

Testimony before the Pennsylvania House Aging and Older Adults Services Committee

October 26, 2021

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Thank you, Chairman Day, Democratic Chair Samuelson, and members of the House Committee on Aging and Older Adult Services for inviting me to speak with you today about the important reforms you are proposing to Guardianships in Pennsylvania. I am speaking today in my individual capacity as a trial judge who has handled over 1000 guardianship cases over the past 12 years. My comments do not reflect a position of the Supreme Court, the AOPC or any court. Nevertheless, I hope my answers to your questions and my remarks may be helpful to you as we grapple with these issues.

PART I – BASIC DESCRIPTION OF GUARDIANSHIP CASES:

Guardianship, also known in some other states as Conservatorship, has been much in the news in the past few years.

I thought it would be helpful to describe briefly the purposes of guardianships, and what risks they pose, so that we all have a common understanding of how we can improve guardianship in Pennsylvania.

Guardianship is a legal proceeding in which the court is asked to determine whether a person lacks the ability – also known as “capacity” – to make their own decisions, and, if so, whether to appoint another person to make all decisions for that person.

Essentially, when a person is not able to make decisions, a guardian may be needed to help that person consent to medical treatment, decide where to live, pay bills and apply for benefits.

The majority of cases each year in Pennsylvania – approximately 65% – involve adults over the age of 60.

Approximately 40% of cases seeking appointment of a guardian are filed by family members, and another 40% are filed either by agencies (such as the area agency on aging) or institutions (such as a hospital or nursing home).

Guardianship may be sought to protect the well-being of a person with an intellectual disability, autism spectrum disorder, stroke, traumatic brain injury, dementia or other cognitive impairment. The most common cases involve adults over age 60 with cognitive impairment due to stroke, dementia or other causes. Some cases are brought to protect an incapacitated adult from exploitation, abuse or neglect.

Most guardians appointed – almost 70% – are private individuals, usually family members.

In approximately 30% of cases the guardians appointed are professional guardians. Neutral, professional guardians are typically appointed only where there is no family member willing or able to serve, or there has been financial exploitation or abuse by a family member, or where there is significant family conflict, and a neutral decision-maker is needed.

Determining that a person is incapacitated and appointing a guardian are among the most significant deprivations of personal liberty that a court can impose. A person for whom a guardian is appointed loses the basic right to make their own decisions – and no longer has control of their liberty or property. When considering depriving a person of liberty to this extent – on par with incarceration for a crime – Courts must ensure that the due process rights of the alleged incapacitated person be given the highest level of protection, as required by the United States Constitution. We do not appoint guardians lightly. In fact, in many cases the needs of a person with a disability may be met without appointing any guardian.

I hope this background is helpful to all of you in understanding why guardianship cases are important, and sometimes necessary, and to help begin our discussion on how to improve guardianship in Pennsylvania.

PART II – OPPORTUNITIES FOR REFORM:

So, what are the problems that arise in guardianship matters that your committee and the proposed legislation is trying to address?

APPOINTMENT OF COUNSEL IN ALL CASES:

First, I am aware that Representative Day has introduced legislation to require the appointment of counsel for every person alleged to be incapacitated.

The person over whom guardianship is sought has a right to due process and a right to be represented by counsel to oppose the total deprivation of his or her rights, to cross-examine any expert witness on the nature of the incapacity, and to cross-examine any proposed guardian. Frequently counsel for the alleged incapacitated person is able to identify an alternative to guardianship that will meet the need without a severe deprivation of rights and autonomy.

Our current statute contemplates that the person has a right to counsel. However, the current statute refers to the appointment of counsel “in appropriate cases.” Across the Commonwealth, the practice of courts varies. I believe that due process requires that capable counsel represent every person who may or may not need a guardian. Our current statute and rules contemplate that counsel will be appointed if the person requests it. The trouble is, not all people are able to make their request known prior to a court hearing.

I would point out that we recognize the need for counsel in all criminal cases that may result in a deprivation of liberty, and in all mental health commitment cases, which may also

result in a temporary deprivation of liberty. The total deprivation of all liberty and autonomy to make all decisions – financial, medical, and residential – surely is so significant that the person who is the subject of a guardianship petition must also be entitled to be represented by capable counsel.

Competent counsel can assist the person in asserting his or her rights not to have a guardian, and can assert that they are either not incapacitated, or that they have a less restrictive alternative to guardianship that is effective. Without capable counsel, the Court may be deprived of the relevant facts. It is difficult – maybe impossible – to reach a good decision without having all of the facts and the whole context presented to the Court.

CRIMINAL BACKGROUND CHECK

Second, I understand that Representative Gillen has introduced legislation to require a criminal background check before a person may be appointed as a guardian.

Remember that when the court appoints a guardian of the estate for a person, that guardian is granted essentially unfettered authority over the person's assets and income. We have had cases, across the country and here in Pennsylvania, of Guardians abusing that trust and misappropriating funds of the person whom they were appointed to serve. And we have had cases in which we learned years later that a court-appointed guardian had a prior criminal record. Judges can ask a person if they have a criminal record, but it would make our system stronger and safer to require a criminal background check to be provided to the court by every person seeking to be appointed as a guardian.

Some have expressed concerns about requiring a criminal background check from family members, as possibly imposing a burden on well-meaning family members. We need to take this concern seriously. Yet, I suggest that a criminal record is relevant to a court's decision whether to appoint someone with broad authority as a guardian. While most family members are honorable and well intentioned, the sad truth is that some family members are the very people who exploit their relatives and take their assets.

MONTHLY FEE

Third, Representative Day has proposed legislation to increase the monthly fee payable to a professional acting as guardian of the estate where the person for whom they are guardian receives a medical assistance long-term care grant. This may seem an esoteric issue, but it is an important one. Courts are asked in some cases to appoint a professional guardian because there are no family members involved or available. Because we are cautious about the dangers of guardianship cases, we are increasingly demanding and expecting that these court-appointed guardians have training and education. In my county we require the guardian to have a certification. And we expect the guardian make monthly visits to see each incapacitated person and to be familiar with their medical and financial issues. We have high expectations – as we should – that the people serving as court appointed guardians will be people who are attentive, responsible, and of the highest ethics, integrity and honesty. These expectations are nothing less

than we should expect from someone whom we are appointing to have almost unfettered authority and responsibility over every aspect of a person's life.

Representative Day's legislation is important to assure that professional guardians can be found who have the skills, integrity and ability to serve honorably in this important role. For more than 20 years, we understand that compensation for guardians for a person of no means who is in a long-term care setting have been limited to \$100 per month. I am hearing from Judges across Pennsylvania that in many counties they cannot find any professional guardian willing to take an appointment in a case in which the fee will be limited to \$100 per month. Moreover, some non-profit entities that often serve as professional guardians have attempted to quantify the expense and time required to perform as a guardian of the person and estate, and there is no question that excellent services from a guardian require significantly more than \$100 per month.

Thank you for the opportunity to appear today to discuss this important issue. I look forward to answering any questions committee members have.