

October 21, 2021

Honorable Gary Day, Chairman
House Committee on Aging & Older Adult Services
113 Ryan Office Building
P.O. Box 202187
Harrisburg, PA 17120

RE: Submitted Comments to HB 1928 and HB 1890

Dear Representative Day:

The Pennsylvania Association of Elder Law Attorneys (“PAELA”) is comprised of attorneys who represent older adults and families with a loved one with disabilities. Elder law involves proactive estate planning that anticipates the need for caregiving and public benefits. Regardless of planning, situations often arise when a child with an intellectual or developmental disability reaches the age of 18 or an older adult experiences a decline in cognitive capacity and guardianship becomes necessary for financial and medical decision-making.

The current guardianship statute in Pennsylvania, originally effective July 1, 1972, as amended in 1992, is found at Title 20 of the Pennsylvania Consolidated Statutes, Chapter 55, with the stated purpose of:

Recognizing that every individual has unique needs and differing abilities, it is the purpose of this chapter to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.

PAELA provides the following comments to the following proposed revisions to the statutory provisions on behalf of the families we represent in their efforts to provide a safe guardianship environment for their loved ones all the while recognizing the actual and practical costs of obtaining a guardianship decree.

A. COMMENTS ON HOUSE BILL 1890, PRINTER'S NO. 2146

The families we represent need the guardianship process to work efficiently. For young adults with disabilities about to turn 18 or for older adults facing impairment, family caregivers routinely need to apply for public benefits (Medical Assistance, Supplemental Security Income, Food Stamps, etc.) to avoid financial crisis. Additional hurdles for the family in the guardianship process translate to delays in applying for these public benefits, which results in interruptions in essential care and financial strain for the alleged incapacitated person and their caregiving family.

If a stated goal of our guardianship system is to achieve supportive surrogate decision-making, then unnecessary impediments to the appointment of a guardian should be avoided. Especially with implementation of the Guardianship Tracking System (GTS), it seems unlikely that a guardian can get away with misconduct. If fear or speculation exists that neglect/abuse might be perpetrated by a guardian, might the guardianship system be better served by empowering the GTS to detect misconduct?

We want to state clearly that we represent families in guardianship situations; we do not routinely represent professional guardians. Protections that may seem warranted for professional guardians have very little applicability to a family setting. The Pennsylvania Supreme Court promulgated rules effective June 1, 2019, that require proposed guardians obtain certification from the Pennsylvania State Police of no criminal record prior to being named as a guardian. We believe this system has worked well from the standpoints of protection, cost, and efficiency. We question the merit of requiring a federal criminal history record and fingerprints. We are aware that our clients spend approximately 15 minutes and \$22.00 to satisfy the existing Pennsylvania State Police criminal record check requirement. We have also encountered a delay of several months to obtain a criminal record check from other states that require fingerprints.

We also question the proposed requirement to prove a prospective guardian's eligibility to work legally in the United States. Given the stated purpose of Pennsylvania's guardianship process is to identify a suitable guardian, did the General Assembly consider eligibility to work legally in the United States as a relevant factor? Especially since family members usually serve as guardians without compensation, U.S. work eligibility seems hardly tangentially related to the selection of an appropriate guardian.

We will leave it to other advocates to opine regarding the appropriate restrictions and protections necessary to protect vulnerable Pennsylvania residents from professional guardians who may want to take advantage. Fortunately, the vast majority of families with whom we work provide selfless, time-consuming care to their family members who require guardianship services. Because House Bill 1890 is overly broad and imposes needless expense on Pennsylvania families, PAELA opposes the bill.

B. COMMENTS ON HOUSE BILL 1928, PRINTER'S NO. 2196

PAELA fully endorses the goal of Pennsylvania's guardianship system, which prioritizes the dignity and independence of every person while authorizing another to make crucial legal, financial, and health care decisions. Guardianship, by definition, deprives an incapacitated person

of important rights. Guardianship proceedings are not, however, adversarial in the sense that a criminal proceeding is, nor is the potential deprivation of rights the same. A criminal defendant has a constitutionally protected right to counsel because the government is seeking to deprive the defendant of liberty. In contrast, a guardianship petitioner is seeking to support an alleged incapacitated person and ensure that the person's financial and medical concerns are addressed.

While PAELA recognizes the laudable goal of House Bill 1928 to safeguard the fundamental rights of alleged incapacitated persons, the bill inappropriately and to the detriment of Pennsylvania families imposes a blanket requirement that counsel be appointed in every case, even where there is no dispute among family members of the need for, and proposed identity of, the guardian. The bill makes no distinction between contested and uncontested guardianships. According to the most recent statistics compiled by the Administrative Office of Pennsylvania Courts,¹ relatively few guardianship proceedings involve someone contesting the appointment of a guardian. Some examples from the 2019 statistics are instructive:

- Allegheny County: of 301 guardianship cases, only 49 were contested – 16%
- Bucks County: of 161 guardianship cases, only 28 were contested – 6%
- Delaware County: of 148 guardianship cases, only 29 were contested – 20%
- Lebanon County: of 35 guardianship cases, 0 were contested – 0%
- Lehigh County: of 101 guardianship cases, only 12 were contested – 12%

Given the rarity of contested guardianship proceedings, PAELA urges the General Assembly to consider the cost of mandating the appointment of counsel. Appointed counsel must be paid by the incapacitated older adult, the family of the disabled child turning 18, or the county in which the guardianship proceeding occurs. The General Assembly is well aware of the constraints on county budgets. Family members petitioning for guardianship typically retain their own attorney to file the petition. In the absence of a challenge to the guardianship, the cost of retaining more than one attorney may be more than families can bear.

PAELA recognizes that there may be uncontested petitions for guardianship in which the alleged incapacitated person may be vulnerable to exploitation or neglect. The guardianship system as it currently operates is flexible enough to address such a situation. Under current law, the petitioner must notify the court if the alleged incapacitated person is unrepresented by counsel. The court conducts a hearing in every case and may appoint counsel where the evidence and the demeanor of witnesses suggest the need for it. The current system honors the independence of the judiciary and avoids needless expense for Pennsylvania families.

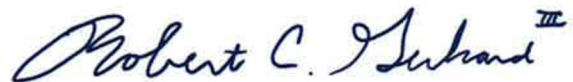
Because House Bill 1928 eliminates the flexibility of the current guardianship system and imposes needless expense on Pennsylvania families, PAELA opposes the bill.

PAELA thanks the General Assembly for devoting attention to the needs of older adults and those with disabilities. We share your devotion and attention to these vulnerable populations

¹ <https://www.pacourts.us/news-and-statistics/research-and-statistics/county-caseload-statistics>

and want to continue this important dialogue. Thank you for accepting and considering our input; we stand ready to answer any questions that may arise from the submission of our comments.

Very truly yours,

A handwritten signature in blue ink that reads "Robert C. Surhand III". The signature is written in a cursive style with a small "III" at the end.

President, Pennsylvania Association of Elder Law Attorneys

Advisory Council on Elder Justice on the Courts

Appointment of Counsel in Adult Guardianship Cases

A proposal to amend the Pennsylvania Guardianship Act (20 Pa. C.S. § 5501, *et seq.*) to make the appointment of counsel mandatory in guardianship cases would assure that the due process rights of persons alleged to be incapacitated are protected as required by the United States Constitution and the Pennsylvania Constitution. This modest and focused amendment is an important reform to the law that applies to guardianship proceedings that has the support of the Advisory Council on Elder Justice and was a recommendation of the Supreme Court’s Elder Law Task Force (2014). As described in more detail below, legal counsel is required to be appointed in all other cases in which a person faces deprivation of their fundamental rights to autonomy, including criminal matters and actions under the Mental Health Procedures Act.

1. Adult guardianship proceedings are procedures wherein a person is at risk of losing all of their fundamental constitutional rights to decision- making and autonomy concerning their finances and also concerning their residential and medical decisions.
 2. Counsel is required to be appointed to represent a person in all court proceedings where the person may lose any of their constitutional rights. Under both Pennsylvania law and the United States Constitution, counsel must be appointed to represent any person who faces:
 - a. Any and all criminal charges and potential criminal penalties – U.S. Const. amend. VI; Pa.R.Crim.P. No. 122.
 - b. Child dependency proceedings – 42 Pa.C.S.A. §§ 6311 and 6337.1 (a) (children) and 42 Pa.C.S.A. § 6337 (parents).
 - c. Termination of parental rights – 23 Pa.C.S.A. § 2313 (a) (children) and 23 Pa.C.S.A. § 2313 (a.1) (parents).
 - d. Involuntary Commitment under the Mental Health Procedures Act – 50 P.S. § 7304.
 - e. Imposition of involuntary protective services – 35 P.S. § 10225.307 (c).
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- f. Civil contempt in Family Court where incarceration is threatened – *B.A.W. N/K/A v. T.L.W., III*, 230 A.3d.402 (Pa. Super. 2020).
 - g. Truancy proceedings heard as dependency matters – 42 Pa.C.S.A. § 6337.1 (a).
 - h. Incarceration for nonpayment of court fees or fines – *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. 2018).
 - i. Involuntary outpatient treatment – 50 P.S. § 7304 (c.2) (3).
 - j. Minors subjected to involuntary drug or alcohol treatment – 71 P.S. § 1690.112-a.
 - k. Paternity cases (defendants) – *Rodriguez v. Rodriguez*, 600 A.2d 589 (Pa. Super. 1991); *Corra v. Coll*, 451 A.2d 480 (Pa. Super. 1982).
 - l. Guardianship, where the individual is in a state mental hospital – 204 Pa. Code § 29.41.
 - m. Sexually violent predator registration – 42 Pa.C.S.A. § 9799.15 (a.2) (4) and 42 Pa.C.S.A. § 9799.58 (e) (2).
 - n. Sexually dangerous person commitment – 42 Pa.C.S.A. §§ 6403 (b) (3), 6404 (b) (2) and 6405.
3. Numerous state statutes require courts to appoint counsel to represent an alleged incapacitated in initial proceedings. See attached ABA chart for information.
 4. Pennsylvania Orphans’ Court Rules require that the court advise every person who has been adjudicated to be incapacitated that they have a right to have counsel appointed for them, free of charge, in order to file an appeal or motion for reconsideration, and to seek to terminate or modify a guardianship. Pa. O.C. Rule 14.7 (a) (2). However, the rule regarding counsel – which follows closely to the language of the statute – leaves a gap in that the court is permitted, but not required, to appoint counsel for an alleged incapacitated person at the initial hearing. Pa.O.C. Rule 14.4 (c) and 20 Pa.C.S. § 5511.

Disclaimer: The opinions, findings and conclusions expressed are those of the Advisory Council and do not represent any official position or policy of the Pennsylvania Judiciary or the Administrative Office of Pennsylvania Courts.