

ALTERNATIVES TO GUARDIANSHIP AND RIGHT TO COUNSEL

**Preserving autonomy, assuring due
process, and preventing exploitation
in Pennsylvania**

WHY CONSIDER ALTERNATIVES?

Required by both **Pennsylvania statute** and **case law**:

- **20 Pa. C.S. § 5502 - “Purpose of Chapter”**
 - Cites accomplishing the objectives of the chapter “through the use of the least restrictive alternative.”
- **20 Pa. C.S. § 5512.1 (a) - “Determination of Incapacity”**
 - “In all cases, the court shall consider and make specific findings of fact concerning: (3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorneys or trusts”
- **20 Pa. C.S. § 5518 - “Evidence of Incapacity”**
 - Requires petitioner to present evidence as to “why no less restrictive alternatives would be appropriate”
- **In re Peery, 727 A.2d 539 (1999)**

To retain more freedom and rights for the AIP (see next slide);

- ▶ Adults - even adults with disabilities - have the right and are presumed to have the capacity to make their own decisions
- ▶ Freedom to make decisions is fundamental to personal autonomy and self-determination
- ▶ An adult's right to make his or her own decisions can sometimes be limited
- ▶ People with disabilities may need supports to help them understand and make decisions and, often, "supported decision-making" will be effective
- ▶ Sometimes, however, people with disabilities may need others to make decisions for them. These "others" are often called "substitute decision-makers" and include guardians, powers of attorney, and health care representatives.
- ▶ Sometimes, a person needs a combination of supported and substitute decision making.

Guardianships are restrictive and burdensome for the court system and guardians and the AIP



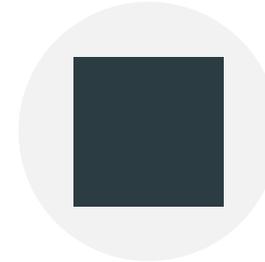
EXPENSIVE— COSTS THOUSANDS OF DOLLARS FOR PETITIONER (PARTY ASKING FOR GUARDIANSHIP) UPFRONT AND FILING FEES EVERY YEAR



ANNUAL COURT FILING REQUIREMENTS – COSTLY, TIMELY, ONEROUS, CAN LEAD TO REMOVAL OF GUARDIANS NOT COMPLETED. USES VALUABLE COURT RESOURCES.



RESTRICTIVE – REMOVES ALL RIGHTS TO DECISION-MAKING FOR THE PERSON WITH LIMITED CAPACITY.



INTRUSIVE - GUARDIANS, EVEN FAMILY MEMBER GUARDIANS, MUST REPORT EVERY YEAR TO THE COURT ALL DETAILS OF THE INCAPACITATED PERSON'S CARE.

Proving that a guardian is necessary should be a two-step process in Court

- ▶ **STEP 1- Determining that a person is incapacitated.**
- ▶ § 5512.2; the burden of proof is on the petitioner - § 5512.2 (b), and the evidence is by deposition or testimony -
- ▶ § 5518; Expert Testimony is usually used, see Rule 14.3
- ▶ **STEP 2 - Proving that there are no less restrictive alternatives to guardianship.**
- ▶ § 5502; § 5512.1 (a)(3), c), (d), (e), § 5518 all cite "no less restrictive alternatives"; see also *In Re. Peery* - which ruled that guardianship is not necessary if an incapacitated person has a circle of support.

Orphans' Court Rules require that less restrictive alternatives be addressed in the petition for guardianship

- ▶ **Rule 14.2(13)** - “*A petition shall state in plain language...steps taken to find a less restrictive alternative to guardianship.*”
- ▶ Often, only the less restrictive alternative of Power of Attorney is addressed. However, there are MANY more alternatives to guardianship, even for AIPs with limited or no capacity. All alternatives to guardianship should be explored prior to petitioning for guardianship. If less restrictive alternatives are not adequate, the burden is on petitioner to explain why, hopefully in the petition itself.

WHAT DOES DUE PROCESS REQUIRE? WHY DOES IT MATTER?

- ▶ Right to Counsel
- ▶ Less Restrictive Alternatives to Guardianship, including Supported Decision-Making
- ▶ Limited Guardianship
- ▶ Terminating Guardianships/Restoring Rights
- ▶ Remediating and Preventing Abuse and Exploitation
- ▶ Upcoming Reforms in Pennsylvania

RIGHT TO COUNSEL FOR THE ALLEGED INCAPACITATED PERSON

Right to Counsel - Questions

- ▶ Does an AIP have a right to counsel in every case?
- ▶ How can courts practically assure that counsel is appointed for an AIP who wishes to have counsel appointed?
- ▶ Does an AIP or IP have a right to selection of own counsel?
- ▶ Would we deny a right to counsel of own choosing in a criminal matter? Where facing a severe deprivation of all rights?
- ▶ What is the role of Counsel for the AIP? Is it appropriate for counsel to act as a guardian *ad litem*, or act as zealous advocate?
- ▶ Can a separate guardian *ad litem* be appointed for AIP if needed?

Counsel for the Alleged Incapacitated Person

19 states plus D.C. have mandatory/automatic right to defense counsel (“shall appoint”) in statute.¹ Distinct from guardian *ad litem* role.

Other areas of Pennsylvania law categorically require court-appointed counsel for those facing deprivations of fundamental rights and freedoms.

- ▶ E.g., indigent criminal defense, civil mental health commitment, judicial bypass, parents accused of abuse/neglect, parents in termination of parental rights, certain involuntary treatment & services.¹

1. “Representation and Investigation in Guardianship Proceedings (Statutory revisions as of August 2020).” American Bar Association, available online at www.americanbar.org

2. See, e.g., National Coalition for a Civil Right to Counsel, www.civilrighttocounsel.org

Right to Counsel under Pennsylvania's Guardianship Statute

- ▶ “In appropriate cases, counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that person.” 20 Pa. C.S. § 5511(a)(2)
- ▶ If AIP cannot pay, Court shall order County to pay § 5511 (c) (to be reimbursed by State)
- ▶ AIP has a right to be notified of hearing at least 20 days in advance **including the requirement to be notified of the right to request appointment of counsel.**

Orphans' Court Rules Governing Counsel

- ▶ Rule 14.4 (b) Private counsel shall prepare comprehensive engagement letter
- ▶ Rule 14.4 (c) Court shall appoint counsel if deemed appropriate; order appointing counsel shall delineate the scope of counsel's services, including taking an appeal.
- ▶ Rule 14.7 (a)(2) Order adjudicating incapacity **must state that the incapacitated person has a right to be represented by counsel to file a motion for reconsideration, an appeal, or to seek modification or termination of the guardianship.** If the person cannot afford counsel, an attorney will be appointed by the court.

Role of Counsel for the Alleged Incapacitated Person

Zealous advocate

- ▶ Pennsylvania Rules of Professional Conduct
 - ▶ Rule 1.14 - Client with diminished capacity - maintain normal attorney-client relationship
 - ▶ Rule 1.2 - Scope of representation and allocation of authority between client and lawyer
 - ▶ Rule 1.6 - Confidentiality of information
- ▶ Appointment of a separate guardian *ad litem* may be helpful or ethically necessary when there is a tension between “best interests” and expressed wishes and direction to counsel

Recommendation of Fourth National Guardianship Summit, May 2021

- ▶ Recommendation 1.2: States and Courts must ensure that all judicial proceedings . . . provide meaningful due process, which includes:
 - ▶ Right to a qualified and compensated lawyer, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.
 - ▶ Preferably public service lawyer (Recommendation 4.3) - see Nevada model

Counsel for the Incapacitated Person: Does Incapacitated person have a right to select counsel?

In re Estate of Rosengarten, 871 A.2d 1249, 1257 (Pa. Super. 2005):

“Finally, this position begs the central question, which is whether Ms. Rosengarten should have the right to appointed counsel of her choosing. As the above-cited case law and statutory language make abundantly clear, Ms. Rosengarten's stated wishes are to be honored to the extent possible. In the absence of some indication that Mr. Ruehl's representation would be harmful to Ms. Rosengarten, once Ms. Rosengarten indicated that she wanted him to represent her, Mr. Ruehl should have been permitted to represent her voice.”

But see In re Sabatino, 159 A.3d 602 (Pa. Super. 2016)

Other Due Process Rights of the Alleged Incapacitated Person

- ▶ Right to be present at the hearing unless § 5511 (a)
 - (1) Harm to Respondent certified by physician or psychologist or
 - (2) Respondent absent from the state
- ▶ Hearings can be in Respondent's home (or residential facility) upon request, § 5511
- ▶ Right to request an independent evaluation - § 5511 (d)
 - ▶ Court will appoint expert "for cause"
 - ▶ Court will give due consideration to person proposed by respondent
- ▶ Right to cross-examine witnesses - § 5518.1 (also in Orphans' Court Rule 14.3(c), which outlines demand to examine petitioner's expert)
- ▶ Hearing shall be closed and with jury upon AIP's request - § 5511 (a)

ALTERNATIVES TO GUARDIANSHIP

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Less Restrictive Alternatives To Plenary Guardianship Of The Person

- ▶ Supported Decision-Making
- ▶ Advanced Medical Directives and Health Care Agents/POA
- ▶ Mental Health Advanced Directives, Act 104 of 2004, title 20 Ch. 58
- ▶ PA exception for special education students aged 18-21
- ▶ Health Care Representatives, 20 Pa. C.S. § 5461
- ▶ A combination of Act 169 and the MH/ID Act for those in an ID institution
- ▶ Adult or Senior Protective Services
- ▶ Limited guardianship

Less Restrictive Alternatives to Plenary Guardianship of the Estate

- ▶ Supported Decision-Making
 - ▶ For example, support with banking arrangements (direct deposit, automatic billing, banking alerts), money management classes, budgeting
- ▶ Power of Attorney
- ▶ Representative Payee for Social Security
- ▶ Trust
- ▶ PA ABLE Account managed by a fiduciary
- ▶ Having a trusted adult be a co-signatory on a bank account
- ▶ Limited guardianship of the Estate

Resource: [National Disability Institute](#)

Supported Decision-Making

- ▶ Allows people with disabilities and older adults (“decision-makers”) to make choices about their own lives with support from people (“supporters”) they choose and trust.
- ▶ Resources:
 - ▶ <https://supporteddecisions.org/>
 - ▶ Statement of Disability Justice and Supported Decision-Making Advocates, [*Britney Spears Spotlights the Need for Change Now*](#) (June 25, 2021)
 - ▶ [*Amicus brief*](#) supporting Ms. Spears’ right to select her own attorney and urging the court to ensure she had access to assistance and tools, including Supported Decision-Making, to make that choice.

Supported Decision-Making in Pennsylvania

- **20 Pa. C.S. § 5512.1 (a)(3)**
 - Courts shall consider “**availability of family, friends and other supports to assist the individual in making decisions**”
- **In re Peery, 727 A.2d 539 (Pa. 1999)**
 - Upholding trial court decision dismissing a petition of incapacity and appointment of a guardian in favor of a “**circle of support**” to assist Ms. Peery in making decisions.
 - “We have no difficulty concluding . . . That a person cannot be deemed incapacitated if his impairment is counterbalanced **by friends or family or other support.**”
- Recommendation 2.4 of **Fourth National Guardianship Summit**
 - “. . . supported decision-making can be a **reasonable accommodation** under the Americans with Disabilities Act of 1990, as amended, in supporting an individual in making their own decisions and retaining their right to do so.”

What if SDM, POAs, or Advance Directives Will Not Work in Health Care?

- ▶ There are still alternatives to guardianship!
 - ▶ **Health Care Representative** under 20 Pa. C.S. § 5461
 - ▶ **Substitute Health Care Decision-Making by MH/ID Facility Directors** under 50 P.S. sec. 4417(c)

Health Care Representatives – Title 20 § 5461

- ▶ A health care representative can make health care decisions for an individual when:
 - ▶ his or her attending physician determines that **s/he does not have capacity** (reads "**the individual is incompetent**");
 - ▶ 18 years old
 - ▶ No guardian of the person
 - ▶ No agent under health care power of attorney, or agent not available

Who may act as Health Care Representatives?

- ▶ Priority of who can serve as a person's health care representative:
 - ▶ Spouse and adult children who are not children of spouse
 - ▶ Adult children
 - ▶ Parent
 - ▶ Adult sibling
 - ▶ Adult grandchild
 - ▶ Adult with knowledge of individual's preferences and values, including religious and moral beliefs
- ▶ Attending physician or health care provider or provider's employees cannot act as a person's health care representative - § 5461(f)
- ▶ The health care provider may demand that the representative sign a declaration - § 5461(k)
- ▶ Unlike guardianships, a health care representative does not need Court approval to exist - § 5461 (j).

Health Care Representatives

- ▶ Limits on health care representatives' authority:
 - ▶ The patient has the right to countermand (say no) § 5521(i)
 - ▶ Cannot refuse life-preserving treatment for person who does not have end-stage disease or who is not permanently unconscious - § 5462(c)(1)
 - ▶ Although not specified in the statute, there may be limits similar to those imposed by law on guardians, see § 5521(d) and (f):
 - ▶ Removal of healthy bodily organ, experimental treatment, Electro Convulsive Therapy, commitment to inpatient psychiatric hospital or state center

Health Care Representatives

- ▶ Health Care Representatives can be an alternative to Guardianship of the Person, **especially when the incapacitated person lives with their family or has involved family members**
- ▶ Unlike Guardians, Health Care Representatives do not have to file anything with the Court, nor get their status from the Court
- ▶ Health Care Representatives are one of the most underutilized options when petitioners are considering guardianship
- ▶ Health Care Rep. can consent to medical care and nursing home or residential placement
- ▶ Health Care Reps. are Personal Reps. Under HIPAA

What happens in a Guardianship Proceeding when there is a less restrictive alternative?

- ▶ Often petitioners' primary concern is making health care decisions
- ▶ Finances often are managed by SS rep. payee, or Special Needs Trust
- ▶ Individual has parents or adult children able to make health care decisions
- ▶ Court may dismiss petition if it is established that there is a less restrictive alternative that is adequate.
- ▶ **INNOVATION:** Court may issue an order explicitly recognizing that the individual has a cognitive disability AND explicitly recognizing that family members are serving as health care representatives.

Incapacitated but less restrictive - Sample Order finding no need for Guardian of Person

- ▶ (1) JANE DOE is adjudged a totally incapacitated person. Jane Doe has _____, a condition that totally impairs her capacity to receive and evaluate information effectively and to make and communicate decisions concerning management of her financial affairs or to meet essential requirements for her physical health and safety.
- ▶ (2) JANE DOE has not signed a health care power of attorney appointing a health care agent.
- ▶ (3) _____ and _____ are the [parents/adult children] of JANE DOE and are acting as the Health Care Representatives for JANE DOE pursuant 20 Pa. C.S.A. section 5461, with the authority to make all health care decisions for JANE DOE. For purposes of HIPAA, these Health Care Representatives shall be considered to be “personal representatives” with the authority to review, receive and discuss all protected health information related to JANE DOE.
- ▶ (4) JANE DOE is not in need of the appointment of a Guardian of the Person as there is a less restrictive alternative that is adequate to meet her need for health care decision-making, in that she has Health Care Representatives.
- ▶ (5) JANE DOE is not in need of the appointment of a Guardian of the Person to make other personal decisions as she has a support system that assists her with decision-making regarding her residential and other personal decisions.

Sample Order - Less Restrictive- finding no need for Guardian of Estate

- ▶ (6) _____ is serving as the Representative Payee for JANE DOE's social security income. JANE DOE has no other income or assets, other than her social security or supplemental security income.
- ▶ (7) JANE DOE is not in need of the appointment of a Guardian of the Estate as there is a less restrictive alternative, in that she has a Representative Payee for receipt of her social security income, which is adequate to meet her needs for financial management, and she at this time has no need for a Guardian of the Estate to file tax returns or manage other assets or income.
- ▶ The requests for appointment of guardians of the person and estate are DENIED as there are less restrictive alternatives that are adequate to meet the needs of Jane Doe. The Petition filed in this matter seeking an adjudication of incapacity is GRANTED and the requests for appointment of Guardians of the Person and Estate are hereby DENIED as the Court finds that there are less restrictive alternatives to the appointment of plenary guardians and that this Final Decree is sufficient at this time to meet the needs of JANE DOE. A review hearing shall promptly be scheduled upon a request by petitioner(s) or by counsel for JANE DOE to the chambers of the undersigned.

Less Restrictive Orders benefit the family, the person and also the Court

- ▶ No annual reports to review from cases in which a less restrictive alternative is recognized because no guardian appointed.
- ▶ Fewer guardianships granted: in 2021, of 201 petitions for guardianship filed, **21** resulted in no guardianship and less restrictive alternative recognized (**10 percent**).
- ▶ **28** additional cases resulted in a less restrictive alternative for one capacity and/or limited guardianship
- ▶ Also it appears fewer petitions for guardianship filed as bar and family members learn it is not needed

Uses of Limited Guardians - Examples and Concerns

- ▶ When might a limited guardianship be useful?
- ▶ Can a person incapacitated for many purposes retain the right to Vote?
- ▶ Can a person incapacitated with respect to handling large sums of money, retain the right to spend \$100 per week?
- ▶ What are some concerns about granting limited guardianship?
- ▶ How do third parties react to limited guardianship orders?
- ▶ Is greater education a possibility?

TERMINATING GUARDIANSHIP, RESTORING RIGHTS

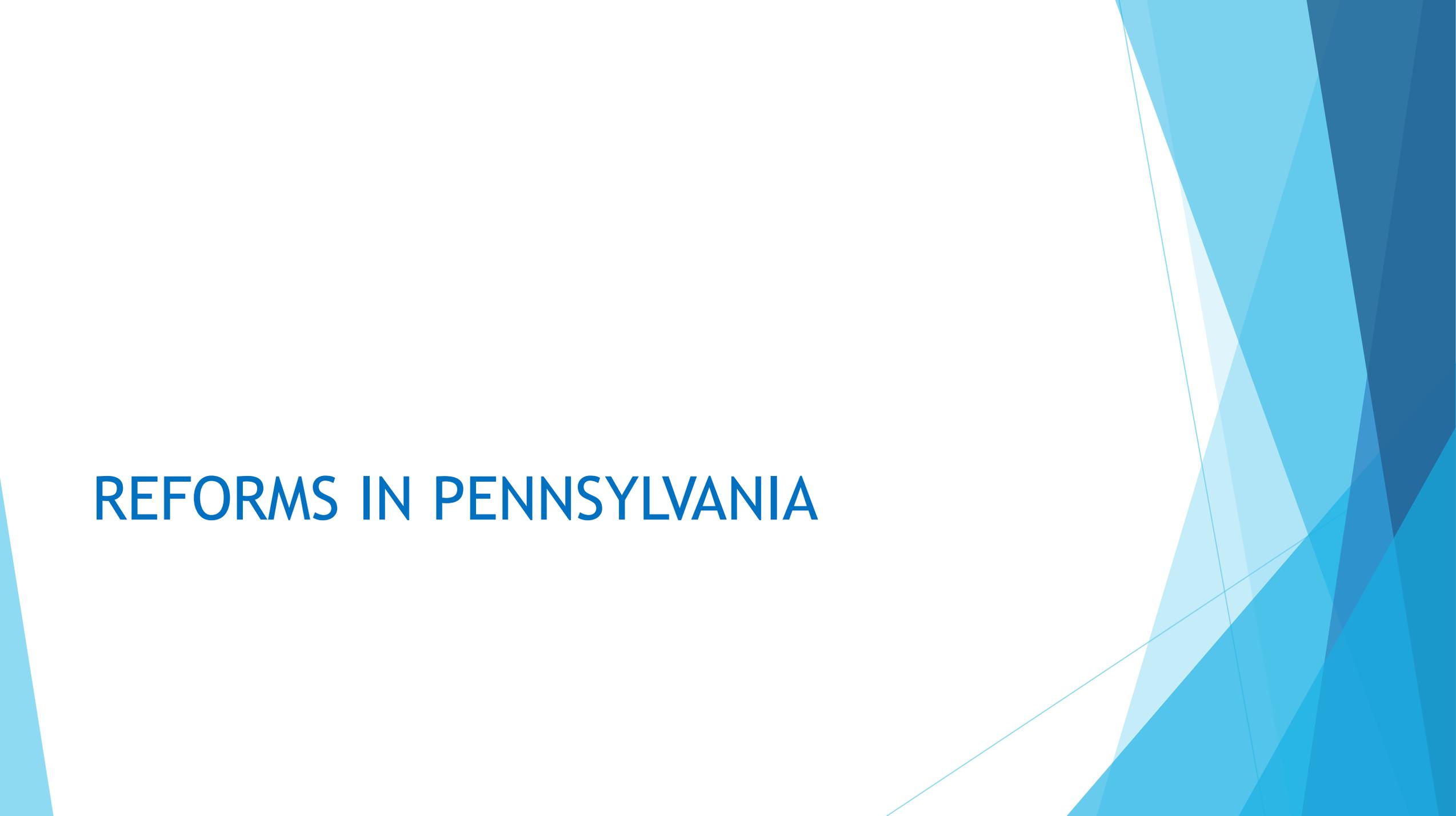
Restoration of Rights

- ▶ Under Pennsylvania law, a review hearing may be requested at any time. 20 Pa. C.S.A. sec. 5512.2
- ▶ IP, guardian or any interested party may petition for reason of significant change in capacity, change in need for guardianship services or guardian's failure to perform duties
- ▶ Court may dismiss if it determines petition to be frivolous
- ▶ **Burden of proof, by clear and convincing evidence, is on party advocating for continuation of the guardianship - just as at initial hearing.**
- ▶ Annual report by guardian must include guardian's opinion whether the guardianship should continue and the reasons therefor. 20 Pa. C.S.A. section 5521(c)(1)(ii)(D).

Request for Review hearing to Revoke Guardianship and Restore Rights or Recognize Less Restrictive Alternative

- ▶ Courts should permit informal request by petition or by letter, by request of any interested party, and schedule review hearing unless request is frivolous

REFORMS IN PENNSYLVANIA

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Proposed Legislative Reforms in Pennsylvania

HB 1356 - Increases monthly payment to guardians for individuals in receiving long-term care grant from Medical Assistance (Medicaid) program

HB 1890 - Adds federal background check requirement for proposed guardians

HB 1928 - Mandates appointment of counsel in adult guardianship cases, provides clear role of counsel

HB 384 - Grants guardian of the person additional powers concerning mental health care decisions

Further Reading

- ▶ Fourth National Guardianship Summit: maximizing Autonomy and Ensuring Accountability -
- ▶ http://law.syr.edu/uploads/docs/academics/Fourth_National_Guardianship_Summit_-_Adopted_Recommendations_%28May_2021%29.pdf
- ▶ Pennsylvania Guardianship Bench Book
- ▶ <https://www.pacourts.us/Storage/media/pdfs/20210516/230256-file-10135.pdf>

QUESTIONS?