

TESTIMONY PRESENTED AT THE
PUBLIC HEARING HELD PURSUANT TO
HOUSE RESOLUTION 377
JULY 31, 1996

BY

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SUBCOMMITTEE ON GUARDIANSHIPS
AND POWERS OF ATTORNEY
OF THE
JOINT STATE GOVERNMENT COMMISSION'S
ADVISORY COMMITTEE ON DECEDENTS' ESTATES LAWS

The proposed amendments contained in House Bill 2713, Pr.'s No. 3763, are recommended by the Subcommittee on Guardianships and Powers of Attorney which is a subcommittee of the Joint State Government Commission's Advisory Committee on Decedents' Estates Laws. An identical bill (Senate Bill 1578, Pr.'s No. 2069) has been introduced in the Senate. The subcommittee was appointed in January 1995 and asked to conduct a review of Chapter 55 (Incapacitated Persons) of Title 20 of the Pennsylvania Consolidated Statutes and a review of Chapter 56 (Powers of Attorney) of Title 20.

By way of background, the advisory committee is composed of lawyers and judges from across the State and is chaired by William McC. Houston of Pittsburgh. The advisory committee, which was formed in 1945, assists a legislative task force. The task force, which is chaired by Senator Stewart J. Greenleaf, is composed of the following members of the General Assembly: Representatives Daniel F. Clark, Michael C. Gruitza, Michael K. Hanna, Robert D. Reber, Donald W. Snyder, Senators Roy C. Afflerbach, Charles D. Lemmond, Tim Shaffer and Hardy Williams. The advisory committee makes its recommendations to the task force. If the recommendations are approved, legislation implementing those recommendations is introduced.

The Subcommittee on Guardianships and Powers of Attorney decided to begin its work with a review of Chapter 55 (Guardianships). This study presented the subcommittee with an opportunity to revisit Chapter 55 as amended in 1992 (Act of April 16, 1992, P.L.108, No.24). The subcommittee has begun its review of Chapter 56 and anticipates concluding its work by late fall 1996. However, HB 2713 does incorporate one recommended amendment with respect to powers of attorney. This amendment would grant the Orphans' Court mandatory jurisdiction over attorneys in fact.

The proposed amendments to Chapter 55 recommended by the subcommittee were approved by the full advisory committee. The Task Force on Decedents' Estates Laws authorized the introduction of legislation incorporating the amendments at its May 13, 1996 meeting.

Proposed Guardianship Amendments

In summary, this recommended legislation would:

- Require that notice of the petition and incapacity hearing be given to all sui juris intestate heirs (§ 5511(a)).
- Provide that if the court is satisfied that the alleged incapacitated person could not understand and participate in the incapacity hearing, then the alleged incapacitated person would not be required to be present at the hearing (§ 5511(a)(1)).

- Provide that the court, when considering the appointment of a guardian, shall give preference to the nominee, including a testamentary nominee, of a parent of an unmarried incapacitated person (§ 5511(f)).
- Provide more flexibility to the court in order to allow the court the opportunity to make an appointment of a plenary guardian when it appears that is what the person needs (§ 5512.1(c) and (e)).
- Remove a potential gap in time from the date an emergency order appointing an emergency guardian of the person or estate or any extension of that order expires until such time as a permanent guardian is appointed (§ 5513).
- Provide that if there is no contest as to the capacity of the alleged incapacitated person, then the petitioner may establish incapacity by a sworn statement from qualified individuals (§ 5518).
- Remove the mandatory annual reporting requirement for guardians and place with the court the discretion to require such reports (§ 5521(c)).
- Clarify the reporting requirements of a guardian of the estate (§ 5521(c)).

- Allow a guardian, with court approval, to enter into a lease for longer than a five-year term (§ 5522).
- Permit a guardian to file an account with the court at any time without the prior authorization of the court (§ 5531).
- Grant the Orphans' Court mandatory jurisdiction over the administration of guardianship support agencies (§ 711(22)).

Proposed Amendment Relating to Powers of Attorney

The recommended legislation would also:

- Grant the Orphans' Court mandatory jurisdiction over attorneys in fact (§ 711(23)).

A fuller explanation of the proposed amendments contained in HB 2713 is provided in the May 1996 report of the subcommittee. The following is essentially a replication of the commentary contained in the report.

Section 5511. Petition and hearing: independent evaluation

Subsection (a) is amended to require that notice of the petition and incapacity hearing be given to all sui juris intestate heirs, whose existence and whereabouts are known to the petitioner, irrespective of whether such heirs reside within the Commonwealth. There did not seem to be any compelling reason to restrict notice to such heirs who reside within the Commonwealth as the present section does.

Subsection (a)(1) is amended to provide that if the court is satisfied that the alleged incapacitated person could not understand and participate in the incapacity proceedings then the alleged incapacitated person would not be required to be present at the hearing. This amendment ameliorates the practical effects of the present harm standard. Under the amendment, even if the physical or mental condition of the alleged incapacitated person would not be harmed by his presence, the court could waive the presence requirement if satisfied that the alleged incapacitated person could not understand and participate in the proceedings.

Subsection (f) is amended to provide that the court, when considering the appointment of a guardian, shall give preference to the nominee, including a testamentary nominee, of a parent of an unmarried incapacitated person. Subsection (f) is further amended to provide that the court shall make its appointment of a guardian in accordance with any nomination of the incapacitated person made by a durable power of attorney. 20 Pa.C.S. § 5604(c)(2) authorizes such a nomination by a durable power of attorney.

Section 5512.1. Determination of incapacity and
appointment of guardian

The amendment to subsection (a) is stylistic.

The amendments to subsections (c) and (e) are designed to provide more flexibility to the court and to allow the court the opportunity to make an appointment of a plenary guardian when it appears that is what the person needs. While limited guardianship is preferred, the court, as it has in the past, determines the scope of the guardianship based on the needs of each case.

Section 5513. Emergency guardian

The amendments to this section are intended to remove a potential gap in time from the date an emergency order appointing an emergency guardian of the person or estate or any extension of that order expires until such time as a permanent guardian is appointed. The amendments permit the court to continue the emergency order if a petition for the appointment of a permanent guardian is filed prior to the expiration of the emergency order or any extension.

Section 5518. Evidence of incapacity

The amendments to this section recognize that in most cases the capacity of the alleged incapacitated person is not contested. In these instances, the requirement that qualified individuals present their testimony in person at the hearing or by deposition causes an unnecessary expense for the alleged incapacitated person. The section is amended to provide that if there is no contest as to the capacity of the alleged incapacitated person,

then the petitioner may establish incapacity by a sworn statement from such qualified individuals. The amendment to the section retains the requirement, that in order to establish incapacity in a proceeding in which the capacity of the alleged incapacitated person is contested, the petitioner must present testimony in person or by deposition from qualified individuals.

A conforming amendment to section 5518.1 (cross-examination of witnesses) is made in order to conform to the amendment of section 5518.

Section 5521. Provisions concerning powers, duties and liabilities

Subsection (c)(1) (relating to reports of guardians to the court) is amended to remove the mandatory annual reporting requirement for guardians and to place with the court the discretion to require such reports.

In order to clarify the reporting requirements of a guardian of the estate, subsection (c)(1)(i) is amended by repealing clause (D). Clause (D) provides that the guardian of the estate must report as to the needs of the incapacitated person for which the guardian has provided since the last report. Clause (D) is unnecessary as the information requested is included with the information requested under clauses (A), (B) and (C).

Subsection (c)(2) is amended to require written notification from the guardian to the court within 60 days of the death of the incapacitated person. Although this amendment removes the mandatory requirement that the guardian file a final report with the court upon the death of the incapacitated

person, the court could require such a report in appropriate cases under the authority of subsection (c)(1).

Section 5522. Power to lease

This section is amended to allow a guardian, with court approval, to enter into a lease for longer than a five-year term. This amendment makes this section consistent with the similar powers of a trustee as provided in 20 Pa.C.S. § 7142 (power to lease).

Section 5531. When accounting filed

The amendment to this section simply permits the guardian to file an account with the court at any time without the prior authorization of the court.

Section 711. Mandatory exercise of jurisdiction
through orphans' court division in general

Paragraph (22) is added to section 711 to grant mandatory jurisdiction over the administration of guardianship support agencies, formed under Subchapter F of Chapter 55 of 20 Pa.C.S., with the court of common pleas through its orphans' court division. Presently, a guardianship support agency is supervised by the court which appointed the agency as guardian but only to the extent of their guardianship activities with respect to that appointment; the overall administration of a guardianship support agency is unregulated.

Paragraph (23) is added to section 711 to grant the orphans' court mandatory jurisdiction over attorneys in fact. A conforming amendment to section 712 (nonmandatory exercise of jurisdiction through orphans' court division) is made to repeal paragraph (4) of that section. Paragraph (4) is repealed since the addition of paragraph (23) to section 711 (mandatory exercise of jurisdiction through orphans' court division in general) grants the orphans' court mandatory jurisdiction over attorneys in fact.