

GUARDIANSHIP VISITATION LEGISLATION ACROSS THE COUNTRY & IN PA

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Guardianship actions often occur in the context of complex family dynamics where family members or friends simply do not agree as to management of the financial and personal issues of the incapacitated person. In recent years, two prominent public figures, Peter Falk and Casey Kasem, have been the subject of contentious guardianship actions where visitation rights by adult children of a first marriage are restricted or even cut off by a second spouse, as appointed guardian. Restrictions created by the 2nd spouse acting as guardian extended to death notification and funeral/burial arrangements. Currently the adult children of Messrs. Falk and Kasem are pursuing legislative solutions to acknowledge rights and mandate processes for the resolution of future cases. Is it possible to legislate an appropriate balance between first, and second, family visitation rights and protection of an incapacitated person from predatory first, and second, family members?

PA Senate Bill 113 (SB113) is Pennsylvania's version of what is commonly referred to as the Peter Falk Law and provides that unless specifically authorized by court order, no guardian may restrict visitation. Rather, a guardian is required to file a petition and show good cause to obtain a court order to limit ability to communicate or visit or interact with a person adjudicated to be incapacitated.

In comparison, New York's Peter Falk Law incorporates visitation issue conflicts in the initial guardianship proceeding. Under current NY law, the court, when appointing a guardian, identifies person(s) entitled to receive notice of the alleged incapacitated person's death, intended disposition of remains, funeral arrangements and resting place. Further, the court order MAY identify persons entitled to visit the alleged incapacitated person, if the incapacitated person chooses to participate in a visit.

Under current provisions of Pennsylvania law, broad statutory provisions set forth general guidance regarding visitation issues. Probate Estate and Fiduciary Code §5521 requires a guardian to consider the expressed wishes and preferences of an incapacitated person and respect these wishes to the extent possible. Further, the guardian is to encourage the incapacitated person to participate to the maximum extent possible in all decisions which affect him, to act on his own behalf whenever he is able to do so, and to develop or regain, to the maximum extent possible, his capacity to manage his personal affairs. Unfortunately, these general provisions do not adequately address intra-family control issues when a guardian, rightly or wrongly, feels that his ward is subject to undue influence or coercion by a potential visitor and does not believe the ward's best interests are served by allowing visitation.

If Pennsylvania is to proceed with its consideration of such legislation, PAELA offers the following recommendations:

1. Structure the legislation to address these personal controversies at the beginning of the guardianship action.
2. Require identification of person(s) entitled to receive notice of the alleged incapacitated person's death, intended disposition of remains, funeral arrangements and resting place.

Specifically, how are we to define terms such as “family,” “immediate family,” “parties in interest,” etc.

3. Permit identification of persons entitled to visit the alleged incapacitated person if the alleged incapacitated person chooses to participate in the visit. One mechanism to address the likely ongoing scheduling and monitoring of visits could be to require the guardian to employ a licensed social worker to manage the likely continuing dynamics of the family without court intervention.
4. Are first, and second, family visitation rights a problem in Pennsylvania? Legislators would do well to ask the members of the Orphans’ Court Bench regarding their perceptions as to best practices useful in resolving these thorny issues. Changes to the law should be made only after receiving input from the stakeholders affected by the legislation, especially the judges who would be charged with implementing such a new law.