



# Five County Guardianship Practice: Part I, Representing the Petitioner

Presented by:

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to the Honorable Matthew D. Carrafiello,

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Guest Speaker: **The Honorable C. Theodore Fritsch, Jr.**,  
Bucks County Orphans' Court



# Agenda

- Guardianship and Mental Health
- Preparing the Petition
- Ethics – Withdrawing from representing the Petitioner
- Guardianship Tracking System



# The Purpose of Guardianship

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 incapacitated persons to participate as fully as possible in all decisions which affect them,
- which assists these persons in meeting the essential requirements for 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 alternatives;
- 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.
- 20 Pa. C.S. § 5502.



# Guardianship Basics

- **Incapacitated person:** [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 financial resources or to meet essential requirements for his physical health and safety. 20 Pa. C.S. § 5501.
- **Guardian of Estate and Guardian of Person.**
- **Limited or Plenary Guardian.**



# Hypothetical – Part I

The Matter of Sam. Mom and Dad ask you to represent them in getting guardianship over their adult son, Sam. Sam has a longstanding mental health illness. He can function when he takes his medication but has never been able to work. Without his medications, he is psychotic and can be aggressive. He has had multiple hospitalizations in the past.



## Hypothetical – Part I, cont'd

Mom and Dad state that Sam is not taking his medication, he left home and is living in an apartment, which is filthy, the utilities are turned off, he is not eating and has lost a lot of weight. Mom and Dad want guardianship:

- To sign Sam into an inpatient psychiatric treatment facility;
- To force him to take his medication;
- And to consent to treatment, including Electro-convulsive therapy.



## Limits of Guardianship

Do Mom and Dad get their wish?

- Powers specifically excluded: power to admit the incapacitated person to an inpatient psychiatric facility or State Center for the intellectually disabled. 20 Pa. C.S. § 5521(f)(1).



# Limits of Guardianship

- Powers controlled by other Statute: The court may not grant the guardian powers controlled by other statutes. 20 Pa. C.S. § 5521(f).
- The Mental Health Procedures Act (“MHPA”) establishes the rights and procedures for **all involuntary treatment of mentally ill persons**, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. 50 P.S. § 7103.





# The MHPA

- According to 50 P.S. § 7301 (a): involuntary emergency examination and treatment for person severely mentally disabled.
- A person is severely mentally disabled when, as a result of mental illness, “his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a **clear and present danger of harm to others or to himself.**”



# The MHPA

- Involuntary Commitment. 50 P.S. § 7302.
- Adequate treatment means a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his or her recovery from mental illness. 50 P.S. § 7104.



# Limits of Guardianship

- Powers and duties only granted to the Court: absent a Court order with specific findings, a guardian or emergency guardian shall not have the power to consent to certain medical procedures, prohibit marriage or consent to divorce, or to consent to experimental procedures. 20 Pa. C.S. § 5521(d).
- Abortion, sterilization, psychosurgery, electroconvulsive therapy (“ECT”) or removal of a healthy body organ. 20 Pa. C.S. § 5521(d) (2).
- Is there a need for guardianship services?



## Hypothetical, Part II

Mom and Dad state that Sam was upset when they discussed the guardianship. He refuses any treatment and said he is fine. Mom and Dad tell you that Sam does not like the doctor and has not seen one voluntarily in the past 15 years. He has been involuntarily committed in the past but always refused to allow Mom and Dad access to his records. Sam stated he may go to NJ to live with his girlfriend and decided he could save a lot of money by no longer paying rent. Mom and Dad want to be co-guardians but Mom was convicted of misdemeanor possession of a controlled substance.



# Guardianship Petition – Threshold Issues

- Who can be the Petitioner?
- Jurisdiction – Domicile and Residence.
- What if Sam was a patient at Norristown State Hospital?
- Citation Pleading.

# Guardianship Petition – Petition Contents

- Name and address.
- ID Parents, spouse, presumptive adult heirs.
- ID Residential Service provider, if any.
- Proposed guardian identified with averment no adverse interest.
- **Proposed guardian averment that are available to visit.**
- **Proposed guardian averment regarding guardianship training, certification, and discipline related to certification.**
- **Proposed guardian ever serve as guardian in prior matter and the number of current matters.**
- **Proposed guardian certified criminal records check from PA State Police within past six months and from other jurisdictions where client resided in past five years.**
- **Proposed guardian's consent to serve.**



# Guardianship Petition – Petition Contents, cont'd

- Statement why guardianship is sought.
- Functional limitations and mental condition.
- Less restrictive alternative.
- **Prior incapacity hearings, result, and court.**
- Limited or plenary guardian of estate/person.
- Gross value of estate and all sources of income.
- Veteran/military status.
- **Power of Attorney, financial and healthcare, mental health, health care agent, attach documents and serve named parties.**
- **List names of persons who will receive the Guardianship reports.**
- Burial account or Will, attach.
- **Specific averment requesting to waive the bond.**



## *Prima Facie Case*

- A person is presumed to have capacity and the burden is on the petitioner to prove incapacity by clear and convincing evidence.
- A petition for adjudication of incapacity, without more, may not itself serve as *carte blanche* for a broad inquest into the allegedly incapacitated person's physical and mental health and personal finances.
- Cannot prove incapacity through testimony of the AIP alone. In re Hyman.
- What evidence do you have in Sam's case?





## Service of the Citation

- The orphans' court does not have personal jurisdiction over the AIP until personal service is effectuated or there is a general appearance on the AIP's behalf. In re Hicks' Estate.
- Can you serve Sam if he will not let you in his apartment?
- The contents and terms of the petition shall be explained to the AIP and such service shall be no less than 20 days in advance of the hearing.



# Independent Evaluation and Discovery

- What if Sam will not submit to an independent evaluation?
- Motion for discovery, OC Rule 7.1.
- Need petition and for cause shown.
- The Court may order an independent evaluation or the AIP may request an independent evaluation. 20 Pa.C.S. § 5511(d).
- MH records are confidential.
- Expert Reports and telephonic testimony.



## Right to Counsel

- The AIP has the right to be represented by counsel in the guardianship proceeding. 20 Pa. C.S. § 5511(a).
- If the case appears to be contested, request counsel.
- Counsel can be appointed by the court and paid for by the county if the AIP's funds are not sufficient. 20 Pa. C.S. § 5511(c).
- The Petitioner must notify the Court 7 days in advance of the hearing. 20 Pa. C.S. § 5511(a).



# Emergency Guardianship

- The Court can appoint an emergency guardian when it appears that the person lacks capacity, is in need of a guardian and a failure to make such appointment will result in **irreparable harm to the person or estate** of the alleged incapacitated person.
- Is Sam's potential loss of his apartment an emergency?
- When requesting an emergency guardian, state what the irreparable harm will be.
- Do you still have to get the criminal records?
- Estate of Gavin v. Loeffelbein



## Hypothetical, Part III

An attorney was appointed for Sam. Mom and Dad drive Sam to his attorney before the scheduled date of the hearing. Mom and Dad tell the attorney that Sam is going to receive an inheritance from his Aunt – something they did not tell you. They state they would like to be repaid for all their years of caring for Sam from the inheritance. They also want to make sure Sam's girlfriend does not get any of Sam's money. Attorney calls you and states that she believes Mom and Dad are planning on self-dealing.



# Candor Towards the Tribunal

- Rule 3.3 (a) (1) and (3) – A lawyer shall not knowingly make or fail to correct a false statement of material fact or law made to a tribunal and may refuse to present evidence he or she reasonably believes to be false.
- Rule 3.3 (b) (c) – lawyer must take reasonable remedial measures, including disclosure to the Court, even in conflict with client confidentiality.
- Rule 3.3 (d) – ex parte proceeding, reveal all facts allowing the Court to make an informed decision.



# Confidentiality of Information

- Rule 1.6 - A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3. This portion of the Rule is mandatory and the lawyer must comply with Rule 3.3.
- However, the lawyer should not reveal information not necessary to comply with Rule 3.3.



# Withdrawal from Representation

Rule 1.16(b) states that the lawyer may withdraw if withdrawal can be accomplished:

- without material adverse effect on the interests of the client;
- the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- or for other good cause shown.





# Guardianship Tracking System

- Guardianship Tracking System (GTS) developed and administered by the Administrative Office of Pennsylvania Courts (AOPC) for tracking data related to all statewide guardianship cases of adult incapacitated persons.
  - Implemented in all 67 counties in 2018.
  - GTS is the electronic filing system for guardianship inventories and reports.
  - <https://ujportal.pacourts.us/>



# Guardianship Inventories and Reports

- New Supreme Court forms for Inventories and Reports
  - Effective 7/1/2018
  - Guardian's Inventory - Form G-05
  - Guardian of the Estate Report – Form G-02
  - Guardian of the Person Report – Form G-03
  - Fillable forms available on-line at <https://www.pacourts.us/forms/forthepublic/orphan-courts-forms>



# Rule 14.8 Guardianship Reporting, Monitoring, Review and Compliance

- Effective 6/1/2019
- Reports
  - Guardian's Inventory
    - Due 90 days after appointment.
  - Report of Guardian of the Person
    - Due one year after appointment and annually on the anniversary date of appointment.
  - Annual Report of Guardian of the Estate
    - Due one year after appointment and annually on the anniversary date of appointment.



## Rule 14.8 continued:

- **Final Reports – due 60 days after event:**
  - Death of Incapacitated Person
  - Adjudication of Capacity of Incapacitated Person
  - Change of guardian
  - Expiration of order of limited duration
  - Receipt of provisional order accepting transfer of guardianship
- **Notice of Filing by Guardian**
  - Sent by Guardian
  - To all persons named in Final Decree.
  - Within 10 days after filing of any Inventory or Report
- **Failure to File Inventory and Reports**
  - 20 day notice
  - Notice of delinquency – referral to Judge
  - Sanctions which can include removal of Guardian

# Necessary Experience and Skill

- Calendar Inventory and Report Anniversary Dates
- Maintain log of guardian activities
- Ability to complete required forms for inventory and reports
- Ability to timely file required inventory and reports
  - Computer access – file directly in GTS
    - E-mail address
    - User access code letter from Court Office for Guardians
    - Create portal account in GTS
    - Credit card for payment of filing fee
  - Public Terminals available at Register of Wills/Orphans' Court Offices



# GTS HELP SYSTEM

- HELP DESK – 1-877-227-2672
- [GTSAOPC@PACOURTS.US](mailto:GTSAOPC@PACOURTS.US)
- [Help](#) Button on every GTS screen
- GTS Reference Guides, Step by Step Guides
- GTS Video Tutorials
- GTS Online Workshop Schedule – Spring 2019



**QUESTIONS?**