

Guardianship Reform in Pennsylvania

April 30, 2018

Those of diminished mental capacity, whether caused by the infirmities of age or otherwise, may at some point need assistance with financial and healthcare matters. Many times, a valid power of attorney exists which enables a trusted family member or friend to act on behalf of an incapacitated person. However, there are situations where there is no valid power of attorney, or the named agent is not acting in the person's best interest.

Pennsylvania courts are often called upon to appoint a legal guardian in these cases. A court-appointed guardian is tasked with managing the welfare and financial well-being of an incapacitated person. Guardians can either be family members or unrelated, independent guardians. Independent guardians are often professionals appointed where there is no suitable family member or significant family dysfunction.

Those in need of guardianship are among the most vulnerable in our society and should be afforded the utmost protection by the Pennsylvania legislature and legal system. Guardians must be trustworthy, capable, and subject to ongoing supervision in order to prevent cases of financial exploitation, neglect, and abuse.

PAELA supports steps that can be taken to improve procedures and oversight of the guardianship process. We must have certain fundamental safeguards in place:

1. Definite Need. Guardians must not be appointed unless there is clear and convincing evidence of incapacity, and the definite need for guardianship.
2. Protect the Civil Rights of Alleged Incapacitated Persons. We need to protect the self-determination, dignity and civil rights of an alleged incapacitated person by making certain that a guardian is not appointed where a less restrictive alternative exists, such as a valid power of attorney. PAELA believes legal representation is appropriate for all non-emergency

initial hearings where the alleged incapacitated person is not physically present or participating by video conference, and also when upon being provided the option, the incapacitated person requests a lawyer. Further, legal counsel should be appointed if the incapacitated person objects to a proposed action that requires court approval, such as the sale of the person's home. Incapacitated persons should participate as fully as possible in all decisions which affect them. Every effort should be made to enable the alleged incapacitated person to be seen by the judge, participate in hearings, and object to proposed actions. PAELA recommends careful study of the [Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act](#) (hereinafter, "Uniform Act") drafted by the National Conference of Commissioners on Uniform State Laws, and approved and recommended by them for enactment in all 50 states, November 1, 2017. Section 305 of the Uniform Act recognizes the split of opinion among experts as to whether legal counsel should be appointed in every case. PAELA recognizes that stakeholders will debate whether appointment of legal counsel in every case is necessary or feasible. PAELA recommends enactment of "Alternative A" of Section 305 (a) of the Uniform Act, with the following supplemental language, as underlined below:

SECTION 305. APPOINTMENT AND ROLE OF ATTORNEY FOR ADULT.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding for appointment of a guardian for an adult, regardless of the respondent's ability to pay, if:

- (1) upon being provided the option, the respondent requests an appointment;
- (2) a court-appointed independent medical evaluator recommends an appointment; or
- (3) the court determines the respondent needs representation.

3. Court Supervised Compensation. Compensation of guardians must be on a modest scale and court-approved, but sufficient to reasonably compensate guardians for work properly performed. Without adequate compensation, high quality individuals, particularly independent guardians, will not be willing to take on this position of responsibility and potential liability.

4. Oversight. Adequate oversight of guardians must be in place in order to prevent financial exploitation and neglect.

Although rare, incidents involving alleged financial exploitation of incapacitated persons by independent, professional guardians have occurred. Certain sensible reforms should be considered. Specifically, PAELA suggests discussion and refinement of the following ideas:

1. Bonding of Guardians. As a general rule, guardians should be bonded unless the court finds good cause to waive the bonding requirement. Would you want an unrelated third party to be put in charge of your assets who was not bonded? Section 5515.3 of [SB 884](#) provides detailed provisions for bonding, while still permitting the court to waive bond when it determines bond is not necessary or warranted, as is often the case for modest estates where bonding may be too expensive. Bonding provides an important safeguard to protect the incapacitated person's estate. Further education about bonding procedures could make the practice easier and more widespread.
2. Criminal Background Checks. PAELA supports [HB 2247](#) to the extent it subjects proposed guardians to criminal background checks and would prevent felons convicted of financial crimes from serving as guardians of the estates of incapacitated persons. We express concern, however, that this proposed law casts too wide a net, and believe the ultimate fitness of a proposed guardian should be determined by the court after evaluation of the facts. The court should have the discretion to determine whether a given crime renders a proposed guardian unfit to serve. PAELA opposes HB 2247's requirement that the proposed guardian must provide validation that he or she is eligible to legally work in the United States because this could impede the court's ability to appoint a person, with appropriate bonding, who might otherwise be entirely fit to act in the incapacitated person's best interests.

3. Credit Check. Would you want to put a person with bad credit in charge of paying your own bills? The proposed guardian to be placed in total control of another person's financial affairs should be encouraged by the court to provide documentation of their current credit score in order to verify that they are managing their own financial matters with responsibility. This information is readily available online. Alternatively, if a bonding requirement were to be incorporated into the guardianship process, the bond agency automatically runs a credit check in the normal course of their due diligence before issuing a bond.
4. Certification of Guardians. Professional guardians in other states are required to be certified. The [National Guardianship Association](#), headquartered in Pennsylvania, provides a certification process and sets forth high [standards of practice](#) for its membership. PAELA does not believe certification should be legally required, but supports certification in concept and believes such a credential should be among the factors considered by the court.
5. Online Education Course for Non-Professional Guardians. Non-professional guardians should complete an online education course before being appointed. This course would inform guardians of their legal duties, including their responsibilities to maintain accurate records, to ask the court for approval before expending principal, and to seek legal advice as needed. Such an online course should warn non-professional guardians of the civil and criminal consequences of breaching their fiduciary duties. A website could serve as a portal for such certification, and provide a resource with free and accurate content supplied by interested stakeholders, including but not limited to orphans' court judges and practitioners.
6. Ongoing Oversight. The following oversight options are offered by PAELA for discussion and refinement:

- a. Review of Guardianship Reports. There should be regular review of guardianship reports by the court, officers of the court, or court-appointed auditors. These reviews should be followed-up with appropriate inquiry, especially in cases where there appears to be a marked decline in assets, or disbursements made without court authorization. PAELA firmly supports [HB 1886](#) which requires the orphans' court clerk to regularly provide the court with lists of guardians who are late by 30 days or more in filing required reports, and provides further that the court shall take appropriate enforcement action against noncompliant guardians. Additionally, [HB 1886](#) makes clear that the court must develop a procedure for the examination of the annual reports in order to help make sure guardians are acting in the best interests of incapacitated persons. PAELA urges that there should be near automatic review hearings scheduled for those guardians who do not respond to the court's enforcement actions.

- b. Courtesy Contact. Non-confrontational courtesy phone calls, e-mail, or other communications should be directed to guardians confirming receipt of required reports. Such routine contact would remind guardians of the presence of court supervision, confirm basic legal duties, and recommend that guardians seek legal guidance if they need advice. Guardians should know that their actions are actually being monitored and reviewed. Simple phone calls could reveal "at risk" situations and uncover cases where a review hearing would be in the best interests of an incapacitated person.

- c. Limited audits. Random "limited audits" of financial statements could catch problems not evident on annual reports. The limited audit could be something as basic as an officer of the court asking for the last year's worth of checking account statements. A simple request would remind the guardian that their actions are being watched. Section 751(7) of [Senate Bill 884](#) provides for such court-appointed

examiners, by general rule or specific order, empowering them to make periodic or special examinations of expenditures, disbursements and withdrawals of a guardian of the estate of an incapacitated person, and require the guardian to present financial records for examination.

- d. Failure to Submit Required Reports. Guardians who, after notice, fail to submit required reports should be summoned to a review hearing, subject to audit, and potentially removed.
 - e. Consequences for Unauthorized Disbursements. Guardians who make improper disbursements of funds should be denied compensation and surcharged in appropriate cases.
 - f. Public and Private Partnership. Courts should work with local bar associations to generate oversight solutions that would be appropriate and cost-effective for their local jurisdiction.
7. Criminal Prosecution. Guardians who steal from their wards should be subject to criminal prosecution.
8. Guardianship Recovery Fund. Other industries, including the legal profession, have a recovery fund so that those financially victimized by an unscrupulous professional can seek recovery. A guardianship recovery fund could be created to provide some payment to those incapacitated persons who have been victimized by a court-appointed independent guardian. Such a fund might encourage families to be more accepting of independent paid guardians, and result in a smoother running, professional, and trusted guardianship process in Pennsylvania. Since instances of financial exploitation by professional guardians are rare, and if court-appointed guardians are also required to be bonded in all cases, then the need to access this fund would be limited.

9. PA Legislature Needs to Fund Guardianship Oversight. Unless legislative efforts to implement ongoing oversight are funded they will not happen, and despite the best efforts of the court system, incapacitated persons will remain systemically vulnerable to financial exploitation by the very people appointed to protect them. Funding is needed for the following:
- a. To support a system to issue certifications and re-certifications for professional guardians.
 - b. To create and maintain a statewide informational website and an online education course for non-professional guardians.
 - c. To pay for random partial audits of financial statements.
 - d. To potentially pay for in depth audits where the court believes good cause exists and funds are not otherwise available.
 - e. To support pro bono legal service organizations in providing lawyers for incapacitated persons who cannot afford legal counsel, and to represent guardians of modest means who need legal advice.
 - f. To create a recovery fund where those who have been the victims of financial abuse by a court-appointed independent guardian can make a claim.