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# Current Complex Issues with Guardianships and POA Abuse Cases

Changes in Law - Changes in Practice

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# Guardianship – Then to Now

- Guardianship Act of 1992
  - Identification of incapacity moves from on/off switch to sliding scale
  - Clear preference for limited guardianship whenever possible
  - The alleged incapacitated person (“AIP”) MUST be involved before, during, and after any adjudication
  - Each petitioner MUST make specific factual allegations of incapacity and lack of a less-restrictive alternative
  - The court must make specific findings of fact to adjudicate incapacity

# Power of Attorney – Then to Now

- Power of Attorney Act substantially changed in 1992, 1999, 2003, 2014, and 2016
- 2014 and 2016 changes were most dramatic – changes in execution, notarization, gifting, and use of hot powers
- For attorneys, problems arise frequently from improper execution and conflicting permissions or misunderstood powers

# Guardianship – Important Cases

## ***In re Peery, 727 A.2d 539 (Pa. 1999)***

Brother filed for guardianship of his sister. Centre County OC found that although sister was mentally impaired, she did not require a guardian.

Superior Court reversed, holding that OC failed to apply second part of a three-part test: Is a guardian necessary?

Supreme Court reversed, saying there is no three-part test. Regardless of incapacitating conditions, if there is a less restrictive alternative to guardianship, there is no incapacity.

# In re Peery

A divided panel of the Superior Court reversed the OC in an unpublished opinion and remanded with instructions to the trial court to determine whether Ms. Peery required a guardian, despite the well-supported factual findings by the OC that she did not.

Superior Court thought there were three steps:

- Determine if Ms. Peery is incapacitated.

- Determine if she needs a guardian.

- Determine who the guardian should be.

# In re Peery

Supreme Court holds that the determining factor is not whether a person suffers from incapacitating conditions, but whether a guardian *is necessary* even if incapacitating conditions exist.

*“The critical fact is whether or not the alleged incapacitated person needs a guardian. If the court finds that a person does not need a guardian, it does not matter whether he is incapacitated— the court cannot proceed to the appointment of a guardian.”*

# In re Peery

## Supreme Court Opinion

After a hearing pursuant to the guardianship statute, the trial judge found that appellant's low I.Q. did not render her incapable of self-care, but required her to depend on others in regard to her health, welfare, safety, and medical needs. The court also found that Miss Peery's needs were being met with the help of individuals already assisting her. The trial judge indicated that he was impressed with the support system which existed to assist Miss Peery, finding that her caretakers were extremely devoted and reliable. He also found that Miss Peery was satisfied with her living arrangements and that she does not wish to see her brother. Accordingly, the court determined that appellant did not need the guardianship services of respondent because the services already available to her meet the essential requirements for her physical health and safety and for managing her financial resources. The court dismissed the petition for adjudication of incapacity and appointment of a guardian.

# In re Peery

Primary question to evaluate every potential guardianship case:  
Allowing for any incapacitating condition(s), is appointment of a guardian the only alternative that will allow the AIP to meet essential requirements for their physical health and safety and financial security?

# In re Peery – Avoiding Traps

- Fully explore all social, familial, governmental, and other support services BEFORE starting the guardianship
- Look at the case from the perspective of the AIP, because that should be the perspective the court and the AIP's counsel will work from
- Get accustomed to actively searching for the least restrictive alternative to guardianship, because that is where the law is likely headed

# Guardianship – Important Cases

## ***In re: Estate of Rosengarten, 871 A. 2d 1279 (Pa. Super. 2005)***

Ms. Rosengarten's brother successfully petitioned to have her adjudicated incapacitated and himself appointed guardian. After brother's resignation, Attorney Smith was appointed as the successor guardian of person and estate. Attorney Smith sought permission to sell Ms. R's house to pay for her residential care despite the existence of other assets valued at over \$600,000. Ms. R challenged sale by counsel of her own choosing and her own letter.

# In re Rosengarten

OC approved the sale despite Ms. R's objection *and* after prohibiting Ms. R's counsel from participating.

OC also ignored Ms. R's request that her father stay on as trustee of her trust and that her father be substituted as her guardian.

Ms. R had also requested a review hearing on the issue of her incapacity and the need for the guardianship to continue, which was ignored by the OC.

Ms. R's new matter also alleged that Attorney Smith, as guardian, had abused her fiduciary duty to Ms. R, including billing \$195/hour for administrative work and challenging Ms. R's right to express her own desires for counsel and management of her assets.

# In re Rosengarten

The Superior Court (Bowes, J.) first held that the OC should have immediately held a review hearing before considering the other issues before it.

*The OC failed to “conduct a review hearing promptly if the incapacitated person, guardian or any interested party petitions the court for a hearing for reason of a significant change in the person's capacity as required by Section 5521.2(a) of the Guardianship Act.”*

The Superior Court also found that the OC violated Section 5521(a) of the Act when it failed to respect the “expressed wishes and preferences of the incapacitated person”.

*“We are dismayed at the direction taken by the orphans' court in this matter in light of the allegations that Ms. Rosengarten was no longer incapacitated, that Ms. Smith was not acting in her best interest, and that Ms. Rosengarten desired her father to act as guardian.”*

# In re Rosengarten

Superior Court also held that Attorney Smith, as guardian, should have:

- Consulted with Ms. R. about all her actions and plans.
- Informed the OC that Ms. R. didn't want the house to be sold.
- Informed the OC that Ms. R. desired her own counsel.
- Hired others for ministerial work, rather than billing attorney rates.
- Retained Ms. R's father to do taxes and other tasks he'd do for free.

# In re Rosengarten

As to the question of Ms. R's choice of counsel, the Superior Court held:

*"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."*

# In re Rosengarten – Avoiding Traps

- **Listen** to the Alleged Incapacitated Person and the Incapacitated Person.
- Speak for, not about, the AIP or IP's wants and desires, not what you, as counsel, believe they need.
- Counsel's role is as advocate for AIP's or IP's wants and desires, not to serve as Guardian *ad litem*.
- Guardian's role as guardian is to protect and serve AIP's needs and independence whenever possible, not to act as Guardian *ad litem*.

# Guardianship – What's to come?

Potential guardianship legislation

Not yet a bill, but language consistent with the Pa Elderlaw Task Force of the Pa. Supreme Court that is likely to be considered.

## **Counsel**

- Add requirement that petitioner identify known, existing counsel for the AIP (counsel for what kind of work in the past?) before or after filing the petition.
- If unaware of counsel, then court shall appoint for every stage of a guardianship proceeding.
- Counsel shall maintain normal attorney/client relationship and “advocate for the expressed wishes and consistent with the client’s instructions to the extent the client is able to express wishes and instructions.”
- Retained or appointed counsel may not act as guardian *ad litem*.

# Guardianship – What's to come?

## **Petition Contents**

- Petition must specifically identify AIP, his or her spouse, parents and presumptive adult heirs, any residential service providers, all other service providers, and the proposed guardian(s).
- Petitioner must allege specific facts regarding what less restrictive alternatives were investigated and specify why they won't work. It's a long list of less restrictive alternatives.

# Guardianship – What's to come?

## **Guardian Certification**

A guardian seeking appointment for three or more cases must receive a DHS certification of qualification which includes:

- work history review
- state and federal criminal clearances, and
- passing a core competency evaluation
- All of this is to be designed by Pa. Dept. of Human Services

# Guardianship – What's to come?

## **Miscellaneous**

- There is a long list of less restrictive alternatives to guardianship.
- The court may not allow a determination of incapacity alone to be grounds for a guardianship. The court must assess and explain why *any* less restrictive alternative to guardianship is insufficient.
- If the court denies all or part of a guardianship, it must explain which less restrictive alternative is the basis for the denial.

# Power of Attorney – Tool or Weapon?

*If Jesse James had known about powers of attorney, he'd never have picked up a gun.*

# Powers of Attorney

## **First contact**

Suspicion is always justified. Yes, that's cynical, but it's not irrational.

## **Who is the client?**

The principal. The principal. The principal. And after the POA is signed, it's still the principal.

## **What is the goal?**

- The basic elements of agency are “the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.” Restatement (Second) of Agency s 1, Comment b (1958). *Scott v. Purcell*, 490 Pa. 109, 117, 415 A.2d 56, 60 (1980)

# Powers of Attorney

## **Form**

*Guided* by 20 Pa.C.S. § 5602. 20 different “defined” powers that can be incorporated by reference. *Not* an exclusive list of powers or authorities.

Avoid cookie cutter documents. Draft for the client’s specific needs. This also means no more \$100 POAs.

Look also to Sections 5601(a) and 5602(a.1) which allow a grant of authority for any lawful purpose and allows a principal to modify the defined powers by express and specific language.

## **Execution**

Be aware of strict execution and notarization requirements.

*In re Koepfinger*, 249 A.3d 1129 (Pa. Super. 2021). Failure of notary to witness principal’s signature renders power void. But that does not necessarily render acts taken void, as well.

# Powers of Attorney – The Devil Is In The Details

- Drafting errors, whether caused by unfamiliarity with the scope and limits of defined powers or by simple neglect, take myriad forms.
- Execution errors usually flow from cutting corners. Notary logs matter.
- Be particularly careful with gifting powers as they relate to actual gifts and as they relate to long-term care planning.
- Be aware of limitations on creation and final distribution of trusts. Section 5603(b)(1)&(2). See also Memorandum Opinion in *In re Estate of Irwin*, 2016 WL 6727172 (Pa. Super. 2016). Trust must revert to principal's estate. Not controlling precedent. And the case ignores Sections 5601(a) and 5602(a.1).

# Power of Attorney – Litigation

- Mandatory Orphans' Court jurisdiction - 20 Pa. C.S. § 711(22)
- Venue is presumed to lie where principal resides. 20 Pa. C.S. § 5614.
- Standing - Only principal (directly or through a guardian) and court have may request and compel an account by an agent. 20 Pa. C.S. § 5610.
- You, the scrivener, don't want to be a witness.

# Power of Attorney: Boon or Bane to Guardianship

- The existence of a power of attorney is a defined less restrictive alternative to guardianship. Guardianship Act of 1992 (20 Pa. C.S. § 5511.1(a))
- The creation of a guardianship does not automatically terminate the authority of an agent (20 Pa. C.S. § 5604(c)(3)), but the court may act to do so in its discretion.
- A power of attorney can also mandate the identification of the guardian, if one is necessary. 20 Pa. C.S. § 5604(c)(2).

# Powers of Attorney - Miscellaneous

- Standard for capacity to execute a power of attorney remains undefined by statute or caselaw.
- Default statutory forms compel great deference to principal's best interest and intent. They also default to limiting the agent's ability to self-deal without express specific approval by principal.

# Powers of Attorney – Avoiding Traps

- Read the *current* statute. Chapter 56 has been revised more than nearly any other statute that relates to estate planning, and those changes have a wide-ranging affect on estate planning, day to day affairs, and guardianship for many, many clients.
- Draft *for* this client, not *from* the last one.
- Meet the client alone, without the agent or anyone who brought the client to you, and really test their capacity and understanding of the scope of the document you're to prepare. Make it clear to the agent that the principal is and will always be your client and if you learn that the agent is acting adversely to the principal's interest, you are obligated to and will pursue the agent on the principal's behalf.

# Powers of Attorney – Avoiding Traps

- Get an evaluation by a medical care provider. Tell the MD in advance what you're looking for in a capacity evaluation. While there is no statutory or caselaw definition, you can convey the important points:
- Is the client capable of understanding that they are giving authority to someone else to act on their behalf?
- Is the client capable of understanding that the agent can act without telling the client what they're doing?
- Is the client capable of understanding that the agent can act in a way that the client may not agree with?

# Powers of Attorney – Avoiding Traps

- Is the client capable of understanding the full scope of the agent's potential authority, including retaining attorneys and other professionals, selling or transferring property, making gifts, filing suit, taking a fee, waiving claims, etc.?
- Is the client capable of understanding that their agent may be required to account to the court and will have burdens on their time that they can charge to the principal?
- Does the client trust the agent? That is a question for the MD and the Attorney, I suggest.

# Questions?

If you have any question, feel free to contact me as follows:

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