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Pennsylvania House Aging and Older Adult Services Committee
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Good morning Chairman Day, Chairman Samuelson, Representative Gillen and the members of the Aging and Older Adult Committee. Thank you for taking up the critically important issues surrounding guardianship and for the opportunity to offer testimony today about House Bills 1829, 1356 and 1890.

Community Legal Services (CLS) has provided free civil legal assistance to low-income Philadelphians. Approximately 10,000 clients have received legal representation from CLS in the past year. CLS assists clients facing the loss of their homes, incomes, health care and even their families. CLS attorneys and other staff provide the full range of legal services, from individual representation to administrative advocacy to class action litigation, as well as community education and social work.

CLS' Health and Independence Unit, where I work, focuses on legal cases involving public benefits, access to health care and long term services and supports, and protecting the autonomy of older adults and people with disabilities. We regularly assist clients who are experiencing legal issues connected to guardianship. This includes people seeking representation to contest a petition to appoint a guardian for them. Others are individuals who have been adjudicated incapacitated but are seeking restoration of their rights. Others seek help because their guardian is not attending to their needs or perhaps not even returning their calls. For some, a less restrictive alternative would meet their needs and render a guardianship unnecessary. And occasionally we see cases where a guardian has mismanaged or stolen funds.

HB 1829

I would like to express our strong support of HB 1829 and thank Representative Day for introducing it. Over the years, we have often encountered clients who had a guardian appointed without having had legal representation in the petition proceedings. The consequences of an adjudication of incapacity and appointment of a guardian are profound – the individual is stripped of their rights to decide where to live, to make health care decisions and to handle their finances. A guardian may decide to sell their home and to place them in a nursing facility against their will. Where such fundamental liberty interests are at stake, it seems clear that constitutional due process requires the appointment of counsel.

Twenty states and the District of Columbia have recognized the necessity of legal representation in proceedings to appoint a guardian by providing a categorical right to counsel. An additional 24 states also have the right to appointment of counsel, although the individual may have to request counsel and the role of counsel may vary in these states. Pennsylvania is only of only six states in the nation which do not provide for the appointment of counsel in all cases, instead leaving it to the court's discretion to appoint counsel in cases where it is deemed appropriate. In practice, the result is that many – perhaps most, although we don't have clear data on this – people face guardianship proceedings without a lawyer in Pennsylvania. The likelihood of counsel being appointed varies widely by county, with some counties deeming it appropriate to appoint counsel in all cases and others doing so far less frequently.

By contrast, there are more than a dozen other types of civil proceedings in Pennsylvania where appointment of counsel is required, in recognition that access to counsel is constitutionally mandated where an individual is at risk of losing any of their constitutional rights. To give a few examples, appointment of counsel is required for unrepresented litigants in cases involving child dependency, termination of parental rights, involuntary commitment under the Mental Health Procedures Act, imposition of involuntary protective services, truancy, civil contempt in Family Court, non-payment of court fees and fines, and involuntary outpatient treatment. In guardianship proceedings, the rights at stake are at least as important as those implicated in these cases: the person is at risk of losing *all* of their fundamental constitutional rights to autonomy and to make decisions about their lives.

Representation by counsel in guardianship proceedings serves a number of critical purposes. Without an attorney, the individual is left to navigate court and evidentiary rules, determine what is relevant to argue, and obtain supportive medical evidence on their own, without an understanding of the legal standards for guardianship in Pennsylvania. And having an attorney can make a real difference in the outcome of a case and the protection of an alleged incapacitated person's rights. In addition to contesting whether the client is incapacitated, counsel can advocate for a limited guardianship tailored to the individual's specific needs, rather than a plenary guardianship in which the individual loses all of their rights. An attorney can also advocate for a less restrictive alternative such as the use of power of attorney, applying for a representative payee to handle Social Security benefits or joint titling on bank accounts for financial matters. For health care decision-making, in addition to a health care power of attorney, family members and others can act as health care representative. 20 Pa. Cons. Stat. Ann. §5461. In addition, Supported Decision Making is a rapidly growing alternative to guardianship, in which a circle of support persons assist the individual in making decisions. An attorney can also advocate on their client's behalf concerning the choice of guardian and promote a care plan according to the client's values and preferences. Representation by an attorney also serves the very important purpose of ensuring that the voice of the alleged incapacitated person – their wishes, values, concerns and expressed needs – are heard in the proceedings.

We are very pleased that HB 1928 also provides for the appointment of counsel in subsequent proceedings to modify or terminate a guardianship. Once an individual has been adjudicated incapacitated, it becomes even more difficult for them to pursue such actions without the appointment of counsel. They likely to have difficulty finding an attorney to engage due to their status, and since they have lost their rights to medical decision-making, they are hampered in getting medical evidence to support a petition. Our unit has represented clients who had an acute incapacitating condition at the time the guardian was appointed but later regained capacity. Although the guardian is supposed to notify the court that guardianship is no longer needed in such situations, this often does not happen, leaving the burden on the protected person to raise and pursue it in court.

We also strongly support the bill's definition of the role of counsel as an advocate for the client's expressed wishes and consistent with the client's instructions, wherever the client is able to express wishes and provide instructions. The role of an attorney is to be a zealous advocate for the expressed wishes of their client. People facing guardianship proceedings - in which their most fundamental rights are at stake - are also entitled to have their attorney play this role on their behalf. This is in accordance with Rule 1.14 of the Pennsylvania Rules of Professional Conduct, which provides that where a client's capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

HB 1356

We generally support HB 1356's increase in reimbursement for guardians under the Medicaid program from $100 to $300 per month, with several comments. First, the reason advocates have supported the fee increase is to improve the quality and amount of attention guardians provide for their wards. Currently, there are no formal standards for what is expected or required from a guardian, and the adequacy of services provided varies widely. One way to set standards and improve the quality of guardianship services is to require professional guardians to obtain certification. In Montgomery County, Orphans Court Judge Lois Murphy is already requiring this. We urge consideration of pairing the fee increase with requirements - such as a certification requirement - to better define and improve the quality of services that guardians provide.

Second, the bill as drafted limits the increase to guardians of older adults. However, people under the age of 60 may also be under guardianship. This increase should apply equally to them.

Third, guardians can obtain this monthly fee through the Medicaid program for their wards who reside in nursing homes, but not for low-income wards who live in their own homes with the support of Medicaid-funded home and community based services. This creates a disincentive for guardians to try to keep protected people in their own homes rather than a nursing home. This is especially true because it typically creates more work for a guardian to

support a individual in the community than in a nursing facility. There is an obvious concern that the fee increase will exacerbate this disincentive. It is therefore critically important to pursue avenues – either through Medicaid or otherwise - to pay equivalent fees for guardians for low-income individuals who reside in the community.

HB 1890

Thank you for the opportunity to comment on HB 1890, as well. We support the use of criminal background checks for professional guardians in order to identify and avoid the appointment of individuals who have a history of criminal conduct with a nexus to the duties of a guardian and the risks presented in serving as fiduciary to a vulnerable individual. The case of Gloria Byars demonstrated the need for criminal background checks for professional guardians. As many know, Ms. Byars was appointed by several Southeastern Pennsylvania courts to serve as guardian for more than 100 vulnerable individuals. She now faces local and federal charges of stealing several million dollars from dozens of wards between 2012 and 2018. After the discovery of the thefts, it was learned that Ms. Byars had pled guilty and served a prison sentence between 2005 and 2008 for felony charges of fraud, forgery and passing bad checks. Given a guardian's position of trust and access to the assets of vulnerable people, criminal background checks should be required for those seeking to serve as professional guardians, as provided for in HB 1890.

We have concerns, however, about the use of criminal background checks for family members seeking to serve as guardian. People who are the subject of guardianship petitions often have a strong preference for their family members to serve, and these family members are often those who best know the protected person's needs and are most invested in ensuring their wellbeing. Therefore, we must ensure that background checks do not unduly interfere with the goal of appointing family members wherever possible. Past convictions, even for felonies, may have no bearing on whether a potential guardian bears a risk to a close family member whose well-being is important to them. For example, a youthful conviction for shoplifting or assault as a result of a fight will likely have no bearing on a candidate's fitness to serve as guardian for his aging mother, where years have passed and there has been no significant subsequent criminal conduct.

We are particularly concerned that requiring criminal background checks could result in discrimination against Black and Hispanic applicants. Black and Hispanic people are arrested and incarcerated at rates disproportionate to their numbers in the general population. This creates a concern that the use of criminal background checks could operate to make it more difficult for Black and Hispanic individuals to serve as guardians for loved ones. To avoid this, we urge you to consider including factors for courts to consider as they utilize criminal background information to measure a candidate's fitness to serve as guardian. In the employment context, the EEOC has issued guidance governing the use of criminal background records in employment decisions. It contains three factors for employers to consider which also provide a good model in the context of appointment of guardians. These factors are:

1. The nature and gravity of the offense
2. The time that has passed since the offense and/or completion of the sentence and
3. The nature of the job for which the individual is being considered.

We urge you to consider adding these factors to HB 1890 for courts to consider in determining whether there is a sufficient nexus between an offense and the requirements and risks of acting as guardian, as well as whether recidivism is likely, given the time which has passed since the offense. In the absence of such standards, there is a risk that some courts may choose to consider any conviction disqualifying, no matter how remote or unrelated to the role of guardian. Even where judges do not consider a conviction automatically disqualifying, they may feel obligated to disqualify family applicants based on convictions which do not indicate an actual risk to the protected person because of their remoteness or the nature of the offense. Having factors to consider will also help avoid the risk of courts treating criminal history information differently for different applicants based on their race or national origin.

The bill should also direct courts to undertake an individualized assessment after background checks results are received, to allow a potential guardian to present information bearing on their fitness to serve. This may include information about the accuracy of the background check results, the circumstances surrounding an offense, or facts showing that the individual has performed responsibly in a similar role with no incidents of criminal conduct. Individualized consideration is particularly critical because the results of criminal background checks can be inaccurate. For example, the FBI Interstate Identification Index often does not include the final disposition of cases due to failures in the flow of information to the Index from other agencies. In addition, the FBI Index still contains all of the cases which were sealed as a result of the Clean Slate legislation because instructions to remove those cases have not been sent to the FBI by the Pennsylvania State Police. This means that 46 million cases will still appear in FBI background check results despite the fact that the Pennsylvania Legislature has determined that these records are to be sealed.

We strongly urge you not to include classes of offenses which are considered disqualifying, as this does not allow for individualized decision-making and has been problematic in the context of the Older Adult Protective Services Act.

Finally, we urge you not to apply to family and other non-professional guardians the requirement to provide proof of eligibility to work in the United States. While the family members and friends who act as lay guardians are providing a service, they usually do so without being paid. Therefore, compliance with the US employment work authorization requirements is not relevant. Applying this requirement to lay guardians risks creating a barrier for immigrant families to serve as guardians to their loved ones.

Thank you again for the opportunity to testify today, and I'd be happy to respond to any questions.