

New Orphans' Court Rules Bring Changes to Pa. Guardianships

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Body

A new World Health Organization supported study confirms the worst fears of an aging population. Drawing upon data from 28 countries spanning 12 global regions, researchers present a grim portrait of unchecked elder abuse and neglect.

Yet WHO senior health adviser Alana Officer notes that societies across the globe consider the subject taboo. Officer explains that, "elder abuse remains one of the least investigated types of violence in national surveys."

The problem has reached epidemic proportions. A 2010 Government Accounting Office (GAO) study revealed "guardians stole or otherwise improperly obtained more than \$5.4 million in assets from 158 incapacitated victims." In 2016, another GAO study, looking at eight cases from six states, found guardians had stolen "more than \$600,000 from their elderly wards." Even more alarming, these cases included neglect as well as emotional and physical abuse.

Here in Pennsylvania, the picture appears equally bleak. The Department of Aging reports a threefold increase in the number of complaints received, with some 30,000 in 2017 alone.

A recent Philadelphia case concerned a court appointed guardian with a criminal history of fraud and forgery in another state. The guardian had cases filed in multiple counties. In the opinion, Judge John W. Herron wrote:

"Perhaps most troublingly ... [an authorized agency's] failure to discover that the guardian it nominated in some many cases was plainly unfit to serve has shaken the public's faith in the guardianship system, which is vital to protecting incapacitated people throughout Pennsylvania," see *Estate of Margareta & Edmund Berg*, No. 1286 IC of 2016 (O.C. Philadelphia May 10, 2018).

Both Pennsylvania's legislative and judicial branches have taken steps to address elder abuse by revisiting guardianship proceedings across the commonwealth. In Harrisburg, the Senate and House of Representatives have scheduled sessions to vote on the passage of Pennsylvania Senate Bill 884

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(SB 884). Introduced by Sen. Stewart Greenleaf, the chair of the Senate's Judiciary Committee, SB 884 would repeal, replace and amend provisions of Title 20 (Decedents, Estates, and Fiduciaries) of the Pennsylvania Consolidated Statutes. Penn State law professor Katherine C. Pearson, has written that the bill "imposes a stronger framework, with modern safeguards that would apply when any court in Pennsylvania finds it necessary and appropriate to appoint guardians for incapacitated persons." In June 2018, the Pennsylvania Supreme Court adopted new Orphans' Court Rules 14.1 through 14.14.

NEW RULES FOR GUARDIANSHIP PROCEEDINGS

"Guardian" comes to us from the Old French *gardien*, meaning "keeper" or "custodian." The word has conveyed different meanings at different times. Scholars tell us that its first use in a specific legal sense dates from about 1510. Yet etymological concerns aside, the human condition has always dictated that some of us must at one time or another, rely on others to keep us safe from harm.

Under Pennsylvania's guardianship statute, "the court has the power to place total control of a person's affairs in the hands of another. This great power creates the opportunity for great abuse," see *In re Hyman*, 811 A.2d 605, 608 (Pa. Super. Ct. 2002) (quoting *Estate of Haertsch*, 609 A.2d 1384, 1386 (1992)).

Mindful of such abuse, the Pennsylvania Orphans' Court Procedural Rules Committee presented the Supreme Court with a rewritten set of rules for guardianship proceedings. As noted above, the court adopted these rules with an effective date of June 1, 2019.

NOTED CHANGES

The new rules bring both substantive and procedural changes. Among other things, these changes will address the waiver of bond, clarification of the role of counsel, and transactions related to real property.

Regarding the adjudication of incapacity, the rules will require a uniform "expert report" in lieu of the past practice of deposition testimony. They implement uniform model language for the drafting of orders and certificates to ensure consistency across jurisdictions. Changes clarify respective obligations regarding content and service and allow the court to order a review hearing, either *sua sponte* or upon petition.

Rule 14.8 addresses the guardian's responsibilities regarding reporting, monitoring, review, and compliance. Specifically, the rule speaks to differences in reporting requirements for emergency guardianships and those of finite duration pursuant to 20 Pa.C.S. Section 5512.1(a)(5). 14.8 outlines the steps a guardian must take when filing a reporting or inventory form, including the requirement to serve notice on all persons entitled thereto.

With few exceptions (Florida, Kansas, Michigan and Texas), state legislatures have adopted laws modeled on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The act and its progeny speak to jurisdictional issues regarding adult guardianships, conservatorships and other protective proceedings. Pennsylvania enacted its own version of the UAGPPJA in 2012.

Taking their cues from this statutory scheme, Rules 14.11-14.13 deal with the procedural questions arising from transfers of guardianships to and from other jurisdictions. Additionally, the new rules

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either incorporate by reference or adopt unchanged the nine most recently published statewide guardianship forms.

PETITION PRACTICE AND PLEADING

Attorneys will most likely encounter the biggest challenges with three of the rewritten rules. Most notably, Rule 14.1 allows for the filing of responsive pleadings to petitions for the adjudication of incapacity. The rule promotes judicial economy by permitting the court to decide objections at the adjudicatory hearing.

Furthermore, 14.1 expands the universe of "potentially aggrieved parties." Now, persons such as a fiancé (or fiancée), best friend, or business partner, may seek permission to intervene in a guardianship proceeding.

In theory, some restrictions apply. First, the court, will only accept responsive pleadings that identify contested legal issues and questions of fact. Second, a party must file and serve such pleadings no later than five days prior to the hearing.

Yet in practice, failure to meet this deadline will not waive the right to raise initial objections at the adjudicatory hearing.

Careful students of the Pennsylvania Rules of Civil Procedure may find these changes worrisome. Attorneys representing proposed guardians could now face pro se litigants suddenly appearing at the bar of court to argue objections not previously raised.

APPOINTMENT OF A GUARDIAN

Unpacking Rule 14.2 will also prove necessary when considering the nomination of a guardian.

Rule 14.2(c)(1) requires petitioners to append all existent powers of attorney (financial, health care, mental health) and living wills to the initial filing. Moreover, Rule 14.2(f)(2)(iii) mandates complete process of service to all named agents.

Absent good cause, the court must appoint as guardian any agent so nominated by a principal pursuant to one of these instruments. The court must also review the effect of the guardianship regarding powers retained by agents not otherwise nominated.

In cases where the petition nominates an entity as proposed guardian, the rule now requires identification of the entity's principal. Additionally, the petition must name the particular individuals tasked with direct responsibility for the welfare of the alleged incapacitated person. This obligates entities using rotating assignments to identify each member of the rotation.

Rule 14.2 places a greater burden on the proposed guardian to provide the court with both qualifying and disqualifying information. Specific disclosures include a full criminal background check. Moreover, nominees must also present the court with records regarding the completion of any guardianship training. Such records must state the status of existent certifications and any disciplinary history connected thereto. Furthermore, the petition must divulge the proposed guardian's current caseload.

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Finally, in an effort to foster statutory and procedural harmony, the revised rule removes the requirement to serve non sui juris intestate heirs.

While perhaps disappointingly slow, progress continues. The rewritten rules exemplify the law's ongoing re-evaluation of the balance between societal obligations and the rights of the elderly and allegedly incapacitated persons. Such a balance must always consider the dignity and personal liberties of the individual.

As Justice Thurgood Marshall, wisely said, "It is in recognizing the humanity of our fellow beings [that] we pay ourselves the highest tribute."

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