

**REPORT OF THE  
SUBCOMMITTEE ON GUARDIANSHIPS  
AND POWERS OF ATTORNEY  
of the  
Task Force and Advisory Committee on  
Decedents' Estates Laws**

Recommending

Amendments to Chapter 55  
(Incapacitated Persons)  
of the  
Probate, Estates and Fiduciaries Code

General Assembly of the Commonwealth of Pennsylvania  
**JOINT STATE GOVERNMENT COMMISSION**  
108 Finance Building  
Harrisburg, Pennsylvania  
May 1996

**JOINT STATE GOVERNMENT COMMISSION  
ROOM 108 - FINANCE BUILDING  
HARRISBURG PA 17120**

**717-787-4397  
FAX 717-787-7020**

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GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA  
JOINT STATE GOVERNMENT COMMISSION  
ROOM 108 - FINANCE BUILDING  
HARRISBURG 17120

717-787-4397  
FAX 717-787-7020

May 1996

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present the report of the Subcommittee on Guardianships and Powers of Attorney of the Task Force and Advisory Committee on Decedents' Estates Laws. This report contains proposed amendments to the guardianship provisions of the Probate, Estates and Fiduciaries Code. Official comments are included to facilitate review of the legislation introduced by members of the task force.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Roger A. Madigan".

Roger A. Madigan  
Chairman





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## **INTRODUCTION**

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The proposed amendments contained in this report are recommended by the Subcommittee on Guardianships and Powers of Attorney which is a subcommittee of the Joint State Government Commission's Advisory Committee on Decedents' Estates Laws. The subcommittee was appointed in January 1995 and asked to conduct a review of Chapter 55 (Incapacitated Persons) of Title 20 of the Pennsylvania Consolidated Statutes and a review of Chapter 56 (Powers of Attorney) of Title 20. The subcommittee consists of: John J. Lombard Jr., chair; Judge Roger M. Fischer; Neil E. Hendershot; Michael J. Mullaugh; William Campbell Ries; M. Paul Smith; and J. Pennington Straus.

The subcommittee decided to begin its review with Chapter 55. This study presented the subcommittee with an opportunity to revisit Chapter 55 as amended in 1992 (Act of April 16, 1992, P.L.108, No.24). The subcommittee has begun its review of Chapter 56 and anticipates concluding its work by late fall 1996. However, by this report, the subcommittee does offer one recommended amendment with respect to powers of attorney. The

subcommittee proposes an amendment which would grant the Orphans' Court mandatory jurisdiction over attorneys in fact.

The proposed amendments to Chapter 55 recommended by the subcommittee were approved by the full advisory committee. The Task Force on Decedents' Estates Laws authorized the introduction of legislation incorporating the amendments at its May 13, 1996 meeting.

### **Proposed Guardianship Amendments**

In summary, this recommended legislation would:

- Require that notice of the petition and incapacity hearing be given to all sui juris intestate heirs (§ 5511(a)).
- Provide that if the court is satisfied that the alleged incapacitated person could not understand and participate in the incapacity hearing, then the alleged incapacitated person would not be required to be present at the hearing (§ 5511(a)(1)).
- Provide that the court, when considering the appointment of a guardian, shall give preference to the nominee, including a testamentary nominee, of a parent of an unmarried incapacitated person (§ 5511(f)).
- Provide more flexibility to the court in order to allow the court the opportunity to make an appointment of a plenary guardian when it appears that is what the person needs (§ 5512.1(c) and (e)).
- Remove a potential gap in time from the date an emergency order appointing an emergency guardian of the person or estate or any extension of that order expires until such time as a permanent guardian is appointed (§ 5513).

- Provide that if there is no contest as to the capacity of the alleged incapacitated person, then the petitioner may establish incapacity by a sworn statement from qualified individuals (§ 5518).
- Remove the mandatory annual reporting requirement for guardians and place with the court the discretion to require such reports (§ 5521(c)).
- Clarify the reporting requirements of a guardian of the estate (§ 5521(c)).
- Allow a guardian, with court approval, to enter into a lease for longer than a five-year term (§ 5522).
- Permit a guardian to file an account with the court at any time without the prior authorization of the court (§ 5531).
- Grant the Orphans' Court mandatory jurisdiction over the administration of guardianship support agencies (§ 711(22)).

During the course of its deliberations of Chapter 55, the subcommittee engaged in a labored consideration of section 5521(g) (criminal and civil immunity). Section 5521(g) provides:

In the absence of gross negligence, recklessness or intentional misconduct, a unit of local government, nonprofit corporation or guardianship support agency under Subchapter F (relating to guardianship support) appointed as a guardian shall not be criminally liable or civilly liable for damages for performing duties as a guardian of the person, as authorized under this chapter.

The subcommittee recommends that the General Assembly give further consideration to the policy of providing guardians with immunity as the present section does for certain guardians of the person.

## **Proposed Amendment Relating to Powers of Attorney**

The recommended legislation would also:

- Grant the Orphans' Court mandatory jurisdiction over attorneys in fact (§ 711(23)).

The proposed amendments and official comments are set forth on the following pages. In order to place the proposed guardianship amendments in statutory context, they are set forth within a replication of Chapter 55. The official comments may be utilized in determining the intent of the General Assembly: 1 Pa.C.S. § 1939; Martin Estate, 365 Pa. 280, 74 A.2d 120 (1950).

# **PROPOSED AMENDMENTS AND COMMENTS**

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## **CHAPTER 55**

### **INCAPACITATED PERSONS**

#### Subchapter

- A. General Provisions
- B. Small Estates
- C. Appointment of Guardian; Bonds; Removal and Discharge
- D. Powers, Duties and Liabilities of Guardians
- E. Accounts, Audits, Reviews and Distribution
- F. Guardianship Support

#### **SUBCHAPTER A**

#### **GENERAL PROVISIONS**

#### Sec.

5501. Meaning of incapacitated person.

5502. Purpose of chapter.

§ 5501. Meaning of incapacitated person.

"Incapacitated person" means an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

§ 5502. Purpose of chapter.

Recognizing that every individual has unique needs and differing abilities, it is the purpose of this chapter to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.

#### SUBCHAPTER B

#### SMALL ESTATES

Sec.

5505. Provisions similar to small estates of minors.



§ 5505. Provisions similar to small estates of minors.

The provisions concerning small estates of incapacitated persons shall be the same as are set forth in the following provisions of this title relating to minors' estates:

Section 5101 (relating to when guardian unnecessary).

Section 5102 (relating to power of natural guardian).

Section 5103 (relating to sequestered deposit).

#### SUBCHAPTER C

#### APPOINTMENT OF GUARDIAN; BONDS; REMOVAL AND DISCHARGE

Sec.

5511. Petition and hearing; independent evaluation.

5512. County of appointment; qualifications.

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5517. Adjudication of capacity and modification of existing orders.

5518. Evidence of incapacity.

5518.1. Cross-examination of witnesses.

§ 5511. Petition and hearing; independent evaluation.

(a) Resident.--The court, upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the Commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate. The petitioner may be any person interested in the alleged incapacitated person's welfare. The court may dismiss a proceeding where it determines that the proceeding has not been instituted to aid or benefit the alleged incapacitated person or that the petition is incomplete or fails to provide sufficient facts to proceed. Written notice of the petition and hearing shall be given in large type and in simple language to the alleged incapacitated person. The notice shall indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. It shall include the date, time and place of the hearing and an explanation of all rights, including the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot be afforded. The Supreme Court shall establish a uniform citation for this purpose. A copy of the petition shall be attached. Personal service shall be made on the alleged incapacitated person, and the contents and terms of the

petition shall be explained to the maximum extent possible in language and terms the individual is most likely to understand. Service shall be no less than 20 days in advance of the hearing. In addition, notice of the petition and hearing shall be given in such manner as the court shall direct to all persons [residing within the Commonwealth] whose existence and whereabouts are known and who are sui juris and would be entitled to share in the estate of the alleged incapacitated person if he died intestate at that time, to the person or institution providing residential services to the alleged incapacitated person and to such other parties as the court may direct, including other service providers. The hearing may be closed to the public and without a jury unless the alleged incapacitated person or his counsel objects. The hearing shall be closed and with or without a jury if the person alleged to be incapacitated or his counsel so requests. The hearing may be held at the residence of the alleged incapacitated person. The alleged incapacitated person shall be present at the hearing unless:

**Comment: Subsection (a) is amended to require that notice of the petition and hearing be given to all sui juris intestate heirs, whose existence and whereabouts are known to the petitioner, irrespective of whether such heirs reside within the Commonwealth.**

(1) the court is satisfied, upon the deposition or testimony of or sworn statement by a physician or licensed psychologist, that his physical

or mental condition would be harmed by his presence or that he could not understand and participate in the proceedings; or

**Comment:** Subsection (a)(1) is amended to provide that if the court is satisfied that the alleged incapacitated person could not understand and participate in the proceedings then the alleged incapacitated person would not be required to be present at the hearing. This amendment ameliorates the practical effects of the present harm standard. Under the amendment, even if the physical or mental condition of the alleged incapacitated person would not be harmed by his presence, the court could waive the presence requirement if satisfied that the alleged incapacitated person could not understand and participate in the proceedings.

(2) it is impossible for him to be present because of his absence from the Commonwealth. It shall not be necessary for the alleged incapacitated person to be represented by a guardian ad litem in the proceeding.

Petitioner shall be required to notify the court at least seven days prior to the hearing if counsel has not been retained by or on behalf of the alleged incapacitated person. 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 individual.

(b) Nonresident.--The court may find a person not domiciled in the Commonwealth, having property in the Commonwealth, to be incapacitated

and may appoint a guardian of his estate. The appointment may be made after petition, hearing and notice, as in the case of a person domiciled in the Commonwealth, or upon the submission of an exemplified copy of a decree establishing his incapacity in another jurisdiction. The court shall give preference in its appointment to the foreign guardian of the nonresident incapacitated person, unless it finds that such appointment will not be for the best interests of the incapacitated person.

(c) Payment of certain costs.--If the alleged incapacitated person is unable to pay for counsel or for the evaluation, the court shall order the county to pay these costs. These costs shall be reimbursed by the Commonwealth in the following fiscal year.

(d) Independent evaluation.--The court, upon its own motion or upon petition by the alleged incapacitated person for cause shown, shall order an independent evaluation which shall meet the requirements of section 5518 (relating to evidence of incapacity). The court shall give due consideration to the appointment of an evaluator nominated by the alleged incapacitated person.

(e) Petition contents.--The petition, which shall be in plain language, shall include the name, age, residence and post office address of the alleged incapacitated person, the names and addresses of the spouse, parents and presumptive adult heirs of the alleged incapacitated person, the name and

address of the person or institution providing residential services to the alleged incapacitated person, the names and addresses of other service providers, the name and address of the person or entity whom petitioner asks to be appointed guardian, an averment that the proposed guardian has no interest adverse to the alleged incapacitated person, the reasons why guardianship is sought, a description of the functional limitations and physical and mental condition of the alleged incapacitated person, the steps taken to find less restrictive alternatives, the specific areas of incapacity over which it is requested that the guardian be assigned powers and the qualifications of the proposed guardian. If a limited or plenary guardian of the estate is sought, the petition shall also include the gross value of the estate and net income from all sources to the extent known.

(f) Who may be appointed guardian.--The court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support) or a county agency. In the case of residents of State facilities, the court may also appoint, only as guardian of the estate, the guardian office at the appropriate State facility. The court shall not appoint a person or entity providing residential services for a fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person except where it is clearly demonstrated that no guardianship support agency

or other alternative exists. Any family relationship to such individual shall not, by itself, be considered as an interest adverse to the alleged incapacitated person. If appropriate, the court shall give preference to a nominee of the incapacitated person or to the nominee of a parent, living or deceased, of an unmarried incapacitated person. If the incapacitated person has nominated, by a durable power of attorney, a guardian of the estate or person, the court shall make its appointment in accordance with the nomination of the incapacitated person, except for good cause or disqualification.

**Comment: Subsection (f) is amended to provide that the court, when considering the appointment of a guardian, shall give preference to the nominee, including a testamentary nominee, of a parent of an unmarried incapacitated person. Subsection (f) is further amended to provide that the court shall make its appointment of a guardian in accordance with any nomination of the incapacitated person made by a durable power of attorney. See 20 Pa.C.S. § 5604(c)(2) which authorizes such a nomination by a durable power of attorney.**

§ 5512. County of appointment; qualifications.

(a) Resident incapacitated person.--A guardian of the person or estate of an incapacitated person may be appointed by the court of the county in which the incapacitated person is domiciled, is a resident or is residing in a long-term care facility.

(b) Nonresident incapacitated person.--A guardian of the estate within the Commonwealth of an incapacitated person domiciled outside of the

Commonwealth may be appointed by the court of the judicial district having jurisdiction of a decedent's estate or of a trust in which the incapacitated person has an interest. When the nonresident incapacitated person's estate is derived otherwise than from a decedent's estate or a trust within the Commonwealth, a guardian may be appointed by the court of any county where an asset of the incapacitated person is located.

(c) Exclusiveness of appointment.--When a court has appointed a guardian of the person or estate of an incapacitated person pursuant to subsection (a) or (b), no other court shall appoint a similar guardian for the incapacitated person within the Commonwealth.

§ 5512.1. Determination of incapacity and appointment of guardian.

(a) Determination of incapacity.--In all cases, the court shall consider and make specific findings of fact concerning:

(1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.

(2) The extent of the individual's capacity to make and communicate decisions.

(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 attorney or trusts.



(4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.

(5) The duration of the guardianship.

[(6) The court shall prefer limited guardianship.]

The court shall prefer limited guardianships.

**Comment: The amendment to subsection (a) is stylistic.**

(b) Limited guardian of the person.--Upon a finding that the person is partially incapacitated and in need of guardianship services, the court shall enter an order appointing a limited guardian of the person with powers consistent with the court's

findings of limitations, which may include:

(1) General care, maintenance and custody of the incapacitated person.

(2) Designating the place for the incapacitated person to live.

(3) Assuring that the incapacitated person receives such training, education, medical and psychological services and social and vocational opportunities, as appropriate, as well as assisting the incapacitated person in the development of maximum self-reliance and independence.

(4) Providing required consents or approvals on behalf of the incapacitated person.

(c) Plenary guardian of the person.--The court may appoint a plenary guardian of the person [only] upon a finding that the person is [totally] incapacitated and in need of plenary guardianship services.

(d) Limited guardian of the estate.--Upon a finding that the person is partially incapacitated and in need of guardianship services, the court shall enter an order appointing a limited guardian of the estate with powers consistent with the court's finding of limitations, which shall specify the portion of assets or income over which the guardian of the estate is assigned powers and duties.

(e) Plenary guardian of the estate.--A court may appoint a plenary guardian of the estate [only] upon a finding that the person is [totally] incapacitated and in need of plenary guardianship services.

**Comment: The amendments to subsections (c) and (e) are designed to provide more flexibility to the court and to allow the court the opportunity to make an appointment of a plenary guardian when it appears that is what the person needs. While limited guardianship is preferred, the court, as it has in the past, determines the scope of the guardianship based on the needs of each case.**

(f) No presumption.--No presumption of incapacity shall be raised from the alleged incapacitated person's institutionalization.

(g) Legal rights retained.--Except in those areas designated by court order as areas over which the limited guardian has power, a partially incapacitated person shall retain all legal rights.

(h) Information as to rights.--At the conclusion of a proceeding in which the person has been adjudicated incapacitated, the court shall assure that the person is informed of his right to appeal and to petition to modify or terminate the guardianship.

§ 5512.2. Review hearing.

(a) Time of hearing.--The court may set a date for a review hearing in its order establishing the guardianship or hold a review hearing at any time it shall direct. The court shall 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, a change in the need for guardianship services or the guardian's failure to perform his duties in accordance with the law or to act in the best interest of the incapacitated person. The court may dismiss a petition for review hearing if it determines that the petition is frivolous.

(b) Burden of proof and rights.--The incapacitated person shall have all of the rights enumerated in this chapter. Except when the hearing is held to appoint a successor guardian, the burden of proof, by clear and convincing

evidence, shall be on the party advocating continuation of guardianship or expansion of areas of incapacity.

§ 5512.3. Annual report.

The court shall annually file with the Supreme Court Administrator's Office on forms furnished by the office a statistical and descriptive report to assist in evaluating the operation and costs of the guardianship system.

§ 5513. Emergency guardian.

Notwithstanding the provisions of section 5511 (relating to petition and hearing; independent evaluation), the court, upon petition and a hearing at which clear and convincing evidence is shown, may appoint an emergency guardian or guardians of the person or estate of a person alleged to be incapacitated, when it appears that the person lacks capacity, is in need of a guardian and a failure to make such appointment will result in irreparable harm to the person or estate of the alleged incapacitated person. The provisions of section 5511, including those relating to counsel, shall be applicable to such proceedings, except when the court has found that it is not feasible in the circumstances. An emergency guardian so appointed for the person or estate of an alleged incapacitated person shall only have and be subject to such powers, duties and liabilities and serve for such time as the court shall direct in its decree. An emergency order appointing an emergency guardian of the person may be in effect for up to 72 hours. If the

emergency continues, then the emergency order may be extended for no more than 20 days from the expiration of the initial emergency order. [After expiration of the emergency order or any extension, a full guardianship proceeding must be initiated pursuant to section 5511.] The court may further continue the emergency order if a petition for the appointment of a guardian of the person is filed pursuant to section 5511 prior to the expiration of the emergency order extension and if the failure to continue the emergency order will result in irreparable harm to the incapacitated person. The court may also appoint an emergency guardian of the person pursuant to this section for an alleged incapacitated person who is present in this Commonwealth but is domiciled outside of this Commonwealth, regardless of whether the alleged incapacitated person has property in this Commonwealth. An emergency order appointing an emergency guardian of the estate shall not exceed 30 days. [After 30 days, a full guardianship proceeding must be initiated pursuant to section 5511.] However, the court may continue the emergency order beyond 30 days if a petition for the appointment of a guardian of the estate is filed pursuant to section 5511 prior to the expiration of the emergency order and if failure to continue the emergency order will result in irreparable harm to the estate of the incapacitated person.

**Comment: The amendments to this section are intended to remove a potential gap in time from the date an emergency order appointing an emergency guardian of the person or estate or any extension of that order expires until such time as a permanent guardian is appointed. The amendments permit the court to continue the emergency order if a petition for the appointment of a permanent guardian is filed prior to the expiration of the emergency order or any extension.**

§ 5514. To fill vacancy; co-guardian.

The court, after such notice to parties in interest as it shall direct, may without a hearing appoint a succeeding guardian to fill a vacancy in the office of guardian or may appoint a co-guardian of the estate of an incapacitated person. Where the vacating guardian was a parent who is now deceased, any testamentary nominee of the parent shall be given preference by the court.

§ 5515. Provisions similar to other estates.

The provisions relating to a guardian of an incapacitated person and his surety shall be the same as are set forth in the following provisions of this title relating to a personal representative or a guardian of a minor and their sureties:

Section 3182 (relating to grounds for removal).

Section 3183 (relating to procedure for and effect of removal).

Section 3184 (relating to discharge of personal representative and surety).

Section 5115 (relating to appointment of guardian in conveyance).

Section 5121 (relating to necessity, form and amount).

Section 5122 (relating to when bond not required).

Section 5123 (relating to requiring or changing amount of bond).

§ 5516. Fiduciary estate.

The court, in its discretion, upon the application of any party in interest, in addition to any bond required for the incapacitated person's individual estate, may require a separate bond in the name of the Commonwealth, with sufficient surety, in such amount as the court shall consider necessary for the protection of the parties in interest in an estate of which the incapacitated person is serving in the capacity as a fiduciary and conditioned in the following form:

(1) When one guardian.--The condition of this obligation is that, if the said guardian shall well and truly account for property held by the incapacitated person as fiduciary according to law, this obligation shall be void; but otherwise it shall remain in force.

(2) When two or more guardians.--The condition of this obligation is that, if the said guardians or any of them shall well and truly account for property held by the incapacitated person as fiduciary according to law,

this obligation shall be void as to the guardian or guardians who shall so account; but otherwise it shall remain in force.

§ 5517. Adjudication of capacity and modification of existing orders.

The court, after a hearing under section 5512.2 (relating to review hearing), may order that a person previously adjudged incapacitated is no longer incapacitated or the court may find that the incapacitated person has regained or lost capacity in certain areas in which case the court shall modify the existing guardianship order.

§ 5518. Evidence of incapacity.

To establish incapacity in a proceeding in which the capacity of the alleged incapacitated person is contested, the petitioner must present testimony, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition, adaptive behavior and social skills. In a proceeding in which the capacity of the alleged incapacitated person is not contested, the petitioner may establish incapacity by a sworn statement from such qualified individuals. The [petition] petitioner must also present evidence regarding the services being utilized to meet essential requirements for the alleged incapacitated person's physical health and safety, to manage the person's



financial resources or to develop or regain the person's abilities; evidence regarding the types of assistance required by the person and as to why no less restrictive alternatives would be appropriate; and evidence regarding the probability that the extent of the person's incapacities may significantly lessen or change.

**Comment:** The amendments to this section recognize that in most cases the capacity of the alleged incapacitated person is not contested. In these instances, the requirement that qualified individuals present their testimony in person at the hearing or by deposition causes an unnecessary expense for the alleged incapacitated person. The section is amended to provide that if there is no contest as to the capacity of the alleged incapacitated person, then the petitioner may establish incapacity by a sworn statement from such qualified individuals. The amendment to the section retains the requirement, that in order to establish incapacity in a proceeding in which the capacity of the alleged incapacitated person is contested, the petitioner must present testimony in person or by deposition from qualified individuals.

§ 5518.1. Cross-examination of witnesses.

[Testimony] Except as provided for in section 5518 (relating to evidence of incapacity), testimony as to the capacity of the alleged incapacitated person shall be subject to cross-examination by counsel for the alleged incapacitated person.

**Comment:** The amendment to this section is made in order to conform to the amendment of section 5518 (evidence of incapacity). Section 5518, as amended,

**provides that if there is no contest as to the capacity of the alleged incapacitated person, then incapacity may be established by a sworn statement from qualified individuals.**

## SUBCHAPTER D

### POWERS, DUTIES AND LIABILITIES OF GUARDIANS

Sec.

5521. Provisions concerning powers, duties and liabilities.

5522. Power to lease.

5523. Collateral attack.

5524. Effect of determination of incapacity.

5525. Notice to Commonwealth and political subdivisions.

§ 5521. Provisions concerning powers, duties and liabilities.

(a) Duty of guardian of the person.--It shall be the duty of the guardian of the person to assert the rights and best interests of the incapacitated person. Expressed wishes and preferences of the incapacitated person shall be respected to the greatest possible extent. Where appropriate, the guardian shall assure and participate in the development of a plan of supportive services to meet the person's needs which explains how services will be obtained. The guardian shall also encourage the incapacitated person to participate to the maximum extent of his abilities in all decisions which affect him, to act on his own behalf whenever he is able to do so and to

develop or regain, to the maximum extent possible, his capacity to manage his personal affairs.

(b) Duty of guardian of the estate.--The provisions concerning the powers, duties and liabilities of guardians of incapacitated persons' estates shall be the same as those set forth in the following provisions of this title relating to personal representatives of decedents' estates and guardians of minors' estates:

Section 3313 (relating to liability insurance).

Section 3314 (relating to continuation of business).

Section 3315 (relating to incorporation of estate's business).

Section 3317 (relating to claims against co-fiduciary).

Section 3318 (relating to revival of judgments against personal representative).

Section 3319 (relating to power of attorney; delegation of power over subscription rights and fractional shares; authorized delegations).

Section 3320 (relating to voting stock by proxy).

Section 3321 (relating to nominee registration; corporate fiduciary as attorney-in-fact; deposit of securities in a clearing corporation; book-entry securities).

Section 3322 (relating to acceptance of deed in lieu of foreclosure).

Section 3323 (relating to compromise of controversies).

Section 3324 (relating to death or incapacity of fiduciary).

Section 3327 (relating to surviving or remaining personal representatives).

Section 3328 (relating to disagreement of personal representatives).

Section 3331 (relating to liability of personal representative on contracts).

Section 3332 (relating to inherent powers and duties).

Section 3355 (relating to restraint of sale).

Section 3356 (relating to purchase by personal representative).

Section 3359 (relating to record of proceedings; county where real estate lies).

Section 3360 (relating to contracts, inadequacy of consideration or better offer; brokers' commissions).

Section 3372 (relating to substitution of personal representative in pending action or proceedings).

Section 3374 (relating to death or removal of fiduciary).

Section 3390 (relating to specific performance of contracts).

Section 5141 (relating to possession of real and personal property).

Section 5142 (relating to inventory).

Section 5143 (relating to abandonment of property).

Section 5145 (relating to investments).

Section 5146 (relating to guardian named in conveyance).

Section 5147 (relating to proceedings against guardian).

Section 5151 (relating to power to sell personal property).

Section 5154 (relating to title of purchaser).

Section 5155 (relating to order of court).

(c) Reports of guardians.--

(1) [Each] The court may require a guardian of an incapacitated person [shall] to file [with the court appointing him] a report, at [least once within the first 12 months of his appointment and at least annually thereafter] such times as the court shall direct, attesting to such of the following as appropriate:

**Comment: Subsection (c)(1) is amended to remove the mandatory annual reporting requirement for guardians and to place with the court the discretion to require such reports.**

(i) Guardian of the estate:

(A) current principal and how it is invested;

(B) current income; and

(C) expenditures of principal and income since the last report[; and

(D) needs of the incapacitated person for which the guardian has provided since the last report].

**Comment: In order to clarify the reporting requirements of a guardian of the estate, subsection (c)(1)(i) is amended by repealing clause (D). Clause (D) provides that the guardian of the estate must report as to the needs of the incapacitated person for which the guardian has provided since the last report. Clause (D) is unnecessary as the information requested is included with the information requested under clauses (A), (B) and (C).**

(ii) Guardian of the person:

(A) current address and type of placement of the incapacitated person;

(B) major medical or mental problems of the incapacitated person;

(C) a brief description of the incapacitated person's living arrangements and the social, medical, psychological and other support services he is receiving;

(D) the opinion of the guardian as to whether the guardianship should continue or be terminated or modified and the reasons therefor; and

(E) number and length of times the guardian visited the incapacitated person in the past year.

(2) [Within 60 days of the death of the incapacitated person or an adjudication of capacity and modification of existing orders, the

guardian shall file a final report with the court.] The guardian shall notify the court, in writing, within 60 days of the death of the incapacitated person.

**Comment:** Subsection (c)(2) is amended to require written notification from the guardian to the court within 60 days of the death of the incapacitated person. Although this amendment removes the mandatory requirement that the guardian file a final report with the court upon the death of the incapacitated person, the court could require such a report in appropriate cases under the authority of subsection (c)(1).

(d) Powers and duties only granted by court.--Unless specifically included in the guardianship order after specific findings of fact or otherwise ordered after a subsequent hearing with specific findings of fact, a guardian or emergency guardian shall not have the power and duty to:

(1) Consent on behalf of the incapacitated person to an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ.

(2) Prohibit the marriage or consent to the divorce of the incapacitated person.

(3) Consent on behalf of the incapacitated person to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.

(e) Knowledge of objection.--In a hearing to determine whether a guardian shall be ordered to consent to a specific act or omission, if the guardian knows or has reason to know of the incapacitated person's objection to the action or omission, whether such objection had been expressed prior or subsequent to the determination of incapacity, the guardian shall report to the court such knowledge or information.

(f) Powers and duties not granted to guardian.--The court may not grant to a guardian powers controlled by other statute, including, but not limited to, the power:

(1) To admit the incapacitated person to an inpatient psychiatric facility or State center for the mentally retarded.

(2) To consent, on behalf of the incapacitated person, to the relinquishment of the person's parental rights.

(g) Criminal and civil immunity.--In the absence of gross negligence, recklessness or intentional misconduct, a unit of local government, nonprofit corporation or guardianship support agency under Subchapter F (relating to guardianship support) appointed as a guardian shall not be criminally liable or civilly liable for damages for performing duties as a guardian of the person, as authorized under this chapter.

§ 5522. Power to lease.



A guardian may lease any real or personal property of the incapacitated person for a term not exceeding five years after its execution unless a longer term is approved by the court.

**Comment:** This section is amended to allow a guardian, with court approval, to enter into a lease for longer than a five-year term. This amendment makes this section consistent with the similar powers of a trustee as provided in 20 Pa.C.S. § 7142 (power to lease).

§ 5523. Collateral attack.

No decree entered pursuant to this chapter shall be subject to collateral attack on account of any irregularity if the court which entered it had jurisdiction to do so.

§ 5524. Effect of determination of incapacity.

A partially incapacitated person shall be incapable of making any contract or gift or any instrument in writing in those specific areas in which the person has been found to be incapacitated. A totally incapacitated person shall be incapable of making any contract or gift or any instrument in writing. This section shall not impair the interest in real estate acquired by a bona fide grantee of, or a bona fide holder of a lien on, real estate in a county other than that in which the decree establishing the incapacity is entered, unless the decree or a duplicate original or certified copy thereof is recorded in the office of the recorder of deeds in the county in which the real estate lies

before the recording or entering of the instrument or lien under which the grantee or lienholder claims.

§ 5525. Notice to Commonwealth and political subdivisions.

When the Commonwealth or a political subdivision thereof has a claim for maintaining an incapacitated person in an institution, the guardian, within three months of his appointment, shall give notice thereof to the Department of Public Welfare or the proper officer of such political subdivision, as the case may be.

SUBCHAPTER E

ACCOUNTS, AUDITS, REVIEWS AND DISTRIBUTION

Sec.

5531. When accounting filed.

5532. Where accounts filed.

5533. Notice, audits, reviews and distribution.

5533.1. Account of personal representative of deceased incompetent

(Repealed).

5534. Recognition of claims.

5535. Disposition of trust income.

5536. Distributions of income and principal during incapacity.

5537. Reserve for funeral.

§ 5531. When accounting filed.

A guardian shall file an account of his administration whenever directed to do so by the court or may file an account [at the termination of the guardianship, or at any other time or times authorized by the court] at any other time.

**Comment: The amendment to this section simply permits the guardian to file an account with the court at any time without the prior authorization of the court.**

§ 5532. Where accounts filed.

All accounts of guardians shall be filed in the office of the clerk.

§ 5533. Notice, audits, reviews and distribution.

The provisions concerning accounts, audits, reviews, distribution and rights of distributees in an incapacitated person's estate shall be the same as those set forth in the following provisions of this title for the administration of a decedent's or minor's estate:

Section 3503 (relating to notice to parties in interest).

Section 3504 (relating to representation of parties in interest).

Section 3511 (relating to audits in counties having separate orphans' court division).

Section 3512 (relating to audits in counties having no separate orphans' court division).

Section 3513 (relating to statement of proposed distribution).

Section 3514 (relating to confirmation of account and approval of proposed distribution).

Section 3521 (relating to rehearing; relief granted).

Section 3532(c) (relating to record of risk distributions).

Section 3533 (relating to award upon final confirmation of account).

Section 3534 (relating to distribution in kind).

Section 3536 (relating to recording and registering decrees awarding real estate).

Section 3544 (relating to liability of personal representative for interest).

Section 3545 (relating to transcripts of balances due by personal representative).

Section 5167 (relating to failure to present claim at audit).

§ 5533.1. Account of personal representative of deceased incompetent

(Repealed).

§ 5534. Recognition of claims.

Upon the audit of the account of the guardian of a person who has died during incapacity, the auditing judge or auditor passing on the account shall not pass upon any claims against the estate of the incapacitated person other than necessary administration expenses, including compensation of the guardian and his attorney. All claims remaining unpaid at the

incapacitated person's death shall be presented to the personal representative.

§ 5535. Disposition of trust income.

Except as otherwise provided by the trust instrument, the trustee of an inter vivos or testamentary trust, with the approval of the court having jurisdiction of the trust, may pay income distributable to a beneficiary who is an incapacitated person for whose estate no guardian has been appointed directly to the incapacitated person, or expend and apply it for his care and maintenance or the care, maintenance and education of his dependents.

§ 5536. Distributions of income and principal during incapacity.

(a) In general.--All income received by a guardian of the estate of an incapacitated person, including (subject to the requirements of Federal law relating thereto) all funds received from the Veterans' Administration, Social Security Administration and other periodic retirement or disability payments under private or governmental plans, in the exercise of a reasonable discretion, may be expended in the care and maintenance of the incapacitated person, without the necessity of court approval. The court, for cause shown and with only such notice as it considers appropriate in the circumstances, may authorize or direct the payment or application of any or all of the income or principal of the estate of an incapacitated person for the care, maintenance or education of the incapacitated person, his spouse,

children or those for whom he was making such provision before his incapacity, or for the reasonable funeral expenses of the incapacitated person's spouse, child or indigent parent. In proper cases, the court may order payment of amounts directly to the incapacitated person for his maintenance or for incidental expenses and may ratify payments made for these purposes.

(b) Estate plan.--The court, upon petition and with notice to all parties in interest and for good cause shown, shall have the power to substitute its judgment for that of the incapacitated person with respect to the estate and affairs of the incapacitated person for the benefit of the incapacitated person, his family, members of his household, his friends and charities in which he was interested. This power shall include, but is not limited to, the power to:

(1) Make gifts, outright or in trust.

(2) Convey, release or disclaim his contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Release or disclaim his powers as trustee, personal representative, custodian for minors, or guardian.

(4) Exercise, release or disclaim his powers as donee of a power of appointment.

(5) Enter into contracts.

(6) Create for the benefit of the incapacitated person or others, revocable or irrevocable trusts of his property which may extend beyond his disability or life.

(7) Exercise options of the incapacitated person to purchase or exchange securities or other property.

(8) Exercise all rights and privileges under life insurance policies, annuity contracts or other plans or contractual arrangements providing for payments to the incapacitated person or to others after his death.

(9) Exercise his right to claim or disclaim an elective share in the estate of his deceased spouse and renounce any interest by testate or intestate succession or by inter vivos transfer.

(10) Change the incapacitated person's residence or domicile.

(11) Modify by means of codicil or trust amendment, as the case may be, the terms of the incapacitated person's will or of any revocable trust created by the incapacitated person, as the court may deem advisable in light of changes in applicable tax laws.

In the exercise of its judgment for that of the incapacitated person, the court, first being satisfied that assets exist which are not required for the maintenance, support and well-being of the incapacitated person, may adopt a plan of gifts which results in minimizing current or prospective taxes, or which carries out a lifetime giving pattern. The court in exercising its

judgment shall consider the testamentary and inter vivos intentions of the incapacitated person insofar as they can be ascertained.

§ 5537. Reserve for funeral.

(a) In general.--The court may authorize the guardian to retain such assets as are deemed appropriate for the anticipated expense of the incapacitated person's funeral, including the cost of a burial lot or other resting place, which shall be exempt from all claims including claims of the Commonwealth. The court with notice thereof to the institution or person having custody of the incapacitated person may also authorize the guardian or another person to set aside such assets in the form of a savings account in a financial institution which account shall not be subject to escheat during the lifetime of the incapacitated person. Such assets may be disbursed by the guardian or person who set aside such assets or by the financial institution for such funeral expenses without further authorization or accounting. Any part of such assets not so disbursed shall constitute a part of the deceased incapacitated person's estate. Should the incapacitated person become capacitated or should such assets become excessive, the court, upon petition of any party in interest, may make such order as the circumstances shall require.

(b) Definition.--As used in this section, "financial institution" includes a bank, a bank and trust company, a trust company, a savings and loan



association, a building and loan association, a savings bank, a private bank and a national bank.

## SUBCHAPTER F

### GUARDIANSHIP SUPPORT

Sec.

5551. Guardianship support agencies; legislative intent.

5552. Services to individuals whose decision-making ability is impaired.

5553. Guardianship services.

5554. Services to courts, guardians and others.

5555. Costs and compensation.

§ 5551. Guardianship support agencies; legislative intent.

The General Assembly finds that there is a need for agencies to provide services, as an alternative to guardianship, to individuals whose decision-making ability is impaired, to serve as guardian when an individual is found to need a guardian and no other person is willing and qualified to serve and to provide services to courts, guardians and others.

§ 5552. Services to individuals whose decision-making ability is impaired.

Guardianship support agencies shall provide guardianship services under this chapter. Such services shall include, but not be limited to:

- (1) Assistance to individuals in decision making, including financial management training.

(2) Assistance to individuals in securing and maintaining benefits and services.

(3) Recruiting, training and maintaining a group of individuals to serve as representative payees or similar fiduciaries established by benefit-issuing agencies, attorneys-in-fact pursuant to a power of attorney, and trustees.

§ 5553. Guardianship services.

(a) In general.--The guardianship support agency shall be available to serve as guardian of the estate or of the person, or both, of an incapacitated person when no less restrictive alternative will meet the needs of the individual and when no other person is willing and qualified to become guardian. The agency itself may be appointed guardian and no individual need be specified by the court. If appointed, the guardianship support agency shall have all of the powers and duties of a corporate fiduciary and shall not be required to post bond.

(b) Powers and duties.--The guardianship support agency shall be treated the same as all other guardians in regard to appointment as guardian or successor or co-guardian, reporting, powers and duties, compensation and in all other respects. In addition to section 5521 (relating to provisions concerning powers, duties, and liabilities), a guardianship support agency shall have the power and duty to:

(1) Invest the principal and income of incapacitated persons for whom it is the guardian of the estate. For this purpose, it may pool the principal and income, but shall maintain an individual account for each incapacitated person reflecting the person's participation therein.

(2) Expend and, if necessary, advance costs necessary to administer guardianships for which it has been appointed guardian.

(3) Apply for letters or otherwise administer the estate of any incapacitated person for whom it has been appointed guardian who dies during the guardianship when no one else is willing and qualified to serve.

§ 5554. Services to courts, guardians and others.

(a) Services to courts.--Guardianship support agencies may be available to assist courts on request with reviewing petitions for appointment of a guardian, recommending alternatives to guardianship, investigating petitions, explaining petitions to respondents or reviewing reports and monitoring guardianship arrangements.

(b) Services to guardians.--Guardianship support agencies may be available to assist guardians in filing reports, monitoring incapacitated persons and otherwise fulfilling their duties.

(c) Services to petitioners and others.--Guardianship support agencies may be available to assist in the filing of petitions for guardianship, to provide

information on available alternatives to potential petitioners, to locate and train individuals skilled in providing functional evaluations of alleged incapacitated persons and to perform such other duties as required.

**§ 5555. Costs and compensation.**

Recipients of service shall be charged for services based on their ability to pay. Guardianship support agencies shall make every effort to minimize costs, including minimizing personnel costs through the use of volunteers.

**PROPOSED AMENDMENT GRANTING MANDATORY  
JURISDICTION OVER ADMINISTRATION OF  
GUARDIANSHIP SUPPORT AGENCIES**

§ 711. Mandatory exercise of jurisdiction through orphans' court division in general.

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

\* \* \*

(22) Guardianship support agencies.--The administration of a guardianship support agency formed under Subchapter F of Chapter 55 (relating to guardianship support). In exercising the jurisdiction of the court over the affairs of a guardianship support agency, the venue shall be the same as provided for nonprofit corporations in section 726 (relating to venue of nonprofit corporations).

**Comment: Paragraph (22) is added to grant mandatory jurisdiction over the administration of guardianship support agencies, formed under Subchapter F of Chapter 55 of 20 Pa.C.S., with the court of common pleas through its orphans' court division. Presently, a guardianship support agency is supervised by the court which appointed the agency as guardian but only to the extent of their guardianship activities with respect to**

**that appointment; the overall administration of a guardianship support agency is unregulated.**

**PROPOSED AMENDMENTS GRANTING  
MANDATORY JURISDICTION OVER ATTORNEYS IN FACT**

§ 711. Mandatory exercise of jurisdiction through orphans' court division in  
general.

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

\* \* \*

(23) Attorney-in-fact.--All matters pertaining to the exercise of powers by attorneys-in-fact or agents acting under powers of attorney as provided in Chapter 56 (relating to powers of attorney).

**Comment:** Paragraph (23) is added to grant the orphans' court mandatory jurisdiction over attorneys in fact. A conforming amendment to section 712 (nonmandatory exercise of jurisdiction through orphans' court division) is made to repeal paragraph (4) of that section.

§ 712. Nonmandatory exercise of jurisdiction through orphans' court  
division.

The jurisdiction of the court of common pleas over the following may be exercised through either its orphans' court division or other appropriate division:

\* \* \*

[(4) Powers of attorney.--All matters pertaining to the exercise of powers by attorneys in fact or agents acting under powers of attorney as provided in Chapter 56 (relating to powers of attorney).]

**Comment: This is a conforming amendment. Paragraph (4) is repealed since the addition of paragraph (23) to section 711 (mandatory exercise of jurisdiction through orphans' court division in general) grants the orphans' court mandatory jurisdiction over attorneys in fact.**



**APPLICABILITY PROVISIONS OF  
IMPLEMENTING LEGISLATION**

Section 3. This act shall apply as follows:

(1) The amendment of the introductory paragraph of 20 Pa.C.S. § 5511(a) shall apply to petitions for the appointment of a guardian filed on or after the effective date of this act.

(2) The amendment of 20 Pa.C.S. §§ 5511(a)(1), 5518 and 5518.1 shall apply to proceedings commenced on or after the effective date of this act irrespective of when the petition for the appointment of a guardian is filed.

(3) The amendment of 20 Pa.C.S. §§ 5511 (f) and 5512.1 (c) and (e) shall apply to proceedings where a guardian has not yet been appointed irrespective of when the petition for the appointment of a guardian is filed.

(4) The remainder of this act shall apply on and after the effective date of this act.

Section 4. This act shall take effect in 60 days.

