

LIMITED GUARDIANSHIP

- Challenges, Experiments and Successes from two Pennsylvania Judges

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PRESENTERS

- The Honorable Lois Murphy, Judge of Court of Common Pleas of Montgomery County, Pennsylvania
- The Honorable Shawn Meyers, Judge of Court of Common Pleas of Franklin and Fulton Counties, Pennsylvania

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LIMITED GUARDIANSHIP ORDERS

- ❖ When a limited guardianship order is appropriate
- ❖ Crafting an order that will be effective
- ❖ Anticipating potential problems

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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? Or \$500 per week?
- What are some concerns about granting limited guardianship?
- How do third parties react to limited guardianship orders?
- Can greater education and greater experimentation help?

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FOURTH NATIONAL GUARDIANSHIP SUMMIT

MAY 2021

- Recommendation 3.2 – **States should eliminate plenary guardianship**, allowing people to retain the maximum of rights, and if guardianship is imposed, **require tailored orders in every case.**
- The person should retain the right to make certain choices such as association, free practice of religion, personal choice, marriage, and voting unless the court makes a specific finding that a restriction is essential.

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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 in all circumstances.

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LIMITED GUARDIANSHIP ORDERS

- To be workable and effective, particularly with third parties, language regarding powers and authority of court-appointed Limited Guardian must be **clear and unambiguous**

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POWERS OF A LIMITED GUARDIAN – WHAT DOES PENNSYLVANIA LAW REQUIRE?

- The Court must identify the powers of the limited guardian and those powers must be consistent with the court's finding of the respondent's limitations.
 - 20 Pa. Cons. Stat. Ann. §§ 5512.1(b) 5512.1(d).
- The partially incapacitated person retains all legal rights other than those designated by the court's order as areas over which the limited guardian has power.
 - 20 Pa. Cons. Stat. Ann. § 5512.1(g).

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POWERS OF A LIMITED GUARDIAN OF THE PERSON MAY INCLUDE:

- providing general care, maintenance, and custody of the partially incapacitated person;
 - designating the partially incapacitated person's place of residence;
 - assuring, as appropriate, that the partially incapacitated person receives appropriate training, education, medical and psychological services, and social and vocational opportunities;
 - assisting the partially incapacitated person in the development of maximum self-reliance and independence; and,
 - providing required consents or approvals on behalf of the partially incapacitated person.
- 20 Pa. Cons. Stat. Ann. § 5512.1(b)

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POWERS DELEGATED TO A LIMITED GUARDIAN OF THE ESTATE

- the court must outline the guardian's specific powers and authority; and
 - must specify the portion of assets or income over which the limited guardian of the estate has assigned powers or duties.
- 20 Pa. Cons. Stat. Ann. § 5512.1(d).

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HOW DO COURTS CRAFT ORDERS THAT MEET THESE REQUIREMENTS FOR LIMITED GUARDIANSHIP

- The tasks for the Courts, lawyers, and parties include:
- Identifying specific areas of retained capacity and of incapacity
- Requiring an expert capacity evaluation that differentiates between areas of functional capacity retained, and areas of incapacity
- Crafting language to make extremely clear what power is delegated to the limited guardian of the person or estate and what powers and abilities are retained by the individual

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A ROLE FOR COURT APPOINTED COUNSEL FOR THE AIP

- Court appointed counsel for the AIP may play a key role in
- Identifying specific areas of retained capacity for the AIP
- Scrutinizing the expert regarding the capacity evaluation to identify areas of functional capacity retained, and areas of incapacity
- Crafting proposed language for a judge's order to make extremely clear what power is delegated to the limited guardian of the person or estate and what powers and abilities are retained by the individual

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WORKING WITH FINANCIAL INSTITUTIONS TO CRAFT EFFECTIVE ORDERS

- Pennsylvania's Advisory Council on Elder Justice has created a working group, partnering with representatives of several financial institutions and the Pennsylvania Bankers Association, to review and discuss language of limited guardianship orders and provide feedback and models for Judges

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EXAMPLES OF LIMITED ORDERS THAT MAY NOT INCLUDE A LIMITED GUARDIAN

- Order To Freeze Account Or Accounts
- Order To Freeze A Joint Account
- Order To Compel Production Of Financial Records For Five Years To Family Member

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LANGUAGE SUGGESTIONS FOR LIMITED GUARDIANSHIP OF THE ESTATE AUTHORITY

- Specify date order becomes effective and date order ends, if any
- Financial institutions request a contact person at the court to confirm whether order is in force, or whether there is a subsequent order
- Direction about what bank or financial institution should do when a temporary or term-limited order expires
- What should financial institution do if a guardian seeks to access or close a joint account or an account that has a beneficiary designation? Order should be specific as to whether limited guardian has authority over joint account

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EXAMPLE OF WORKABLE MODEL FOR LIMITED GUARDIAN OF THE ESTATE

- Limited Guardianship With Authority Over Large Accounts But Authority To Create A Small Checking Account Or Small Debit Card Account
- DO: specify that the limited guardian shall create two accounts – one for larger investments and one smaller checking account or bank card into which Guardian can deposit a specific amount per month for access the person with partial incapacity
- DON'T: expect bank or FI to be able to permit some payments each month up to a maximum amount per month, or review approved invoices

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CAPACITY EVALUATIONS

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CAPACITY EVALUATIONS

Recognizing	Recognizing that Capacity is on a Spectrum – not all or nothing
Obtaining	Obtaining an evaluation that addresses specific decisions to be made in this case – housing, medical decisions, financial decisions
Obtaining	Obtaining an evaluation that addresses decisional capacity specifically
Requiring	Requiring testimony when decisional capacity is impaired, but not totally

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DECISIONAL CAPACITY IS DEFINED AS THE PERSON'S ABILITY TO:

Understand

- Understand the information about their circumstances and options

Appreciate

- Appreciate the consequences of their decision

Reason through

- Reason through the risks, benefits, and alternatives of options

Communicate

- Communicate their wishes freely and voluntarily

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DETERMINATION OF INCAPACITY

PENNSYLVANIA LAW

- The court shall prefer less restrictive alternatives to guardianship and, if no less restrictive alternatives are available and sufficient, limited guardianship.
- (i) A determination of incapacity is separate from a determination of whether a guardian should be appointed.
- (ii) The court may not use a determination of incapacity alone to justify a guardianship.
- (iii) The court may not appoint a guardian if a lesser restrictive alternative exists that is sufficient to support the needs of an incapacitated person.
- (iv) When entering an order denying a petition for guardianship in whole or in part, the court shall identify the less restrictive alternatives that are available and sufficient to enable the alleged incapacitated person to manage personal financial resources or to meet essential requirements of personal physical health and safety.
- **An order may assist the respondent and any supportive and substitute decision makers involved to effectuate the respondent's decisions with third parties.**
 - 20 Pa. C.S. Section 5512.1(a)(6)

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DECISIONAL CAPACITY

A key concept in medical law and ethics

Decisional capacity is typically assessed with respect to a particular medical decision.

A person may have capacity in one situation but not another.

For example, someone who is legally incompetent to manage their finances may still be able to make a meaningful choice about participating in research.

Someone who may have difficulty understanding the differing options for treating cancer (radiation, chemotherapy, surgery, etc.) may be able to make a simpler decision about having a needed appendectomy

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CAPACITY EVALUATIONS

- How does the capacity evaluation relate to identifying alternatives to guardianship or crafting a limited guardianship order?

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LESSONS FROM PENNSYLVANIA'S LEGAL SERVICES PILOT PROJECT

- Appointment of legal counsel for all individuals aged 60 and over who are the subject of a petition for appointment of a guardian;
- Pilot Project launched in November 2023 in Dauphin County Pennsylvania and expanded to three additional counties
- Notable improvements:
 - Increased recognition of less restrictive alternatives to guardianship
 - Fewer grants of guardianship (32% of cases resulted in no guardianship, compared to 17% of cases statewide)
 - Increased use of limited guardianships (28% of cases compared to 4% statewide)
 - Decreased granting of plenary guardianship (40% of cases compared to 79% statewide)

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REVIEW HEARINGS

- Required review hearing must be scheduled within one year of initial hearing, where evidence indicates that need for guardianship or capacity may change.
- Increased scheduling of review hearings for at least three circumstances:
 - To reconsider capacity and whether a guardian is needed; or whether an alternative or limited guardianship could be sufficient;
 - To follow up on filed or unfiled reports and examine activities of appointed guardian(s); to compel compliance with report filings and to consider removing guardians where necessary
 - Review hearings to assure that any end of life decision making is made upon adequate notice to family and involvement of counsel for IP
- Consider routine scheduling of review hearings, in new case and old cases

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REVIEW HEARINGS

- Conduct a review hearing concerning guardian's reports and guardians compliance with fiduciary responsibilities

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REVIEW HEARINGS

- Examples of circumstances in which Guardianship may be terminated as no longer needed:
 - Where person's capacity to make decisions has improved and guardianship may not be needed or could be modified to a limited guardianship
 - Where the person has no assets and no income other than social security income and has a representative payee for the social security income
 - Where the person has a trust, including a special needs trust, to manage their assets, income and expenditures
 - Where a person has relatives who are willing and able to be Health Care Representatives, and there is no conflict among them and a guardian of the person may not be needed

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REVIEW HEARINGS

- Can be scheduled Sua Sponte
- No petition needed
- May be requested informally by unrepresented interested parties
- May be requested by petition by the IP, his or her counsel, or by another interested party
- May be scheduled by the court when reports have not been timely filed by the guardian or where review of reports raises concerns that must be explained

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QUESTIONS?

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