



# Five County Guardianship Practice: Part II, Representing the AIP May 9, 2019

Presented by:

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Guest Speakers:

The Honorable Stanley R. Ott (Retired)  
*Montgomery County Orphans' Court*

The Honorable Katherine B. L. Platt  
*Chester County Orphans' Court*



# Does the AIP Have a Right to Counsel?

- Guaranteed by Pa. C.S. §5511
- Need to advocate AIP's position
- AIP not required to speak
- County pays if resources are insufficient.
  - *Query– Can AIP select counsel but have County pay?*



# Can the Court Appoint Counsel for the AIP?

- **20 Pa. C.S. § 5511** – “In appropriate cases.”
- Prior representation of AIP by other counsel:
  - When?
  - What kind of matters?
  - How extensive was the representation?
  - Is the attorney able to handle a guardianship?
  - Does the attorney even want to be involved?



# Why Should the Court Appoint Counsel?

- AIP contests incapacity.
- Family members disagree about best interests.
- Evidence of financial exploitation.
- Evidence of self neglect or abuse by others.
- Power of attorney issues.
- Medicaid eligibility issues.
- The need for someone to be AIP's "voice."



# Important New Rule Changes (Effective July 1, 2019)

- **Rule 14.4 (c)** --- The Court must now delineate the scope of Court-appointed counsel's services and indicate if representation includes pursuing an appeal if necessary.
- **Rule 14.4 (a)**--- Petitioner must advise the Court whether AIP has requested counsel, not just if the AIP has counsel or if one should be appointed.
- ***Query: Is Petitioner required to advise why counsel might be advisable or necessary? Does it include telling the AIP that the County will pay for counsel if the AIP cannot afford it?***



# CHECKLIST FOR AIP COUNSEL

1. Is the petition legally sufficient?
2. Emergency guardianship necessary?
3. IME?
4. Timetable for plenary hearing?
5. Should client testify?
6. Should the proceedings be closed?
7. Is there a less restrictive alternative?
8. Who should be the guardian?



## *HYPOTHETICAL #1*

The Court appoints you as counsel for the 70 year old recently widowed AIP, a scamming victim who wired \$750K (½ his net worth) overseas to his “fiancée.” AIP appears to be fully functional except for this one, little “blind spot.” He still works, mows his own lawn, can pay his bills, and can balance his checkbook. AIP vigorously contests guardianship and also wants to resist the Court’s Order for an IME. He confides in you that he intends to wire another \$50K overseas “as soon as this silly thing is over.” He also tells you that he wants to testify.

# ETHICAL CONSIDERATIONS

- **20 Pa C.S. § 5502**
  - Purpose of statute is to allow IP's to participate as fully as possible.
- **Rule 1.14**
  - Must try to maintain normal attorney client relationship. Incapacity doesn't mean that the client can't understand, deliberate upon and reach conclusions affecting his/her wellbeing.
  - Advocate client's wishes. "Best interests" usually more appropriate for Guardian *ad Litem*.
- **Rule 1.6 (a)**
  - Must protect client's confidences.
  - "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent."
- **Rule 3.3** --- Duty of Candor to the Court
  - What/how much are you allowed to tell the Court about AIP's overall situation and medical condition?



# Safe Haven of Rule 1.14 (b)

- Where the lawyer reasonably believes the AIP:
  - (1) Has diminished capacity,
  - (2) Is at risk of physical, financial or other harm,
  - (3) Cannot act in his/her own best interests.
- The lawyer may take reasonably necessary protective actions, including seeking appointment of a guardian.



## *HYPOTHETICAL #2—Part 1*

You are court-appointed to represent an 82 year old man whose daughter from his first marriage has petitioned for guardianship. You visit your client and are greeted by his 55 year old second wife who wants to stay for your interview. She also tells you that they already hired an attorney.

# Can the AIP Hire Counsel?

- **Rosengarten** --- *Still* the seminal case.

- **Important New Rule Change --- Rule 14.4 (b)**

If AIP has retained counsel, a comprehensive, signed engagement letter is needed, including

- (1) When and how counsel was retained,
- (2) Scope of services,
- (3) Whether services include pursuing an appeal,
- (4) Hourly rate and how services are billed,
- (5) Who is responsible for payment,
- (6) Whether a retainer is needed and if so how much.

**Note:** “Counsel shall provide a copy of the signed engagement letter to the Court upon request.”



# Can Family Members or Friends Hire Counsel for the AIP?

- **Possible competing interests** --- Family and intestate heirs who wish to control the outcome, save money for inheritance, or have philosophical differences about care.
- **Hidden agendas** --- Is this just a ploy for someone to conceal past misdeeds?
- **New Rule 14.4 (b)** --- Should provide greater transparency



## *HYPOTHETICAL #2—Part II*

While interviewing your client, he informs you that his new attorney just wrote a new will for him last week. He does not tell you what is in that new will. You also notice throughout the interview that your client repeats himself a lot. As you get up to leave, you notice a stack of “flash cards” on the coffee table. Your client tells you that it helps him to remember things.

# INVESTIGATION

1. **TALK TO THE AIP---**If possible, do it without others being present. (Make sure that no monitors are on).
2. **INSPECT THE AIP'S HOME---**Check the refrigerator, medicine cabinet, general condition of the home. Are bills piled up and unpaid? Do plumbing, heat and electric work? Is there evidence of hoarding?
3. **ESTABLISH WHAT THE FAMILY DYNAMICS ARE---**Look for possible hidden agendas by those looking out for their "inheritance."
4. **BE ALERT TO CHANGE IN CIRCUMSTANCES---**Life-changing events such as recent deaths, illnesses; the hiring of new attorneys, financial advisors, and/or caretakers.
5. **RECENTLY CREATED DOCUMENTS OR SIGNIFICANT CHANGES IN EXISTING DOCUMENTS---**Wills, POA's, Deeds.
6. **FINANCIAL DOUCMENTS---**Changes in titling of accounts, new credit cards, new accounts.
7. **CHANGES IN GIFT GIVING PATTERNS---**Be aware of the possibility of scamming.
8. **POSSIBLE NEED FOR INDEPENDENT MEDICAL ASSESSMENT**

# “Best interests” v. “AIP’s Wishes”

- In Re: Michael Sabatino, 2016 WL 6995384
  1. AIP’s ability to hire counsel.
  2. Court-appointed counsel’s role as viewed under multiple provisions of the Code of Professional Ethics.
  3. Striking a balance between zealous advocacy and “best interests” of the AIP.
- When is a *Guardian Ad Litem* appropriate?

## *HYPOTHETICAL #3*

A petition for guardianship is filed without any supporting written interrogatories or expert report. Petitioner acknowledges to the Court in a conference that she has no expert and requests that the Court order an IME.

### **Questions:**

1. Under what circumstances should you as court-appointed counsel oppose the request?
2. Can the AIP refuse to cooperate?
3. Is Petitioner's counsel allowed to use the IME to prove her case-in-chief?
4. When written interrogatories are prepared, does Petitioner have to provide them to **all** interested parties?



# Compelling AIP to Testify

- AIP cannot be compelled to testify.
- Taylor, Incapacitated Person, 21 Fid Rep. 2d 205 (Montg. 2001) (Petitioner has the initial burden of making a prima facie case for incapacity without AIP's own testimony. If that initial showing is made, AIP will be subject to questions from the bench by interview rather than by direct or cross. No questions by counsel unless AIP (or his counsel) acquiesces).
- Wismer Estate, 15 Fid Rep. 308 (Montg. 1965) (*Court has the right to refuse Petitioner's request to call an alleged incompetent as a witness. An incompetency matter is not an adversary proceeding and does not, in any way, affect the Petitioner's own legal rights*).
- **Must you allow the Court to address the AIP?**
- **What if AIP insists on testifying?**



**QUESTIONS?**