

**GUARDIANSHIP AND POWERS OF ATTORNEY FOR
ADULTS WITH SPECIAL NEEDS**

STEPHEN D. POTTS, ESQUIRE

HERR, POTTS AND POTTS

200 EAGLE ROAD, SUITE 106

WAYNE, PA 19087

AND

138 WEST GAY STREET

WEST CHESTER, PA 19380

TELEPHONE: (610) 254-0114

FAX: (610) 293-9660

EMAIL: STEVE@HPPLAW.NET

GUARDIANSHIPS

I. DEFINITION OF AN INCAPACITATED PERSON

- A. A person whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he or she is partially or totally unable to manage their financial resources or to meet essential requirements for physical health and safety.

II. TYPES OF GUARDIANSHIP

A. Plenary versus Limited.

- 1. Must protect the health, safety and financial well being of the alleged incapacitated person by use of the least restrictive means.
- 2. Limited guardianships allow for participation by the alleged incapacitated person to the maximum extent possible.
- 3. Limited orders of court can allow for maximum input by the alleged incapacitated person in the management of financial and/or personal affairs.

B. Guardianship of the Estate.

- 1. On a plenary or limited basis, the guardian of the estate oversees the management of the alleged incapacitated person's resources.

C. Guardianship of the Person.

- 1. On a plenary or limited basis, the guardian of the person oversees the health, safety and physical well being of the incapacitated person.

III. WHO CAN PETITION THE COURT?

- A. Any person interested in the alleged incapacitated person's welfare.
- B. May be a spouse, children, family members, clergy, nursing home, interested party, fiduciary, or the Commonwealth.
- C. In crisis situations, the County Office of Aging may petition the Court for guardianship. In most cases, the Office of Aging will request the appointment of a public or private agency to serve as guardian. Available agencies to serve in this capacity vary by locality. Where no other alternative exists, the Office of Aging

may serve as guardian of last resort.

IV. WHO MAY BE APPOINTED AS GUARDIAN?

- A. A court may appoint any qualified individual, including a spouse, family member, clergy, attorney, corporate fiduciary, non-profit corporation or a county agency.
- B. The court shall not appoint any entity providing residential services or providing any other services for a fee unless no alternative exists.
- C. No party with a conflicting or adverse interest should be appointed.
- D. If appropriate, consideration will be given to any individual nominated by the incapacitated person.
- E. A guardian nominated by the incapacitated person prior to his or her incapacity in a Durable Power of Attorney shall be appointed as guardian absent good cause or disqualification.
- F. Co-guardians are possible. Most often utilized when more than one child is interested in the well being of the parent. Co-guardianship has the potential for conflicts between the guardians.
- G. Where no alternative exists, County Office of Aging may be appointed. Most County Offices of Aging will only agree to serve where no alternative exists.

V. JURISDICTION AND COUNTY OF APPOINTMENT

- A. The Orphans' Court division of the Court of Common Pleas in the county in which the alleged incapacitated person is domiciled or in which the alleged incapacitated person resides has jurisdiction over guardianship matters and may appoint a guardian of the person and/or estate of the alleged incapacitated person.

VI. PROCEDURE FOR APPOINTMENT OF A GUARDIAN

- A. A Petition is filed in the Orphans' Court division of the court in the county in which the alleged incapacitated person is domiciled or in which the alleged incapacitated person resides.
 - I. Petition Contents
 - (a) Name, age, and residence of alleged incapacitated person;
 - (b) Names and addresses of spouse, parents, heirs;

- (c) Name and address of residential service providers and other service providers;
- (d) Proposed guardian of the person and/or estate;
- (e) Averment that proposed guardian has no adverse interests;
- (f) Description of physical and mental limitations of the AIP;
- (g) Steps taken to find less restrictive alternatives;
- (h) Specific areas of incapacity;
- (i) Whether seeking limited or plenary guardianship; and
- (j) Value of estate and amount of income.

2. Emergency Guardianships Petition Contents

- (a) All of the above information must be included as well as the Notice and Citation;
- (b) Must contain specific information authorizing the imminent risk of irreparable harm;
- (c) Request for limited v. plenary guardianship must be specified; and
- (d) In emergency proceedings, relief requested should address the emergency need. Request for broader guardianship powers should be addressed in the full guardianship proceeding after required notice to the AIP.

B. Written notice must be given to the alleged incapacitated person. Written notice must be given in large type and simple language to the alleged incapacitated person.

1. Citation contents.

- (a) Purpose and seriousness of the proceeding.
- (b) Rights that can be lost.
- (c) Date and time and place of hearing.
- (d) Explanation of all rights including right to request appointment of

counsel and to have it paid for if appropriate.

2. Personal service of the petition with its contents must be made no less than twenty (20) days in advance of the hearing. The contents and terms of the citation and petition must be explained to the alleged incapacitated person in language and terms the individual is most likely to understand.
 3. Notice also must be given to all persons entitled to share in the estate of the alleged incapacitated person, if the alleged incapacitated person died at that time intestate. Notice must also be given to service providers and such other persons as the court may direct.
- C. The alleged incapacitated person shall be present at the hearing unless the court is satisfied by deposition or testimony of or sworn statement by physician or licensed psychologist that either:
1. The physical or mental condition of the alleged incapacitated person would be harmed by his or her presence in open court; or
 2. That it is impossible for the alleged incapacitated to be present in court because of his or her absence from the Commonwealth.
- D. The petitioner must notify the court at least seven (7) days prior to hearing if counsel has not been obtained for the alleged incapacitated person. In appropriate cases, counsel will be appointed on his or her behalf.
- E. The hearing will be closed and without a jury unless the alleged incapacitated person or his or her counsel objects.
- F. The hearing may be held at the residence of the incapacitated person.

VII. EVIDENCE TO BE PRESENTED AT HEARING

- A. Testimony in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by petitioner which establishes the nature and extent of the incapacities and the disabilities and the mental, emotional and physical condition, adaptive behavior and social skills of the alleged incapacitated person.
- B. The court may order an independent evaluation of the alleged incapacitated person. (See 20 Pa. C.S.A. § 5511(d)).
- C. Evidence regarding services being utilized to meet physical health and safety needs and management of financial resources.

- D. Evidence regarding services being utilized to assist the alleged incapacitated person in regaining physical and mental abilities.
- E. Evidence of types of assistance required and evidence as to why no less restrictive alternatives are available.
- F. Evidence regarding probability of the condition changing.

VIII. EMERGENCY GUARDIANSHIP

- A. Upon petition and hearing at which good cause is shown, the court may appoint an emergency guardian.
- B. The evidence must show that the person lacking capacity is in need of a guardian and failure to appoint a guardian will result in irreparable harm to the person or estate of the alleged incapacitated person. This is a tough standard to meet.
- C. The emergency order may be in effect for up to 72 hours.
- D. If the emergency continues, the order may be extended for no more than 20 days from the expiration of the initial order.
- E. After the expiration of the emergency order and/or any extension thereto, a full guardianship proceeding must be initiated.
- F. In practice, Courts are more likely to grant emergency Orders where the request is for limited purpose to address the imminent risk of irreparable harm.

IX. COURT FINDINGS AT FINAL HEARING

- A. Determination of incapacity. The court shall consider:
 - 1. The testimony of the expert witness, including the following:
 - (a) The diagnosis of the alleged incapacitated person.
 - (b) A description of the mental impairments of the alleged incapacitated person.
 - (c) A description of the physical impairments of the alleged incapacitated person.
 - (d) Whether the alleged incapacitated person is partially or totally unable to manage financial resources.

- (e) Whether the alleged incapacitated person is particularly or totally unable to meet essential requirements for physical health and safety.
 - (f) Whether the ability of the alleged incapacitated person to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he or she is partially or totally unable to manage their financial resources or to meet essential requirements for physical health and safety.
 - (g) Recommendations concerning services necessary to meet the essential requirement for the physical health and safety of the alleged incapacitated person.
 - (h) Recommendations concerning the management of the financial resources of the alleged incapacitated person.
 - (i) Recommendations concerning the development or regaining of the physical or mental abilities of the alleged incapacitated person.
 - (j) Type of assistance is required by the alleged incapacitated person.
 - (k) Why no less restrictive alternatives would be appropriate.
- 2. The nature of any condition or disability impairing the alleged incapacitated person's ability to communicate decisions and the alleged incapacitated person's capacity to evaluate information and protect financial, physical and mental well-being.
 - 3. The extent of the alleged incapacitated person's capacity to evaluate information and make and communicate competent decisions regarding health and welfare.
 - 4. The need for guardianship services.
 - 5. The duration of the guardianship.
- B. Determination of whether there is a need for guardianship services.
- 1. The Court shall consider whether there are sufficient supports in place to assist the individual in making decisions.
 - 2. Existence of Living Wills and Powers of Attorney will be considered.

C. Upon finding of incapacity and determination that there is a need for guardianship services, the court shall determine plenary versus limited guardianship.

1. The court shall prefer limited guardianship.
2. The alleged incapacitated person should be permitted to participate to the maximum extent possible in all decisions regarding personal and financial matters.
3. Plenary guardians should be appointed only upon a finding that the alleged incapacitated person is totally incapacitated and in need of plenary guardianship services.

D. Appointment of guardians upon adjudication of incapacity.

1. The court shall appoint a plenary or limited guardian of the person.
2. The court shall appoint a plenary or limited guardian of the estate.
3. In appointing guardians, the court will consider the following:
 - (a) Best interests of the incapacitated person.
 - (b) Conflicting or adverse interests of proposed guardians.
 - (c) The court shall make its appointment of a guardian in accordance with a nomination of a guardian by the incapacitated person in a Durable Power of Attorney, except for good cause or disqualification.

E. Requirement of bond.

1. Guardians of the estate shall execute and file a bond in the name of the Commonwealth in such amount as the court considers necessary.
2. Exceptions.
 - (a) No bond required when guardian is appointed in accordance with the terms of a will or other intervivos conveyance.
 - (b) No bond shall be required of a bank or trust company incorporated in the Commonwealth.
 - (c) In all cases, the court may waive bond upon a finding it is not necessary.

X. THE RIGHT OF APPEAL

- A. At the conclusion of a guardianship proceeding in which an individual has been adjudicated to be incapacitated, the incapacitated individual must be advised of his or her right to appeal, terminate or modify the guardianship order.

XI. MODIFICATION OR TERMINATION OF EXISTING ORDER.

- A. The incapacitated person or any person interested in the welfare of the incapacitated person may at any time petition the court to modify or terminate an existing guardianship order due to a change in circumstances.

XII. POWERS, DUTIES AND LIABILITIES OF GUARDIANS

- A. Responsibilities of the guardian of the person.

1. To assert the rights and best interests of the incapacitated person.
2. To respect the express wishes and preferences of the alleged incapacitated person to the greatest extent possible.
3. To develop a plan of supportive services and arrange for the services which are necessary to meet the incapacitated person's needs.
4. To encourage the incapacitated person to participate to the maximum extent possible in all decisions which affect him or her.
5. To assist the incapacitated person in whatever way possible to develop and/or regaining the capacity to manage his or her personal affairs.
6. To file with the court at least once within the first 12 months of appointment, and at least annually thereafter, a report which shall include the following:
 - (a) The current address and living arrangements of the incapacitated person.
 - (b) The major medical and/or mental conditions affecting the incapacitated person.
 - (c) A brief description of the support services the incapacitated person is receiving.
 - (d) The opinion of the guardian as to whether the guardianship continues to be necessary.

- (e) The number of times the guardian visited the incapacitated person during the last 12 months.

- 7. Within 60 days of the death of the incapacitated person or the adjudication of capacity, the guardian of the person must file a final report with the court.

B. Responsibilities of the guardian of the estate.

- 1. The powers, duties and liabilities of guardians of incapacitated person's estates are the same as those relating to personal representatives of decedents' estates and guardians of minors' estates. See 20 Pa. C.S.A. § 5521(b) for a complete list of the provisions of Title 20 relating to guardians of the estates of incapacitated persons.
- 2. The guardian of the estate must file with the court appointing him or her a report at least once within the first 12 months of appointment, and at least annually thereafter, which must include the following:
 - (a) Current principal and how it is invested.
 - (b) Current income.
 - (c) Expenditures of principal and income since the last report.
 - (d) Needs of the incapacitated person for which the guardian has provided since the last report.
- 3. Within 60 days of the death of the incapacitated person or the adjudication of capacity, the guardian of the estate must file a final report with the court.

C. Powers and duties only granted by the court.

- 1. Unless specifically included in the guardianship order, a guardian or emergency guardian shall not have the power to:
 - (a) Consent on behalf of the incapacitated person to an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ.
 - (b) Prohibit the marriage or consent to the divorce of an incapacitated person.
 - (c) Consent on behalf of the incapacitated person to any experimental or behavioral medical procedure.

D. Powers and duties specifically not granted to the guardian.

1. The court may not grant the guardian the power to:
 - (a) Admit the incapacitated person to an inpatient psychiatric facility or state center for the mentally retarded.
 - (b) Consent to the relinquishment of the incapacitated person's parental rights.

E. Relationship of guardian to Power of Attorney.

1. An Attorney-in-fact previously appointed by an incapacitated person is accountable to the guardian as well as to the incapacitated person. Pursuant to 20 Pa. C.S.A. § 5604, the guardian has the specific power to revoke or amend a Power of Attorney the incapacitated person executed prior to his or her incapacitation.

F. Criminal and civil immunity for the guardian.

1. Absent a showing of gross negligence, recklessness or intentional misconduct, any agency appointed as guardian shall not be criminally liable or civilly liable for damages incurred as a result of the guardian's performance of duties as guardian of the person.

XIII. REMOVAL OF GUARDIAN

A. Grounds for removal of the guardian include:

1. Waste and mismanagement.
2. Failure to perform a duty by law.
3. Incapacitation.
4. Relocation out of state or left no known place of residence.
5. When for any reason the interests of the estate are likely to be jeopardized by the continuance of the guardian in office.

B. Any party in interest may petition the court to have the guardian removed.

POWERS OF ATTORNEY

I. DEFINITION

- A. A Power of Attorney is a document signed by an adult who gives another adult legal authority to act on his/her behalf. The Power of Attorney can be revoked by the principal who gave it. Principal can still make his/her own decisions and the Power of Attorney cannot override his/her decision.**
- B. Agent must act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest. Agent must act in good faith. Agent can only Act within the scope of authority granted in the power of attorney.**
- C. Proper execution includes: 1)Capacity to sign 2)Dated 3)2 witnesses 4)Legal Notice Attached 5)Notarized**

II. TYPES OF POWERS OF ATTORNEY

A. DURABLE GENERAL POWER OF ATTORNEY

- 1. Definition: Declare that the principal authorizes the durable general agent to make financial decisions on behalf of the principal.**
- 2 Powers include: Gifting, bank transactions (open or close), real estate transactions, signing contracts, authority to discuss government benefits or educational matters, business powers, etc.**

B. HEALTH CARE POWER OF ATTORNEY

- 1. Definition: Declare that the principal authorizes the health care agent to make health care decisions on behalf of the principal.**

- 2. Powers include: access to all medical records, power to make health care decisions, decisions regarding treatment or medications, certain end of life decisions**
- 3. Most likely execute a Living Will: A document expressing one's wishes whether he/she wants heroic measures to keep him/her alive if he/she has an end-stage medical condition (one which will result in death, despite the introduction or continuation of medical treatment) or is in a state of permanent unconsciousness such as being in an irreversible coma or an irreversible vegetative state, and there is no realistic hope of significant recovery.**

C. MENTAL HEALTH DECLARATION AND POWER OF ATTORNEY

- 1. Definition: Written instructions from a competent individual to family or physicians concerning mental health care, including, continuation or refusal of mental health treatment. Must be renewed every 2 years.**
- 2. Includes directions to the agent as to principal's intent on initiation, continuation or refusal of mental health treatment.**