



Five County Guardianship Practice: Part III, Theft, Exploitation & Choice of Guardian

Presented by:

Elizabeth T. Stefanide, Esq.

Guest Speakers:

The Honorable Matthew D. Carrafiello
Administrative Judge, Philadelphia County Orphans' Court

Mark J. Newell, Senior Counsel

Lesley Oakes, Assistant Senior Counsel

PA Department of Human Services, Governor's Office of General Counsel,
Philadelphia



Who Should Be Guardian?

- Court determines guardian is necessary
- Court must find suitable individuals or entities willing to serve. 20 Pa. CS 5502
- New OC Rule 14.6 establishes a priority for Court's Consideration
- #1 Selection by the IP
- #2 Schedule of Priority of Individuals
- #3 per 20 Pa. CS 5511(f)



Who May Serve?

- New OC Rule 14.6 Court shall appoint person nominated by IP
- Person nominated in a POA
- HCPOA
- Advance Health Care Directive – LW
- Mental Health Care Declaration
- Mental Health Care POA

Who May Serve - Person?

- Otherwise: Order of Priority
- Guardian of the **Person**:
- Guardian of the estate;
- Spouse, unless estranged or an action for divorce is pending;
- An adult child;
- A parent;
- Nominee of a deceased or living parent of an unmarried AIP;
- Adult sibling;
- Adult grandchild;
- Other adult family member;



Who May Serve - Person?

- Adult who knows AIPs preferences and values, including, but not limited to religious and moral beliefs, and would be able to assess how AIP would make decisions; or
- Other qualified proposed guardian, including a professional guardian.



Who May Serve - Estate?

- Guardian of **Estate**. When the estate of the incapacitated person consists of minimal assets or where the proposed guardian possesses the skills and experience necessary to manage the finances of the estate:
- Guardian of the person;
- Spouse unless estranged or an action for divorce is pending;
- Adult child;
- A Parent;
- Nominee of a deceased or living parent of an unmarried AIP;
- Adult sibling;
- Adult grandchild;
- Other adult family member; or



Who May Serve - Estate?

- An adult who knows AIP's preferences and values, including, but not limited to religious and moral beliefs, and would be able to assess how the AIP would make decisions.
- Where none of the above individuals possesses skills & experience necessary to manage the finances, guardian of estate may be any qualified proposed guardian, including a professional guardian or corporate fiduciary.



Who May Serve?

- Any qualified individual, corporate fiduciary, nonprofit corporation, guardianship support agency or county agency. 20 Pa. CS 5511(f)
- What is in Incapacitated Person's ("IP's") best interest?
- Court analysis of IP and Proposed Guardian's values & whether love & concern for IP.
- Should Court appoint co-guardians?
- Should Court appoint Successor Guardians?



Who May Not Serve?

- Court will not appoint guardian whose interests conflict w/ IP.
- What gives rise to unsuitability?
 - Rivalry among family members
 - Hostile relationship w/ IP
 - Direct financial Interest in IP's estate
 - Allegations of Inappropriate handling of finances as an Agent under POA or otherwise



Who May Not Serve?

- Allegations of Neglectful conduct
- Conflicting Religious beliefs
- Conflicting End of Life beliefs
- Incapacity existed when documents were created by IP
- Non-cooperation w/ Hospital or Nursing Home in discharge or care planning
- Non-cooperation w/ Department of Human Services in obtaining Medicaid for Long Term Care

Who May Not Serve?

- New OC Rule 4.2 requires certified response from PSP criminal record check for each proposed guardian from w/n 6 months of filing. Goes back 5 years. Is criminal record a total bar? Case by case analysis?
- Is bond required? Can proposed guardian become bonded?
- Absent good cause or reason for disqualification. In re Sylvester.
- Circumstances giving rise to unsuitability:
Who May Not Serve?



Removing and Replacing

- Review hearing may be requested or ordered sua sponte by court
- Court will monitor Annual reports
- Any party interest may petition to remove guardian
- Review hearing - court will determine whether Petitioner showed CC evidence exists guardian failed to perform duties or act in best interest of IP



Grounds For Removal:

- Wasting or mismanaging the estate
- Became incapacitated
- Left PA without posting bond
- Has been charged with voluntary manslaughter or homicide
- When, for any other reason, the interests of the estate are likely to be jeopardized



Recovering Funds?

- Pursue Criminal Charges
- Pursue a Civil Investigation where funds exit to hire counsel.
- Pursue a County Office For Services for the Aging report of need. See Adult Protective Services Act attached.
- What does DHS expect from Guardian; duty to go after those assets; bring criminal/civil action to recover funds; file action in Orphans Court to recover assets.



Recovering Funds?

- File a Petition to Freeze Bank Accounts and Return Assets.
- File a Petition For Review.
- File a Petition to Surcharge the Prior Guardian.



Attorney and Fiduciary Fees

- Reasonable fees
- Upon Petition only approved by Court
- Extent & value of services must be properly established
- Guardian has burden of proof
- How do you analyze whether reasonable:
 - a. Amount of work;
 - b. Character of the services;
 - c. difficulty of the problems involved;

.



Reasonableness

- d. importance of the litigation;
- e. amount of money or value of property in question;
- f. degree of responsibility incurred;
- g. whether the fund was “created” by the attorney;
- h. professional skill & standing
- i. results obtained; and
- j. ability of IP to pay




Ethical Rule:

- Rule 1.5 (a) of the Pennsylvania Rules of Professional Conduct states lawyer's fee shall not be illegal or excessive. Factors considered under Rule 1.5 (a) in determining whether a particular fee is excessive:
 - (1) Whether the fee is fixed or contingent.
 - (2) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly.
 - (3) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.



Ethical Rule:

- (4) The fee customarily charged in the locality for similar legal services.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the lawyer or lawyers performing the services.

- 
- **In Re: Mardell Dardarian, 7 Fid. Rep. 3d 259 (2017)**
 - Abiding Principals in Guardian Compensation
 - 1) Aggregate Fees charged to the estate shouldn't exceed a reasonable fee for all services performed;
 - 2) must be on most moderate scale;
 - 3) Attorneys serving as guardians should not assume they will get their attorney billing rate.