taking medications
 - g. Financial management
33. Can the AIP communicate
- a. in writing;
 - b. by speaking;
 - c. by other mean of communication?
34. Can the AIP receive information
- a. by reading;
 - b. by hearing;
35. Can the AIP follow simple directions?
36. Can the AIP follow complex directions?
37. What is the extent of the AIP's ability to evaluate information?
38. How is his or her judgment as to issues such as
- i. Residential placement
 - ii. Personal health and safety
 - iii. Need for medical care
 - iv. Financial management
39. How is the AIP's insight into the issues he or she faces day to day regarding:
- a. Residential placement
 - b. Personal health and safety
 - c. The need for medical care
 - d. Financial management

40. Does the AIP exhibit any other symptoms of impairment in his or her cognitive ability?
- a. What symptoms?
 - b. How frequently?
41. Can the AIP monitor and manage his or her own medical care without supervision or assistance?
- a. If not, how much supervision is required?
42. Can the AIP monitor and manage his or her own medications without supervision or assistance?
- a. If not, how much supervision is required?
43. Does the AIP have the independent ability to provide informed consent to a medical procedure?
44. Can the AIP understand and manage his or her own finances?
- a. If not, how much assistance is required?
45. Does the AIP suffer from any behavioral limitations?
- a. Withdrawn
 - b. Hyperactive
 - c. Aggressive
46. Does the AIP suffer from any social skill limitations?
47. Does the AIP have the ability to receive and evaluate information so as to be able to make independent decisions about his or her physical health and safety and financial resources?
48. Does the AIP have the ability to communicate such decisions?

49. Are the incapacitated person's limitations likely to increase or decrease in the immediate future?

a. Over the next year?

50. Based on your examination of the AIP and any review of his or her records, do you have an opinion as to whether or not the AIP is totally or partially unable to independently manage his or her personal affairs, such as physical health and safety, residential placement and medical care?

a. What is that opinion?

51. If you believe the AIP is partially unable to manage his or her personal affairs, for what aspects of the AIP's life is assistance required.

52. Based on your examination of the AIP and a review of his or her records, do you have an opinion as to whether or not the AIP is totally or partially unable to independently manage his or her financial affairs, such as bill paying and asset and income management?

53. What is that opinion?

54. If you believe the AIP is partially unable to manage his or her financial affairs, for what aspects of the AIP's life is assistance required

55. What immediate placement recommendation would you make for the AIP?

56. What long term placement recommendation would you make for the AIP?

57. Would the AIP be harmed, either physically or mentally, if he or she were required to attend a hearing in downtown Pittsburgh?

a. Anxiety

b. Depression

c. Physical harm due to acute medical condition

58. Have all of your opinions today been rendered with a reasonable degree of medical/psychological/professional certainty?

OFFER FOR CROSS EXAMINATION (if other counsel present)

At conclusion of testimony ask:

Are you willing to waive a review of the transcript of this deposition and trust the skills of the court reporter or would you like an opportunity to review the transcript to correct typographical errors but not make substantive changes to your testimony?

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