

DECEDENTS, ESTATES AND FIDUCIARIES (20 PA.C.S.) - PETITION AND HEARING AND INDEPENDENT EVALUATION, DETERMINATION OF INCAPACITY AND APPOINTMENT OF GUARDIAN AND REVIEW HEARING

Act of Dec. 14, 2023, P.L. 446, No. 61

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SB 506

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, in incapacitated persons, further providing for petition and hearing and independent evaluation, for determination of incapacity and appointment of guardian and for review hearing.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 5511(a), (e) and (f) of Title 20 of the Pennsylvania Consolidated Statutes are amended and the section is amended by adding a subsection to read:

§ 5511. Petition and hearing; independent evaluation.

(a) Resident.--The court, upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the Commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate. The petitioner may be any person interested in the alleged incapacitated person's welfare. The court may dismiss a proceeding where it determines that the proceeding has not been instituted to aid or benefit the alleged incapacitated person or that the petition is incomplete or fails to provide sufficient facts to proceed. Written notice of the petition and hearing shall be given in large type and in simple language to the alleged incapacitated person. The notice shall indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. It shall include the date, time and place of the hearing and an explanation of all rights[, including the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot be afforded]. The Supreme Court shall establish a uniform citation for this purpose. A copy of the petition shall be attached. Personal service shall be made on the alleged incapacitated person, and the contents and terms of the petition shall be explained to the maximum extent possible in language and terms the individual is most likely to understand. Service shall be no less than 20 days in advance of the hearing. In addition, notice of the petition and hearing shall be given in such manner as the court shall direct to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the alleged incapacitated person if he died intestate at that time, to the person or institution providing residential services to the alleged incapacitated person and to such other parties as the court may direct, including other service providers. The hearing may be closed to the public and without a jury unless the alleged incapacitated person or his counsel objects. The hearing shall be closed and with or without a jury if the person alleged to be incapacitated or his counsel so requests. The hearing may

be held at the residence of the alleged incapacitated person. The alleged incapacitated person shall be present at the hearing unless:

(1) the court is satisfied, upon the deposition or testimony of or sworn statement by a physician or licensed psychologist, that his physical or mental condition would be harmed by his presence; or

(2) it is impossible for him to be present because of his absence from the Commonwealth. It shall not be necessary for the alleged incapacitated person to be represented by a guardian ad litem in the proceeding.

[Petitioner shall be required to notify the court at least seven days prior to the hearing if counsel has not been retained by or on behalf of the alleged incapacitated person. In appropriate cases, counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual.]

(a.1) Appointment of counsel.--

(1) If the petitioner under subsection (a) is aware that the alleged incapacitated person is represented by counsel, the petitioner shall advise the court that the alleged incapacitated person is represented by counsel at the time of filing the petition or as soon as the petitioner becomes aware of the representation.

(2) Regardless of the ability of the alleged incapacitated person to pay, the court shall appoint counsel to represent the alleged incapacitated person in any matter for which counsel has not been retained by the alleged incapacitated person, including in all proceedings under subsection (a) and in any subsequent proceedings to consider, modify or terminate a guardianship. Appointed counsel shall be qualified by experience or training and shall act without delay under the circumstances.

(3) Counsel for an alleged incapacitated person shall, as far as reasonably possible, maintain a normal client-attorney relationship with the client. Counsel shall advocate for the client's expressed wishes and consistent with the client's instructions, to the extent the client is able to express wishes and provide instructions. Counsel shall comply with the Rules of Professional Conduct governing the attorney-client relationship. Retained or appointed counsel may not act as guardian ad litem for the alleged incapacitated person. If the court determines that a guardian ad litem is necessary, the court shall make a separate appointment. Appointed counsel shall meet with the alleged incapacitated person as soon as reasonably possible after the appointment. Within five days of the meeting, appointed counsel shall file with the court a certification of the time and place that the meeting occurred.

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(e) Petition contents.--The petition, which shall be in plain language, shall include the name, age, residence and post office address of the alleged incapacitated person, the names and addresses of the spouse, parents and presumptive adult heirs of the alleged incapacitated person, the name and address of the person or institution providing residential services to the alleged incapacitated person, the names and addresses of other service providers, the name and address of the person or entity whom petitioner asks to be appointed guardian, an averment that the proposed guardian has no interest adverse to the alleged incapacitated person, the reasons why guardianship is sought, a description of the functional limitations and physical and

mental condition of the alleged incapacitated person, the steps taken to find less restrictive alternatives, the specific areas of incapacity over which it is requested that the guardian be assigned powers and the qualifications of the proposed guardian. **Petitions must allege specific facts demonstrating that less restrictive alternatives were considered or tried and why the alternatives are unavailable or insufficient.** If a limited or plenary guardian of the estate is sought, the petition shall also include the gross value of the estate and net income from all sources to the extent known.

(f) Who may be appointed guardian.--

(1) The court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support) or a county agency. In the case of residents of State facilities, the court may also appoint, only as guardian of the estate, the guardian office at the appropriate State facility. The court shall not appoint a person or entity providing residential services for a fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person except where it is clearly demonstrated that no guardianship support agency or other alternative exists. Any family relationship to such individual shall not, by itself, be considered as an interest adverse to the alleged incapacitated person. If appropriate, the court shall give preference to a nominee of the incapacitated person.

(2) **An individual seeking guardianship of three or more incapacitated persons must be certified as provided in this paragraph and provide proof of the certification to the court prior to a third guardianship appointment. The following provisions shall apply:**

(i) The Supreme Court shall prescribe rules and forms necessary to effectuate the certification required under this paragraph, including rules regarding the expiration and renewal of certifications.

(ii) When the Supreme Court prescribes rules relating to requirements for certification:

(A) The Supreme Court shall provide opportunities for relevant stakeholders to provide input.

(B) The certification shall, at a minimum, require:

(I) Submission of education and employment history.

(II) Submission of Federal and State criminal history record information.

(III) Passage of a certification exam administered by a national nonprofit guardianship certification organization. The national nonprofit organization must provide a comprehensive certification program for guardians, including supervising a national certification process, developing certification exam content and maintaining a decertification process.

(3) The certification required under paragraph (2) may be waived by a court upon a petition demonstrating that a proposed guardian has such equivalent licenses or certifications as are necessary to ensure that the proposed guardian is capable of fully, faithfully and competently performing the obligations of a guardian. For purposes of

this paragraph, a license to practice law shall not constitute an equivalent license or certification.

Section 2. Sections 5512.1(a) and 5512.2 of Title 20 are amended to read:

§ 5512.1. Determination of incapacity and appointment of guardian.

(a) Determination of incapacity.--In all cases, the court shall consider and make specific findings of fact concerning:

(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 and other supports to assist the individual in making decisions and in light of the existence, if any, of [advance directives such as durable powers of attorney or trusts.] **less restrictive alternatives. The court shall make specific findings of fact based on the evidentiary record of the absence of sufficient family, friends or other supports and of the insufficiency of each less restrictive alternative before ordering guardianship. Less restrictive alternatives include, but are not limited to:**

(i) Advance directives such as durable power of attorney or trusts.

(ii) Living wills.

(iii) Health care powers of attorney.

(iv) Health care representatives.

(v) Financial powers of attorney.

(vi) Trusts, including special needs trusts.

(vii) Representative payees for individuals receiving Social Security benefits.

(viii) Pennsylvania Achieving a Better Life Experience accounts.

(ix) Mental health advance directives.

(4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.

(5) The duration of the guardianship.

(6) The court shall prefer **less restrictive alternatives to guardianship and, if no less restrictive alternatives are available and sufficient, limited guardianship. The following apply:**

(i) A determination of incapacity is separate from a determination of whether a guardian should be appointed.

(ii) The court may not use a determination of incapacity alone to justify a guardianship.

(iii) The court may not appoint a guardian if a lesser restrictive alternative exists that is sufficient to support the needs of an incapacitated person.

(iv) When entering an order denying a petition for guardianship in whole or in part, the court shall identify the less restrictive alternatives that are available and sufficient to enable the alleged incapacitated person to manage personal financial resources or to meet essential requirements of personal physical health and safety. An order may assist the respondent and any supportive and substitute decision

makers involved to effectuate the respondent's decisions with third parties.

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§ 5512.2. Review hearing.

(a) [Time of hearing.--The court may set a date for a review hearing in its order establishing the guardianship or hold a review hearing at any time it shall direct. The court shall conduct a review hearing promptly if the incapacitated person, guardian or any interested party petitions the court for a hearing for reason of a significant change in the person's capacity, a change in the need for guardianship services or the guardian's failure to perform his duties in accordance with the law or to act in the best interest of the incapacitated person. The court may dismiss a petition for review hearing if it determines that the petition is frivolous.] **Automatic review.--If the evidence presented during the guardianship proceeding indicates that the circumstances of the person's incapacity may change, the court shall hold a review hearing to determine whether the guardianship continues to be necessary. The court shall set the date for a review hearing under this subsection in the court's order establishing guardianship. The review hearing under this subsection shall be held no later than one year from the date of the order establishing the guardianship. The hearing shall be conducted in the presence of the incapacitated person and the person's attorney, and the court shall adhere to the procedures and standards as outlined in section 5512.1(a) (relating to determination of incapacity and appointment of guardian). If, following the presentation of evidence and testimony from all parties, the court finds that guardianship continues to be necessary and that no less restrictive alternatives exist, the court may order that the guardianship continue. If the court finds that guardianship is no longer necessary or a less restrictive alternative exists, the court shall discharge the guardianship. In determining whether the circumstances of the person's incapacity may change, the court may consider any of the following:**

- (1) whether the incapacity could be adequately managed by medication, rehabilitation or other means;
- (2) whether the potential exists for the incapacitated person to regain physical or cognitive capacity;
- (3) the opinion of a medical professional or other qualified expert who has personally examined the incapacitated person;
- (4) the circumstances of the incapacitated person's daily living, including, but not limited to, support from others; and
- (5) any other factor indicating that the incapacitated person's condition could improve at a future time.

(a.1) **Petition for review.--At any time following the issuance of the order establishing guardianship, any interested person may file a petition with the court to terminate or modify the guardianship. The court shall promptly schedule a hearing or hold a review hearing at any time it shall direct. The hearing shall be held in the presence of the incapacitated person and the incapacitated person's attorney, and the court shall adhere to the procedures and standards as outlined in section 5512.1(a). If, following the presentation of evidence and testimony from all parties, the court finds that guardianship continues to be necessary and that no less restrictive alternatives exist, the court may order that the guardianship continue. If the court finds that guardianship is**

no longer necessary or a less restrictive alternative exists, the court shall discharge the guardianship.

(b) Burden of proof and rights.--The incapacitated person shall have all of the rights enumerated in this chapter. Except when the hearing is held to appoint a successor guardian, the burden of proof, by clear and convincing evidence, shall be on the party advocating continuation of guardianship or expansion of areas of incapacity.

Section 3. This act shall take effect in 180 days.

APPROVED--The 14th day of December, A.D. 2023.

JOSH SHAPIRO