

GUARDIANSHIP TRAINING GUIDE

Giving Families Legal Authority to Care for Incapacitated Loved Ones

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Why Should You Handle a Guardianship Case?

- Meaningful work;
- Great opportunity for client contact;
- Great opportunity to prepare a witness to testify and to conduct direct examination;
- On-your-feet court time; and
- Limited time commitment.

What Is a Guardian?

- A Guardian is someone who has the legal authority to act for someone else. It is a fiduciary relationship and the Guardian must act on that person's behalf and in that person's best interests.

Two Types of Guardianship Estates

GUARDIANSHIP OF A MINOR'S ESTATE	GUARDIANSHIP OF AN INCAPACITATED PERSON'S ESTATE
For those under the age of 18.	For those over the age of 18 who have been declared Incapacitated by the Court.

We Are Discussing Only Guardianship of an Incapacitated Person (not of a Minor)

- The Incapacitated Person is a “Ward”
 - Note: The word “Beneficiary” is used when referring to a Trust.
 - But Guardianship is also a fiduciary relationship.

There Are Two Kinds of Guardians of the Incapacitated Person

GUARDIAN OF THE ESTATE:

Guardian has the right to control the Estate (the financial affairs) of the Ward.

GUARDIAN OF THE PERSON:

Guardian has the right to control decisions concerning the Ward's person – e.g., medical care, where he/she lives or goes to school.

The Guardianship Can Be Plenary or Limited

PLENARY GUARDIANSHIP	LIMITED GUARDIANSHIP:
Used when the Ward is totally incapacitated and completely unable to manage his/her own affairs.	Used when the Ward is only partially incapacitated and is capable of handling some, but not all, of his/her affairs.

Legal Definition of Incapacitated Person

- An incapacitated person is:
 - “[A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.”
20 Pa. Cons. Stat. Ann. § 5501
- **The focus is on the Alleged Incapacitated Person’s ability to:**
 - Evaluate information, and
 - Communicate decisions.

Controlling Law

- Chapter 55 of the Pennsylvania Probate Estates, and Fiduciaries Code (“PEF Code”) Annotated:
20 Pa. C.S.A. 5501, et. seq. – **Exhibit 1.**
- Chapter XIV of Pennsylvania Orphans’ Court Rules – **Exhibit 2.**
- Chapter XIV of Philadelphia County Orphans’ Court Division Local Rules, plus relevant sections of Appendix – **Exhibit 3.**

Why Is a Guardianship Needed?

- If the Alleged Incapacitated Person (AIP) did not make a power of attorney before losing capacity, he/she can't make one now because he/she lacks capacity.
- Or when a disabled child has reached the age of majority (18).
 - The law assumes he/she has capacity, unless declared incapacitated by a court.

Who Can File for Guardianship in Philadelphia?

- Anyone interested in the alleged incapacitated person's welfare may file a petition to appoint a Guardian.

20 Pa. Cons. Stat. Ann. § 5511(a)

- Until June 1, 2019, in Philadelphia, the proposed guardian had to certify that he/she:
 - is a citizen of the United States; and
 - is able to speak, read and write the English language.

Local Rule 14.2B (no longer in effect as of 6/1/19)

Jurisdictional Issues

- Pennsylvania courts have the power to appoint a Guardian for:
 - Any resident of the Commonwealth of Pennsylvania; or
 - Any non-resident who owns property in the Commonwealth of Pennsylvania.
 - If the non-resident has a guardian in another state, the court will give preference to the foreign guardian.

20 Pa. Cons. Stat. Ann. § 5511(b)

Jurisdictional Issues (Continued)

- The Orphans' Court division of the Court of Common Pleas has jurisdiction to declare an individual to be incapacitated and to appoint a guardian.
- Which county should you file in?
 - The Petition for Guardianship should be filed in the county where the alleged incapacitated person resides.

20 Pa. Cons. Stat. Ann. § 5512(a)

Important Notice and Service Issues

- Written notice must be given to the AIP “in large type and simple language.”
- Personal service is required at least 20 days before the hearing.
- Written notice of the Petition must be given to presumptive heirs at law (typically parents).
- Written notice to anyone providing residential services to the AIP.

Required Court Findings:

- The Court must find that the individual is incapacitated through clear and convincing evidence.
- The Court considers the following:
 - The nature of the condition/disability that impairs the person's capacity to make and communicate decisions; and
 - The extent of the individual's capacity to make and communicate decisions.
- The AIP's incapacity must be proven through expert medical testimony, which is typically provided by way of a written Expert Report in the Orphans' Court mandated form, and not by live testimony, as discussed in greater detail in Slide 22 and in Pennsylvania Orphans' Court Rule 14.3. See Exhibit 2.

Who Is Your Client?

- Your client is the proposed Guardian.
- You do not represent the AIP
- The Court will consider whether the AIP should have counsel appointed to represent him/her in the matter.

Going Step by Step . . .

How to Handle a Guardianship Matter from Start to Finish

First Steps

- Review the intake form with basic biographical information about the client and the AIP.
 - Run a conflict check on your client (the proposed guardian), the AIP, and any interested parties; and
 - Prepare an engagement letter.

Initial Client Meeting

- Explain that you will be helping the client obtain guardianship only, not representing him/her for any other purpose; and
- Manage expectations: explain that guardianships in Philadelphia take time (usually several months), and involve a hearing at City Hall, which the AIP will also likely have to attend.

Initial Client Meeting (Cont.)

- Ask the following questions:
 - Nature of AIP's disability/condition;
 - Care provided to the AIP
 - List of medical providers (and contact information) for AIP;
 - List of AIP's assets/income;
 - If AIP receives social security: Who is serving as the representative payee for the AIP?

Initial Client Meeting (Cont.)

- Ask the following questions:
 - What are the names and addresses of adult relatives who will inherit assets if the AIP dies without a will (refer to intestacy statute)?
 - Does the client have a criminal/arrest history? If so, explore more about this. Did criminal history involve fraud/theft?
 - Does the client speak/understand the same primary language as the incapacitated person?

Step Two: Obtain Written Deposition from Medical Provider

- You need to present medical evidence as to the disabilities of the AIP.
- Usually provided through a written expert report of “an individual qualified by training and experience in evaluating persons with incapacities of the type alleged by the petitioner.”
 - Expert Report Form: **Exhibit 4.**
- Ideally, the treating doctor provides this information.
- **Philadelphia Local Rules require that the expert report to be notarized.** Note: Add a Notary Block to the expert report to ensure that the doctor gets the report notarized.

Step Two: Obtain Written Deposition from Medical Provider (Cont.)

- Obtaining the doctor's expert report is often the most challenging part of the case.
- If you have difficulties – ask your client (who is often the AIP's caretaker) for help.

As You Are Preparing the Petition:

- Think about guardianship as a two-prong process:
 - Is the person incapacitated?
 - If so, who should serve as the Guardian?
- Your goal is to show the Court that the AIP is incapacitated (i.e., unable to make decisions or communicate effectively those decisions) AND your client is the best person available to make decisions for the AIP.

How does the Court Decide Who to Appoint as Guardian?

- Pursuant to O.C. Rule 14.6, the court considers the eligibility of persons to serve as guardian in the following order:
 - If the AIP executed a valid power of attorney (or similar document), the court will appoint the person named by the AIP in that document, unless evidence at the hearing demonstrates the unsuitability of that person to serve as Guardian.

How does the Court Decide Who to Appoint as Guardian?

- If the AIP did not appoint someone in a POA, then the order of consideration is, as follows (R. 14.6(b)):

FOR GUARDIAN OF THE PERSON	FOR GUARDIAN OF THE ESTATE
	<i>When the estate of the incapacitated person consists of minimal assets or where the proposed guardian possesses the skills and experience necessary to manage the finances of the estate. R. 14.6(b)(2)</i>
The Guardian of the Estate	The Guardian of the Person
Spouse (unless estranged)	Spouse (unless estranged)
Adult Child	Adult Child
Parent	Parent
List continues, with professional guardian as last option	List continues, with professional guardian as last option

What Needs to be Included in Your Petition:

- Sample Petition – **Exhibit 5.**
- See Rules 14.1-14.14 of the Pennsylvania Orphans' Court Rules for rules relating to Guardianship of Incapacitated Persons – **Exhibit 2.**

What Needs to be Included in Your Petition (Cont.):

- Name, age, and address of petitioner/client (i.e., the proposed guardian);
- Relationship of petitioner/client and AIP;
- Name, age, and address of AIP;
- Name and addresses of AIP's spouse (if any), parents, and presumptive intestate heirs (and indicate whether they are *sui juris* or not)
 - Note: Intestacy statute: *20 Pa.C.S. § § 2101-04.*
 - See **Exhibit 6** *Intestate Heirs in Pennsylvania*
 - Note: If a spouse or parent or intestate heir is deceased, still list them and indicate that they are deceased

What Needs to be Included in Your Petition (Cont.):

- If AIP lives in a residential facility, provide the name/address of the residential facility (and make sure that the facility receives notice of the petition);
- Names and addresses of other service providers and nature of services being provided;
- Whether there is a healthcare and/or financial power of attorney;

What Needs to be Included in Your Petition (Cont.):

- AIP's physical/mental condition and limitations;
- An averment about whether these conditions are permanent or expected to change
- Whether there has been a prior incapacity hearing;
- Statement that there is no less restrictive alternative to guardianship (i.e., health care power of attorney or financial power of attorney executed while AIP had capacity);

What Needs to be Included in Your Petition (Cont.):

- Names/addresses of anyone who should receive notice of the filing of guardianship reports, pursuant to O.C. Rule 14.8(b):
 - Spouse, parents, presumptive intestate heirs
 - See Exhibit 6.
 - Any residential facility
 - Any agent under a power of attorney or advance health care directive

What Needs to be Included in Your Petition: (Cont.)

- If seeking a limited guardianship, list the specific areas of incapacity over which the petitioner requests that the guardian be assigned powers
 - Usually, seeking plenary guardianship – i.e., seeking guardianship over “all areas”;
- If the petitioner seeks appointment of a guardian of the estate, the petitioner must include a description of the assets owned by the AIP, and all sources of income.

20 Pa. Cons. Stat. Ann. § 5511(e)

- Statement whether the AIP was in the armed forces and if so, whether the AIP is receiving veterans’ benefits;

What Needs to be Included in Your Petition: (Cont.)

- Petition should include a request to waive a bond requirement for guardian of the estate and aver good cause.
 - “Good cause” may include:
 - Estate of nominal value
 - Fluctuation in size of estate
 - Creditworthiness of the guardian

What Needs to be Included in Your Petition (Cont.):

- Description of the qualifications of the proposed guardian;
- Averment that proposed guardian has no interest that is adverse to the AIP;
- Averment describing whether the petitioner/proposed guardian is available to visit with the AIP;
- Averment describing whether the petitioner/proposed guardian has completed any guardianship training/certification;
 - Note: this is less important with a Petitioner/proposed guardian who is a family member
- Averment that states whether the Petitioner/proposed guardian has been a guardian in any other matters and if so, how many matters are currently active;

What Needs to be Included in Your Petition (Cont.):

- Include Proposed Preliminary Decree and Proposed Final Decree – See **Exhibit 5** for sample.
- Note: If you want to amend language in the proposed decrees, address your requested change in your petition (e.g., to waive requirement of service on an intestate heir).
- Include Guardian Address Confirmation form. See **Exhibit 2**, page 59, for sample.

What Needs to be Included in Your Petition: (Cont.)

- Required Exhibits:
 - **Criminal History Record**: For each proposed guardian, you will need to attach a certified response to the PA State Police criminal records check (with the SSN redacted), issued within 6 months of the filing of the petition.
 - <https://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx>
 - If proposed guardian lived outside of PA within the previous 5 years, you need a criminal records check from each state of residence.
 - Include a signed consent/acknowledgement of proposed guardian to serve as guardian, as an Exhibit to Petition. (See last two pages of **Exhibit 5** for sample).
- Note: If proposed guardian has a criminal history, amend Guardian Consent/acknowledgement form before client signs and address this issue in the petition.
- Note: It is helpful to attach consent of non-guardian parent. (See **Exhibit 7** for sample).

Should the Alleged Incapacitated Person Attend the Hearing?

- An AIP must be present at the hearing unless a physician or psychologist states (under oath) that the person would be harmed by being present.
20 Pa. Cons. Stat. Ann. § 5511(a)
- If the AIP is unable to attend, make sure the doctor includes this as an averment in the written expert report (in response to Question 17 of expert report).

Tips for Your Petition

- If expert report answers are handwritten, make sure they are legible.
 - Consider having them typed and include both as exhibits.
- Consider including “consent and joinder forms” for any close relatives who are in agreement. See Exhibit 7.
- Even if you can’t reach the close relatives, you must serve them with the Petition, via certified mail.

Filing the Petition and Next Steps

- You need to file a Redacted (redacting all confidential information and exhibits – including SSN, medical information) and Unredacted version of the Petition with the Court.
- You must complete and attach a Certification of Compliance with the Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts (“Certificate of Compliance”). See Exhibit 8.

Filing the Petition and Next Steps (Cont.)

- In Philadelphia– e-file the Petition. See Exhibit 9 for instructions on e-filing Guardianship Petition. (Note: These instructions do not address filing a redacted/unredacted version).
- Court will send you Preliminary Decree (with the date of the hearing) and will notify you by telephone (and on the docket) that the Citation(s) have been issued and are available to be picked up at the Office of the Clerk of the Orphans' Court. If you are unable to pick up the Citation(s) in person or by messenger, you can send the Clerk a self-addressed postage pre-paid envelope for the Clerk to mail the Citation(s) to you.
- You must include the Citation and the Preliminary Decree when you make personal service on the AIP and when you serve the Interested Parties.

Serving the Petition

- **Make Personal Service of the Petition and Citation on the AIP:**
 - read the Petition and explain it to the AIP in simple terms.
 - Leave a copy of the Petition and written Notice of the time, date, and place of the hearing with the AIP.
- **Personal service must be made at least 20 days prior to the hearing.** *20 Pa. Cons. Stat. Ann. § 5511(a)*
- Have the Citation With Notice signed that day and serve all parties with it.
 - **TIP:** Hearing dates are often scheduled only 4 weeks from issuance of citation, so time to serve AIP is limited (you may have only one week to make personal service).

Preparing for the Hearing

- No later than 7 days before the hearing, send a letter to the Judge explaining if the AIP has counsel and if not, whether the AIP needs counsel appointed.
 - “No Counsel Needed” See Exhibit 10 for sample letter.
- Put together all of your documents, and also prepare an Affidavit of Service. See Exhibit 11 for sample Affidavit of Service.
 - This will have a copy of the Citation With Notice from your personal service on the AIP
 - Also include the certified mail receipts from serving the family members, if any.

Preparing for the Hearing (Continued)

- You will want to prepare your client and any family members who may want to attend the hearing.
 - Prepare your client to testify by reviewing direct examination questions. See Exhibit 12 for Sample Hearing Outline.
 - Make sure your client brings identification with him/her to enter into City Hall.
 - Consider if your client and/or the AIP needs assistance with transportation (e.g., help finding parking that will accommodate a wheelchair-accessible van).

The Hearing

- Hearing is informal – relaxed rules of evidence.
- First step: Hand up Affidavit of Service.
 - **TIP:** Ideally, you will also have e-filed your Affidavit of Service prior to the hearing.
- Second step: Introduce Medical Testimony
 - The Court may read the expert report into the record, OR may want you to read expert report into record
 - **TIP:** Highlight relevant sections of expert report in advance of hearing.
- Third step: Call your client to testify

Post-Hearing

- Once the “Final Decree” appointing a guardian is issued, your client needs to read it to the AIP (now an Incapacitated Person) within 10 days.
- Send your client the Final Decree and have them confirm that they read it to the Incapacitated Person.
- Then file an Affidavit of Service with the Court and serve all parties. See Exhibit 13 for sample. See Exhibit 14 for instructions on e-filing of Proof of Service.

Post-Hearing (Continued)

- Prepare a “closing letter” to the client explaining that your representation ends when he/she is appointed as guardian.
- Sample closing letter – **Exhibit 15**.
 - Include sample forms and fee schedule with this letter, which you can find at <http://www.courts.phila.gov/forms/index.asp>; and
 - Also include a copy of the Philadelphia Guardian’s Manual for the client – **Exhibit 16**. (Check online for most current version before sending).

Post-Hearing (Continued)

- Make sure the client understands the responsibilities he/she is undertaking as Guardian.
 - The client will have to file an inventory with the Court within three months of appointment and an annual report every year.
 - Explain that the Guardian is not allowed to expend principal of the Guardianship Estate without prior court approval.
- File Withdrawal of Appearance – See Exhibit 17 for sample.
- See Exhibit 18 for Instructions on E-filing Withdrawal of Appearance.

Post-Hearing (Continued)

- File all testamentary writings of Incapacitated Person with the Judge within 30 days of discovery of such writings.
 - Phila. O.C. R. 14.6.A(4).

Post-Hearing (Continued)

The Guardianship Tracking System (GTS):

The Guardian must file inventory and annual reports online through the new state mandated GTS system:
<https://ujportal.pacourts.us/Guardianship.aspx>

- Client will need an email address to set up an account and will have to call the county clerk's office to have their IFP order applied.
- GTS Help Desk: 1-877-227-2672 or GTSAOPC@pacourts.us

Recap and Overview

- Obtain expert report from doctor(s), if not provided;
- Obtain PA criminal history report for client;
- Draft petition;
- Have client review and sign petition;
- Obtain and attach to your Petition signed Consents and Joinders from Interested Parties willing to sign them and Certificate of Compliance;
- e-File petition;
- Receive Citation and Preliminary Decree from the Court;
- Review Preliminary Decree carefully – look for instructions/deadlines from the Court;

Recap and Overview (Continued)

- Personally serve the Petition and Citation on AIP, at least 20 days before hearing;
- Serve Petition with Citation and Notice on all interested parties;
- Prepare Affidavit of Service (to hand up at hearing and, ideally, to e-file before the hearing);
- Send letter to court re: no counsel needed for AIP (at least 7 or more days before hearing);
- Prepare for hearing – review direct examination questions with your client;

Recap and Overview (Continued)

- Attend Hearing (held at City Hall);
- Receive Final Decree from the Court;
- Review Final Decree carefully (look for instructions/deadlines from the Court);
- Serve the Final Decree as required by the Order;
- Discuss guardianship role and responsibilities with your client;
- File Affidavit of Service demonstrating that the Final Decree was served on Incapacitated Person.
- File Withdrawal of Appearance.

Resources

- Philadelphia Guardians Manual, available at <http://www.phila.courts.gov>; and
- “Guardianship in Pennsylvania,” Disability Rights Network of Pennsylvania.

Questions?



Please contact us with any Questions:

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