

**GUARDIANSHIP LAW:
PROPOSED AMENDMENTS TO THE
PROBATE, ESTATES AND FIDUCIARIES CODE**

**REPORT OF THE ADVISORY COMMITTEE ON
DECEDENTS' ESTATES LAWS**

OCTOBER 2012



JOINT STATE GOVERNMENT COMMISSION
Serving the Pennsylvania General Assembly for 75 Years

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INTRODUCTION

The Joint State Government Commission

The Joint State Government Commission serves as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly. The Commission has the power to conduct investigations, study issues and gather information, as directed by resolution. In performing its duties, the Commission may call upon any department or agency of the Commonwealth for pertinent information and may designate individuals, other than members of the General Assembly, to act in advisory capacities. The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly.

The Task Force and Advisory Committee on Decedents' Estates Laws

Senate Resolution No. 46 of 1945 directed the Commission to study decedents' estates laws in the Commonwealth, and in July 1945, the Commission created the Task Force and Advisory Committee on Decedents' Estates Laws.

The Task Force on Decedents' Estates Laws is a bicameral and bipartisan panel of legislators, currently consisting of Senator Stewart J. Greenleaf (Chair), Senator Patrick M. Browne, Senator Jay Costa, Representative Michael K. Hanna, Representative C. Adam Harris and Senator Michael J. Stack.

The Advisory Committee on Decedents' Estates Laws is a standing group of attorneys and judges from across the Commonwealth who assist the General Assembly by recommending improvements to Pennsylvania's Probate, Estates and Fiduciaries Code¹ and related statutes. Since 1945, the Advisory Committee has provided expertise and advice to formulate legislation aimed at modernizing Pennsylvania law.

Over the years, the Advisory Committee has formed various subcommittees to assist in reviewing specific topics and developing statutory recommendations involving the Probate, Estates and Fiduciaries Code for consideration by the Advisory Committee

¹ Title 20 of the Pennsylvania Consolidated Statutes (20 Pa.C.S.).

and Task Force. The Subcommittee on Guardianships and Powers of Attorney² was formed to review, among other things, 20 Pa.C.S. Chapters 54 (health care), 55 (incapacitated persons)³ and 56 (powers of attorney).

At its February 2007 annual meeting, the Advisory Committee agreed that the Subcommittee should review the recommendations of the Working Group on Guardianships⁴ and other provisions contained in the Probate, Estates and Fiduciaries Code. In addition to its discussions concerning the Working Group recommendations, the Subcommittee also extensively reviewed 20 Pa.C.S. Chapter 55, the Uniform Guardianship and Protective Proceedings Act,⁵ the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,⁶ the Uniform Power of Attorney Act⁷ and other matters regarding guardianship law and powers of attorney in Pennsylvania, including statutory law and case law.⁸

² The Subcommittee currently consists of John F. Meck, Esq., Chair; Robert Clofine, Esq.; William R. Cooper, Esq.; The Honorable Calvin S. Drayer, Jr.; Jay C. Glickman, Esq.; H. Amos Goodall, Jr., Esq.; Neil E. Hendershot, Esq.; The Honorable Anne E. Lazarus; John J. Lombard, Jr., Esq.; James F. Mannion, Esq.; Michael J. Mullaugh, Esq.; R. Thomas Murphy, Esq.; The Honorable Paula Francisco Ott; The Honorable Stanley R. Ott; William Campbell Ries, Esq.; Robert B. Wolf, Esq. and W. Steven Woodward, Esq.

³ An incapacitated person is “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.” 20 Pa.C.S. § 5501.

⁴ House Resolution No. 131 of 2005 (Printer’s No. 1861) created the Working Group on Guardianships, whose recommendations appear in the Joint State Government Commission report titled *Guardianship Law in Pennsylvania: Report of the Working Group on Guardianships* (May 2007), available at <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2007-30-Guardianship%20Law%20in%20PA.pdf>.

⁵ Unif. Guardianship & Protective Proceedings Act, © 1997 by the Nat’l Conf. of Comm’rs on Unif. State Laws. At the time of publication of this report, seven jurisdictions had adopted this uniform act: Ala., Colo., D.C., Haw., Mass., Minn. & V.I. Unif. Law Comm’n, available at [http://www.uniformlaws.org/Act.aspx?title=Guardianship and Protective Proceedings Act](http://www.uniformlaws.org/Act.aspx?title=Guardianship%20and%20Protective%20Proceedings%20Act) (last accessed Aug. 9, 2012).

⁶ Unif. Adult Guardianship & Protective Proceedings Jurisdiction Act, © 2007 by the Nat’l Conf. of Comm’rs on Unif. State Laws. At the time of publication of this report, 35 jurisdictions had adopted this uniform act: Ala., Alaska, Ariz., Ark., Colo., Conn., Del., D.C., Haw., Idaho, Ill., Ind., Iowa, Ky., Me., Md., Minn., Mo., Mont., Neb., Nev., N.J., N.M., N.D., Okla., Or., Pa., S.C., S.D., Tenn., Utah, Vt., Va., Wash. & W. Va. In addition, five other jurisdictions introduced this uniform act in 2012: Mass., Miss., N.Y., Ohio & P.R. Unif. Law Comm’n, available at [http://www.uniformlaws.org/Act.aspx?title=Adult Guardianship and Protective Proceedings Jurisdiction Act](http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act) (last accessed Aug. 9, 2012). In Pa., the uniform act was introduced as House Bill No. 1720 of 2011 and subsequently became Act No. 108 of 2012. *Infra* pp. 143-154.

⁷ Unif. Power of Attorney Act, © 2006 by the Nat’l Conf. of Comm’rs on Unif. State Laws (last amended in 2008).

⁸ Between June 2007 and April 2012, the Subcommittee formally met in person or conducted teleconferences on 28 separate occasions to review the law regarding guardianships and powers of attorney. The Subcommittee concurrently reviewed (1) the Uniform Power of Attorney Act and Pennsylvania’s current power of attorney statute, in direct response to House Resolution No. 484 of 2007 and (2) the topics of powers of attorney and health care decision-making, in response to the Pennsylvania Supreme Court rulings in *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010) and *In re D.L.H.*, 2 A.3d 505 (Pa. 2010). The Joint State Government Commission issued two Advisory Committee reports concerning these matters: *Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code* (Mar. 2010) and *Powers of Attorney and Health Care Decision-Making: Proposed Amendments to the Probate, Estates and*

At its February 2008, February 2011 and May 2012 annual meetings, the Advisory Committee reached consensus⁹ on the legislative recommendations regarding guardianships. The Advisory Committee subsequently presented its recommendations to the Task Force, which authorized the Joint State Government Commission to publish a report containing the recommendations.¹⁰ These recommendations serve as a basis for legislation.

Contents of Report

This report contains proposed legislation to amend, repeal or add numerous sections in 20 Pa.C.S., among them §§ 751, 752, 5503, 5504, 5511, 5512, 5512.2, 5512.4, 5512.5, 5513, 5515, 5515.1, 5515.2, 5515.3, 5518, 5518.1, 5521, 5526, 5531, 5536 and 5553.¹¹ The proposed legislation contains official comments, which may be used in determining the intent of the General Assembly.¹² Transitional language (provisions regarding applicability and the effective date of the proposed legislation) follows the statutory recommendations.¹³

This report also contains the following:

- (1) A summary of the proposed legislation.¹⁴
- (2) Background material regarding the current law and the discussions of the Advisory Committee.¹⁵

Fiduciaries Code (June 2011). During the Subcommittee's review process, the Joint State Government Commission also released two other Advisory Committee reports: *The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes* (Oct. 2007) and *The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes* (June 2010).

⁹ Consensus does not necessarily reflect unanimity among the Advisory Committee members on each individual legislative recommendation. However, it does reflect the views of a substantial majority of the Advisory Committee, gained after lengthy review and discussion.

¹⁰ Task Force authorization does not necessarily reflect the endorsement of all the findings and recommendations contained in this report.

¹¹ *Infra* pp. 81-127. Proposed additions to the statutory language are underlined; proposed deletions are bracketed.

¹² 1 Pa.C.S. § 1939 ("The comments or report of the commission . . . which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly").

¹³ *Infra* p. 129.

¹⁴ *Infra* pp. 5-12.

¹⁵ *Infra* pp. 13-80. The Advisory Committee also acknowledges the work of the National Guardianship Network (NGN), "a group of national organizations dedicated to effective adult guardianship law and practice[.]" which has promulgated standards and recommendations regarding guardianships Nat'l Guardianship Network, *available at* <http://www.gnaji.org/Articles/Guardianship%20Summit%202011%20Article.pdf> (last accessed Sept. 4, 2012). The NGN includes such organizations as the AARP Public Policy Institute; The American Bar Association Commission on Law and Aging; The American Bar Association Section of Real Property, Trust and Estate Law; The Alzheimer's Association; The American College of

- (3) A source table that explains the basis for a number of the proposed new subsections in 20 Pa.C.S. § 5521.¹⁶
- (4) Select provisions from the Probate, Estates and Fiduciaries Code that are cross-referenced in current 20 Pa.C.S. § 5521(b).¹⁷
- (5) Act No. 108 of 2012.¹⁸
- (6) A roster of the members of the Advisory Committee since its inception in 1945.¹⁹

Trust and Estate Counsel; The Center for Guardianship Certification; The National Academy of Elder Law Attorneys; The National Center for State Courts; The National College of Probate Judges; and The National Guardianship Association. *Id.*

¹⁶ *Infra* p. 131.

¹⁷ *Infra* pp. 133-142.

¹⁸ *Infra* pp. 143-154.

¹⁹ *Infra* pp. 155-160.

SUMMARY OF PROPOSED LEGISLATION

This report contains the following amendments to Title 20 of the Pennsylvania Consolidated Statutes (the Probate, Estates and Fiduciaries Code):

- § 751.** This section is amended to provide for the appointment of (1) an examiner to make periodic or special examinations of expenditures, disbursements and withdrawals of a guardian of the estate and to require the guardian of the estate to present financial records for examination or (2) a mediator or an arbitrator.
- § 752.** This section is amended to provide for the compensation of any master, auditor, examiner, guardian ad litem or trustee ad litem from such source and in such amounts as the court directs.
- § 5503.** This section is new and (1) contains venue provisions for a guardian of the person and a guardian of the estate and (2) specifies the procedure when a guardianship proceeding is brought in more than one judicial district in Pennsylvania. This section is subject to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (20 Pa.C.S. Ch. 59).
- § 5504.** This section is new and provides that (1) confidentiality and the disclosure of information under Chapter 55 are governed by applicable court rule or as the court determines and (2) the Supreme Court may prescribe uniform rules relating to confidentiality and the disclosure of information.
- § 5511.** This section is amended to repeal current subsection (a) in light of the addition of new subsections (a.1) and (a.2), which reorganize the current statutory provisions and change current law by (1) providing that notice of the petition and hearing must be given to all persons whose existence and whereabouts are known or could be readily obtained (instead of all persons residing within this Commonwealth); (2) specifying that the inability of the alleged incapacitated person to comprehend the proceedings does not, by itself, constitute harm and (3) mandating that if the petitioner is a guardianship support agency, the petition must disclose the agency's financial information and a list of its current guardianships.

The current statutory language of subsection (f) is repealed in light of a reorganized subsection (f) (who may be appointed as guardian of the person or guardian of the estate, or both) and the addition of new subsection (g) (who may not be appointed guardian).

New subsections (h) and (i) provide a statutory framework regarding preference in appointing a guardian of the person or a guardian of the estate.

The comment to this section clarifies that (1) the appointment of a guardian is dependent on both incapacity and the need for guardianship services; (2) even though a person does not have a power of attorney or other comparable document, the person should retain the greatest amount of autonomy possible and his or her wishes should be taken into account as much as possible and (3) a court should have as much flexibility as possible to determine which cases merit the appointment of counsel.

§ 5512. This section is repealed in light of the addition of new § 5504.

§ 5512.2. Subsection (a) is amended to replace the term “interested party” with “person interested in the incapacitated person’s welfare.”

New subsection (c) provides for an order regarding an independent evaluation in a review hearing.

§ 5512.4. This new section provides for the termination of a guardianship when the matter is uncontested.

§ 5512.5. This new section provides for (1) counsel’s ability to act on behalf of the incapacitated person, even if counsel was retained before the adjudication of incapacity and (2) the termination of services of current counsel and the appointment of new counsel or a guardian ad litem.

§ 5513. The provisions of this section are repealed and replaced by new, reorganized subsections. New subsections (a), (b), (c) and (e) are based on provisions contained in current § 5513.

New subsection (a)(1) specifies when an emergency guardian of the person or estate may be appointed.

New subsection (a)(2) provides for the appointment of an emergency guardian of the person who is present in Pennsylvania but domiciled outside Pennsylvania, regardless of whether the person has property in Pennsylvania.

New subsection (b) specifies the applicability of the other provisions regarding guardianship petitions and hearings to emergency guardianship proceedings, along with the general principle that an emergency guardian only has and is subject to the powers, duties and liabilities as the court directs in its decree.

New subsection (c) provides for the duration of an initial emergency order appointing an emergency guardian of the person or guardian of the estate.

New subsection (d) provides for the appointment of counsel for the alleged incapacitated person prior to the expiration of the initial emergency order or if an extension of the emergency order is sought.

New subsection (e) provides for the extension of an emergency guardianship order and the filing of a petition for a permanent guardianship of the person or a permanent guardianship of the estate, or both, with the legislative intent being to avoid multiple, successive emergency guardianships that do not provide the full panoply of procedural guarantees to the alleged incapacitated person.

§ 5515. This section is repealed in light of the addition of new §§ 5515.1, 5515.2 and 5515.3.

§ 5515.1. This section provides for the removal and discharge of a guardian of the person or guardian of the estate.

§ 5515.2. This section provides for the appointment of a guardian in a conveyance.

§ 5515.3. This section provides for the execution and filing of a bond by a guardian of the estate.

§ 5518. This section is amended to specify how to establish incapacity in a proceeding in which the incapacity of the alleged incapacitated person (1) is contested and (2) is not contested but the person or the person's counsel is present.

§ 5518.1. This section is amended to state that, in general, testimony as to the capacity of the alleged incapacitated person is subject to cross-examination (not just cross-examination by counsel for the alleged incapacitated person).

§ 5521. New subsection (a.1) specifies that an action or proceeding in which a guardian of the person or guardian of the estate is a party is not abated by the death or resignation of the guardian or by the termination of the guardian's authority.

Subsection (b) is repealed and replaced by a new statutory framework that eliminates cross-references to other provisions in 20 Pa.C.S., clarifies and modernizes the statutory language, specifies which guardianship duties require further court approval and which do not, and relocates several provisions that do not actually concern guardianship duties.

New subsection (b.1) addresses the powers that a guardian of the estate of an incapacitated person may exercise without the need for further court authorization or confirmation (except as otherwise qualified, limited or directed by the court in its order of appointment). These powers include the following:

- (1) Insuring the assets of the estate against damage and loss and protecting persons from liability to a third person that arises from the administration of the incapacitated person's estate.
- (2) Taking any legal action against a co-guardian of the estate to protect the estate of the incapacitated person, if one of two or more guardians of the estate is individually liable to the estate.
- (3) Employing a custodian, holding property unregistered or in the name of the nominee without disclosing the fiduciary relationship and without retaining possession and control of securities or other property so held or registered, and paying reasonable compensation to the custodian.
- (4) Taking a deed in lieu of foreclosure for the estate from the owner of property encumbered by a mortgage owned by the estate.
- (5) With respect to tangible or intangible personal property of the estate, (i) generally acquiring, taking possession of or disposing of the property; (ii) maintaining and administering the property; (iii) making all reasonable expenditures necessary to preserve the property and (iv) maintaining any action regarding the property.

- (6) Accepting, holding, investing in and retaining investments as provided in the prudent investor rule.
- (7) Advancing money to protect the estate and for all expenses, losses and liability sustained in the administration of the estate or because of the holding or ownership of any estate asset.
- (8) Renouncing any fiduciary position to which the incapacitated person has been appointed and resigning any fiduciary position in which the incapacitated person is then serving.
- (9) Voting a security, in person or by general or limited proxy, with or without the power of substitution.
- (10) With respect to the real property of the estate, (i) managing, repairing, improving, maintaining, restoring, altering, building, protecting or insuring the property; (ii) demolishing structures; (iii) collecting rent, earnings and other proceeds; (iv) paying, contesting, protesting and compromising taxes and assessments; (v) granting and obtaining easements; (vi) developing, dedicating, partitioning or subdividing the property; (vii) filing plans, applications or other documents; (viii) releasing in whole or in part, assigning the whole or a part of, satisfying in whole or in part and enforcing any mortgage, encumbrance, lien or other claim to real property and (ix) generally exercising all powers that a person who is not incapacitated could exercise.

New subsection (b.2) addresses the powers that a guardian of the estate of an incapacitated person may exercise only with further court authorization or confirmation. These powers include the following:

- (1) Continuing a business in which the incapacitated person has an ownership interest, for the benefit of the incapacitated person's estate.
- (2) Organizing a corporation or forming a partnership, limited liability company or other entity to carry on the business of the incapacitated person, and contributing all or part of the property of the incapacitated person that was invested in the business.
- (3) With respect to the real property of the estate, (i) selling, buying or exchanging any property (or granting an option for the sale, purchase or exchange of any property); (ii) joining with the spouse of the incapacitated person in performing any of the foregoing acts with respect to property held by the entireties; (iii) releasing the right of the incapacitated person in the property

of the person's spouse and joining in the deed of the spouse on behalf of the incapacitated person and (iv) abandoning any real property.

New subsection (b.3) specifies that when the estate holds a judgment that is a lien on the real estate of the guardian, any person interested in the incapacitated person's estate may bring an appropriate action to revive it and to continue its lien.

New subsection (b.4) provides a statutory framework regarding the death or incapacity of a guardian of the estate.

New subsection (b.5) provides that unless the order of appointment specifies otherwise, surviving or remaining guardians of the estate shall have all the powers of the original guardians of the estate.

New subsection (b.6) provides a statutory framework regarding disputes arising among guardians of the estate.

New subsection (b.7) specifies that, if a guardian of the estate has the power to engage in a transaction involving the real estate of an incapacitated person, a certified copy of the decree appointing the guardian of the estate may be recorded in the office for the recording of deeds in any county where the real estate, which is subject to that power, is located.

New subsection (b.8) relates to the inadequacy of consideration.

New subsection (b.9) specifies that if a party to a pending action or proceeding has a guardian of the estate appointed, the guardian of the estate of the incapacitated person may be substituted as a party as provided by law.²⁰

New subsection (b.10) provides a statutory framework regarding specific performance of contracts.

New subsection (b.11) specifies when a guardian of the estate may abandon property of the incapacitated person and when the court may authorize the guardian of the estate to transfer, renounce or release property of the incapacitated person without consideration.

New subsection (b.12) provides a statutory framework regarding title of purchaser.

²⁰ Part of the comment to § 5521 references the Pennsylvania Rules of Civil Procedure that govern substitution of parties. *Infra* p. 120.

New subsection (b.13) provides that a guardian of the estate may compromise or otherwise settle any claim by or against the estate (through litigation or otherwise) without court approval. However, the guardian may seek court approval of any such compromise or settlement, subject to the specific provisions set forth in the subsection.

Subsection (c) is amended to (1) provide for when a guardian must file a report and the contents of the report and (2) specify that the failure of a guardian to file a timely report subjects the guardian to appropriate sanctions.

New subsection (c.1) provides that each guardian of an incapacitated person must keep records regarding the guardianship and the incapacitated person. Failure to do so subjects the guardian to appropriate sanctions.

Subsection (g) is amended to (1) apply the same standard of liability to all guardians of the person, without regard to whether the guardian is a unit of local government, nonprofit corporation or guardianship support agency and (2) generally provide that a guardian of the person is not personally liable on a contract properly entered into by the guardian of the person in a fiduciary capacity.

New subsection (h) provides a statutory framework regarding liability of guardians of the estate of an incapacitated person, including the application of the guardian's reasonable care, skill and caution in the context of his or her identity, background and experience.

New subsection (i) provides a statutory framework regarding the delegation of powers and duties of a guardian of the estate.

New subsection (j) specifies the requirements regarding the filing and contents of an inventory.

The comment notes that § 5521 is not intended to limit any additional powers or duties of a guardian of the estate that may otherwise be provided by law.

§ 5526. This new section provides for third party liability, third party immunity and information regarding the guardianship, including the mandate to comply with a guardian's instructions, civil liability for damages resulting from non-compliance and good faith reliance on a guardianship order.

- § 5531.** This section is amended to provide that a guardian must file an account whenever directed to do so by the court and may file an account at any other time.
- § 5536.** Subsection (a) is reorganized and amended for both technical and substantive purposes. Amendments include the addition of (1) the phrase “other periodic payments payable for the life or life expectancy of the incapacitated person”; (2) a provision for the limitation of discretionary expenditures where financial circumstances and needs so require; (3) language regarding principal and income and (4) a provision regarding a guardian’s fees. Subsection (b)(8) is amended to clarify the nature of “all rights and privileges” and to add “retirement plans,” with a detailed list of types of retirement plans. Subsection (b) is further amended to specify that the court may adopt a plan of gifts or authorize any other action, including an action that minimizes taxes, carries out a lifetime giving pattern or creates or preserves the incapacitated person’s eligibility for a benefit, a program or assistance under a statute or regulation. New subsection (c) is added to provide for notice to specific persons.
- § 5553.** Subsection (a) is amended to provide that a guardianship support agency may be required to post bond as the court directs (instead of “shall not be required to post bond”).

This section of the report summarizes the background information and current law reviewed by the Advisory Committee, which formed the basis for the proposed legislation concerning guardianships and incapacitated persons and other amendments to the Probate, Estates and Fiduciaries Code.²¹

Transfer of Jurisdiction

Because Chapter 55 does not contain statutory language regarding the transfer of jurisdiction, the Advisory Committee discussed the addition of a new section to address the matter. It first turned to the Uniform Guardianship and Protective Proceedings Act (UGPPA), which provides for the transfer of a guardianship proceeding to a court of another county or state if the transfer will serve the best interest of the ward or protected person.²² The uniform act specifically provides for communication and consultation between courts, petitions, and notice.²³

²¹ See *infra* pp. 61-80 regarding the powers of guardians of the estate under 20 Pa.C.S. § 5521.

²² The UGPPA defines the following terms, among others:

Conservator: a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

Guardian: a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

Incapacitated person: an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

Minor: an unemancipated individual who has not attained [18] years of age.

Protected person: a minor or other individual for whom a conservator has been appointed or other protective order has been made.

Ward: an individual for whom a guardian has been appointed.

Unif. Guardianship & Protective Proceedings Act § 102(2), (4), (5), (8), (11) & (15).

²³ Section 107 of the UGPPA provides the following:

SECTION 107. TRANSFER OF JURISDICTION.

(a) After the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another [county] in this State or to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(b) If a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this State, the court in this State shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

Following its review of the UGPPA, the Advisory Committee developed statutory language that contained the following provisions regarding the transfer of jurisdiction, based on § 107 of the UGPPA:²⁴

- (1) After the appointment of an incapacitated person's guardian of the person or guardian of the estate, the court may transfer the proceeding to another judicial district in Pennsylvania or to another state, if the court is satisfied that the transfer will serve the best interest of the incapacitated person.
- (2) If a guardianship or protective proceeding is pending in another state or a foreign country and a guardianship petition is filed in a court in Pennsylvania, the court in Pennsylvania must notify the original court and (after consultation with the original court) assume or decline jurisdiction, whichever is in the best interest of the incapacitated person.
- (3) An incapacitated person's guardian of the person or guardian of the estate (or similar fiduciary) appointed in another state may petition the court for appointment as the incapacitated person's guardian of the person or guardian of the estate in Pennsylvania if venue in Pennsylvania is or will be established. This appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court of Pennsylvania. Notice of the hearing on the petition, together with a copy of the petition, must be given to the incapacitated person and to other persons interested in the alleged incapacitated person's welfare who would be entitled to notice if the regular procedures for appointment of a guardian under Chapter 55 were applicable. The court must make the appointment unless it concludes that the appointment is not in the best interest of the

(c) A guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this State if venue in this State is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this State. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained 14 years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this [Act] were applicable. The court shall make the appointment in this State unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

²⁴ This proposed statutory language is the same as that recommended by the Working Group.

incapacitated person. In general, Chapter 55 governs all matters regarding the guardianship.

However, after the Advisory Committee began its deliberations regarding the transfer of jurisdiction, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) was promulgated and subsequently introduced in Pennsylvania as House Bill No. 1720 of 2011.²⁵ The UAGPPJA provides for, among other things, communication and cooperation between courts, taking testimony in another state, accepting and declining jurisdiction,²⁶ proceedings in more than one state, the transfer of a guardianship or conservatorship to another state and the acceptance of a guardianship or conservatorship from another state (with provisions concerning a petition, notice, hearing, order and modification) and the registration and recognition of orders from other states.

In light of the introduction of House Bill No. 1720 and its subsequent enactment as Act No. 108 of 2012, the Advisory Committee withdrew its original recommendation regarding the transfer of jurisdiction, instead favoring the substantive provisions of the UAGPPJA, now set forth in Chapter 59 of the Probate, Estates and Fiduciaries Code.²⁷

²⁵ See note 6. The UAGPPJA defines the following terms, among others:

Adult: an individual who has attained [18] years of age.

Conservator: a person appointed by the court to administer the property of an adult, including a person appointed under [insert reference to enacting state's conservatorship or protective proceedings statute].

Guardian: a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under [insert reference to enacting state's guardianship statute].

Incapacitated person: an adult for whom a guardian has been appointed.

Protected person: an adult for whom a protective order has been issued.

Protective order: an order appointing a conservator or other order related to management of an adult's property.

Unif. Adult Guardianship & Protective Proceedings Jurisdiction Act, *supra* note 6, § 102(1), (2), (3), (6), (9) & (10); H.R. 1720 (Pa. 2011), § 5902.

²⁶ The UAGPPJA introduces the concepts of "home state" (the state in which the individual was physically present for at least six months) and "significant-connection state" (a state in which the individual has a significant connection other than mere physical presence and in which substantial evidence concerning the individual is available, considering such factors as the location of the individual's family and other persons required to receive notice of proceedings, the length of time that the individual was physically present in the state and the duration of any absence, the location of the individual's property, and the individual's other ties to the state, including voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship and receipt of services). Unif. Adult Guardianship & Protective Proceedings Jurisdiction Act, *supra* note 6, § 201; H.R. 1720 (Pa. 2011), § 5911.

²⁷ 20 Pa.C.S. Ch. 59.

Venue

Under Chapter 55, § 5512 provides the only statutory guidance regarding venue. A guardian of the person or guardian of the estate of an incapacitated person may be appointed by the court of the county where the incapacitated person is domiciled, is a resident or is residing in a long-term care facility.²⁸ A guardian of the estate within Pennsylvania of an incapacitated person domiciled outside Pennsylvania “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.”²⁹ If the nonresident incapacitated person’s estate is derived otherwise than from a decedent’s estate or a trust within Pennsylvania, a guardian may be appointed by the court of any county where an asset of the incapacitated person is located.³⁰ If a court has appointed a guardian of the person or guardian of the estate of an incapacitated person under the foregoing provisions, another court may not appoint a similar guardian for the incapacitated person within Pennsylvania.³¹

In addition, Pennsylvania law provides that when a court has jurisdiction of the estate of a minor or an incapacitated person, venue is as follows: (1) in the case of a guardian of a minor or incapacitated person appointed by the court, in the county whose court appointed the guardian and (2) in the case of a guardian of a minor or incapacitated person not appointed by the court, or when there is a minor’s estate or incapacitated person’s estate but no guardian, in the county whose court at the time proceedings are first initiated would have jurisdiction to appoint a guardian of the estate.³²

The UGPPA contains a separate section regarding venue and specifically provides for venue regarding (1) a guardianship proceeding for a minor or an incapacitated person, (2) the appointment of an emergency or a temporary substitute guardian of an incapacitated person and (3) a protective proceeding. The UGPPA also provides for the situation where a proceeding is brought in more than one county.³³

²⁸ 20 Pa.C.S. § 5512(a).

²⁹ *Id.* § 5512(b) (1st sentence).

³⁰ *Id.* § 5512(b) (2nd sentence).

³¹ *Id.* § 5512(c).

³² *Id.* § 721(2).

³³ Section 108 of the UGPPA provides the following:

SECTION 108. VENUE.

(a) Venue for a guardianship proceeding for a minor is in the [county] of this State in which the minor resides or is present at the time the proceeding is commenced.

(b) Venue for a guardianship proceeding for an incapacitated person is in the [county] of this State in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the [county] in which the court is located. Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the [county] in which the respondent is present.

(c) Venue for a protective proceeding is in the [county] of this State in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this State, in any [county] of this State in which property of the respondent is located.

Because the Advisory Committee supports updated and more detailed venue provisions, it recommends the repeal of § 5512, to be replaced by a new section, based on § 108(b), (c) and (d) of the UGPPA and containing the following provisions.³⁴

- (1) Venue for a guardianship proceeding for an incapacitated person or an alleged incapacitated person is in the judicial district of Pennsylvania in which the person resides. If the person has been admitted to an institution by order of a court of competent jurisdiction, venue is in the judicial district in which the institution is located. Venue for the appointment of an emergency guardian of an incapacitated person or an alleged incapacitated person is also in the judicial district in which the person is present.³⁵
- (2) Venue for a proceeding regarding a guardianship of the estate of an incapacitated person or of an alleged incapacitated person is in the judicial district of Pennsylvania in which the incapacitated person or alleged incapacitated person resides, whether or not a guardian of the person has been appointed elsewhere or, if the person does not reside in Pennsylvania, in any judicial district of Pennsylvania in which the person's property is located.³⁶
- (3) If a proceeding under Chapter 55 is brought in more than one judicial district in Pennsylvania, the court of the judicial district in which the proceeding is first brought has the exclusive right to proceed, unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.³⁷

This new section concerning venue is subject to the UAGPPJA.³⁸

The proposed legislation contains a comment noting that proposed § 5503 refers to residence instead of domicile and explaining that the terms are distinguishable because domicile is the true, fixed, principal and permanent home to which the individual intends to return and remain even though currently residing elsewhere. The comment also states that the UAGPPJA addresses jurisdiction.³⁹

(d) If a proceeding under this [Act] is brought in more than one [county] in this State, the court of the [county] in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

³⁴ This proposed statutory language is the same as that recommended by the Working Group. To the extent there is a conflict between proposed § 5503 and current § 721(2), the provisions of § 5503 control.

³⁵ Proposed 20 Pa.C.S. § 5503(b). *Infra* p. 82.

³⁶ Proposed 20 Pa.C.S. § 5503(c). *Infra* p. 82.

³⁷ Proposed 20 Pa.C.S. § 5503(d). *Infra* p. 83.

³⁸ Proposed 20 Pa.C.S. § 5503(a). *Infra* p. 82. The uniform act is located at 20 Pa.C.S. Ch. 59.

³⁹ *Infra* p. 83.

Confidentiality and Disclosure of Information

The Working Group recommended the amendment of § 5521(c) to add two new paragraphs regarding the confidentiality of the annual reports and final report of the guardian, specifying that (1) in general, a report shall be confidential and made available only to each party, each person (upon request) that has been given notice of the petition or that has appeared in the guardianship proceeding, counsel for that person or the party, the court, or an agency as defined under the Older Adults Protective Services Act⁴⁰ and (2) the court may release a report at any time if it serves the interests of the incapacitated person.⁴¹

The Advisory Committee reviewed the provisions of the UGPPA and the laws of New York and New Jersey to determine how to improve the law in Pennsylvania regarding confidentiality and the disclosure of information.

The UGPPA provides that “[t]he written report of a visitor⁴² and any professional evaluation are confidential and must be sealed upon filing.”⁴³ However, those reports are available to (1) the court; (2) the respondent, without limitation as to use; (3) the petitioner, the visitor and legal counsel for the petitioner and respondent, for purposes of the proceeding and (4) other persons, as directed by the court for good cause shown.⁴⁴

The Surrogate’s Court Procedure Act of New York provides that “[r]ecords and papers which are sealed and withheld from public inspection as required by law or directed by the court shall thereafter be opened only to the extent as may be authorized by the court.”⁴⁵ In addition, “[a]ll books and records other than those sealed are open to inspection of any person at reasonable times.”⁴⁶

⁴⁰ Act of Nov. 6, 1987 (P.L.381, No.79), § 103.

⁴¹ The Advisory Committee originally approved similar statutory language, replacing the provision that a report be made available to “upon request, each person that has been given notice of the petition or that has appeared in the guardianship proceeding” with “upon request, each person that has been given notice of any petition under this chapter.” Subsequently, however, the Advisory Committee expanded its recommendation regarding confidentiality and the disclosure of information.

⁴² A visitor is appointed by the court to investigate the appropriateness of the guardianship or conservatorship requested for an adult. The visitor must promptly file a report with the court, which includes, among other things, (1) a summary of the daily functions that the respondent can manage without assistance, can manage with supportive services or benefits, and cannot manage; (2) a recommendation regarding the appropriateness of guardianship and whether less restrictive means of intervention are available, the type of guardianship and the powers to be granted in the case of a limited guardianship and (3) the qualifications of the proposed guardian, along with the scope of the guardianship and proposed powers and duties. Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 305(e)(2)-(4).

⁴³ *Id.* §§ 307 & 407, which separately concern guardianship and conservatorship.

⁴⁴ *Id.*

⁴⁵ N.Y. Surr. Ct. Proc. Act § 2501(7).

⁴⁶ *Id.* § 2501(8).

Under the Mental Hygiene Law of New York, a record of the proceedings must be made in all cases.⁴⁷ The court may not enter an order sealing these court records (either in whole or in part), except upon a written finding of good cause shown, with consideration given to the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.⁴⁸ Similarly, the court may not exclude any person from a proceeding under this law except upon a written finding of good cause shown, with the same foregoing considerations.⁴⁹ When the hearing is commenced, the court must inform the allegedly incapacitated person of the right to request for good cause that the court records be sealed and that a person may be excluded from the hearing.⁵⁰

The New Jersey Rules of Court (Public Access to Court Records and Administrative Records) provides that court records “are open for public inspection and copying except as otherwise provided in this rule.”⁵¹ Certain court records are excluded from public access, including, among others, (1) records required to be kept confidential by statute, rule or prior case law, unless a court orders otherwise⁵² and (2) in general, guardianship records and reports.⁵³

However, the following information in the guardianship index must be available for public access: (1) the name of the minor or incapacitated person, (2) the name of the municipality where the minor or incapacitated person resided when the guardianship was created, (3) the name of the guardian, (4) the docket number, (5) the date of the judgment appointing the guardian and (6) the date of the guardian’s qualification.

Notwithstanding the foregoing, all guardianship records and reports are available to (1) the incapacitated person and the minor upon reaching majority; (2) the incapacitated person’s spouse, civil union partner or domestic partner; (3) the parents and siblings of the minor or incapacitated person; (4) any adult children of the incapacitated person; (5) the guardian appointed in the action and (6) any attorneys appearing in the guardianship action on behalf of these persons.⁵⁴ In addition,

⁴⁷ N.Y. Mental Hyg. Law § 81.14(a).

⁴⁸ *Id.* § 81.14(b). Court records include all documents and records of any nature filed with the clerk in connection with the proceeding. Documents obtained through disclosure and not filed with the clerk remain subject to protective orders under the civil practice law and rules. *Id.*

⁴⁹ *Id.* § 81.14(c).

⁵⁰ *Id.* § 81.14(d).

⁵¹ N.J. Rule of Ct. No. 1:38-1. A court record includes, among other things, (1) information maintained by a court in any form in connection with a case or judicial proceeding (including, but not limited to, pleadings, motions, briefs and their respective attachments, evidentiary exhibits, indices, calendars and dockets); (2) any order, judgment, opinion or decree related to a judicial proceeding; (3) any official transcript or recording of a public judicial proceeding, in any form and (4) any information in a computerized case management system created or prepared by the court in connection with a case or judicial proceeding. *Id.* No. 1:38-2(a).

⁵² Such records remain confidential even when attached to a non-confidential document. *Id.* No. 1:38-3(a).

⁵³ *Id.* No. 1:38-3(a) & (e).

⁵⁴ *Id.* No. 1:38-3(e).

any person may inspect and copy the following guardianship file documents: the guardianship judgment, the Letters of Guardianship, and any subsequent order dealing with the powers or limitations of the guardian, provided any financial information contained in these documents, including information on the amount of the bond, is redacted prior to the documents being made available for review or copying. Any individual or entity seeking other records must demonstrate before a Superior Court judge a special interest in the matter.⁵⁵

The New Jersey Rules of Court specify that a party may not set forth a confidential personal identifier⁵⁶ “in any document or pleading submitted to the court unless otherwise required by statute, rule, administrative directive, or court order.”⁵⁷ In general, if a confidential personal identifier is so required, it must be redacted before public inspection is permitted.⁵⁸

In New Jersey, information in a court record may be sealed by court order for good cause, with the moving party bearing the burden of proving by a preponderance of the evidence that good cause exists.⁵⁹ Good cause to seal a record exists when (1) disclosure will likely cause a clearly defined and serious injury to any person or entity and (2) the person or entity’s interest in privacy substantially outweighs the presumption that all records are open for public inspection.⁶⁰

The Advisory Committee first proposed three separate sections regarding the disclosure of information generally, records of the guardian and confidentiality.⁶¹ These proposed sections contained the following provisions:

- (1) As a general rule (except as otherwise provided or on an order of court granted upon cause shown), the following information pertaining to a guardianship proceeding is confidential and must be kept in the files of the court as a permanent record: (i) pleadings, exhibits and notes of testimony; (ii) reports; (iii) the incapacitated person’s will or other estate planning documents and (iv) other documents, papers or information deemed confidential by the court. The foregoing information must be made available to the incapacitated person, the guardian of the incapacitated person,

⁵⁵ *Id.*

⁵⁶ A confidential personal identifier is a Social Security number, drivers license number, vehicle plate number, insurance policy number, active financial account number or active credit card number. *Id.* No. 1:38-7(a).

⁵⁷ *Id.* No. 1:38-7(b). However, “an active financial account number may be identified by the last four digits when the financial account is the subject of the litigation and cannot otherwise be identified.” *Id.*

⁵⁸ *Id.* No. 1:38-7(f).

⁵⁹ *Id.* No. 1:38-11(a).

⁶⁰ *Id.* No. 1:38-11(b).

⁶¹ Because these proposed statutory provisions concerned more than guardianship reports under § 5521(c), the Advisory Committee did not recommend the amendment of § 5521(c), as the Working Group recommended.

counsel for the incapacitated person or the guardian, the court or its designee, or an agency as defined under the Older Adults Protective Services Act⁶² or the Adult Protective Services Act.⁶³ Upon petition or in such other manner as the court deems appropriate, the court may release the foregoing information at any time to another person if (i) the release of information serves the best interest of the incapacitated person or (ii) the person demonstrates to the satisfaction of the court that the person is interested in the incapacitated person's welfare and has a legitimate interest in examining this information. The court may not require that person to file a subsequent petition for additional or subsequent information (upon request, the court may release additional or subsequent information to that person). Upon request and if appropriate, the court may release the foregoing information to the petitioner seeking an adjudication of incapacity during the pendency of the adjudication of incapacity or subsequent to the adjudication of incapacity. In accordance with applicable court rule or when it is otherwise appropriate to do so, the court may redact information before releasing it.⁶⁴

- (2) A guardian must keep records of the administration of the estate and make them available upon reasonable request to any person specified in the foregoing list or authorized by the court to receive the information. As appropriate, a guardian may release the records in a redacted form.
- (3) A person authorized to receive information must maintain the confidentiality of the information and is bound by any condition of disclosure as prescribed by the court. If the person does not maintain the confidentiality of the information or does not follow the conditions of disclosure as prescribed by the court, the court may appropriately sanction the person.

Ultimately, the Advisory Committee decided the foregoing provisions should not be specified in the statute; instead, the statute should contain a more general statement of policy. Accordingly, the proposed legislation provides that confidentiality and the disclosure of information under Chapter 55 is governed by applicable court rule or as the court determines, and the Supreme Court may prescribe uniform rules relating to confidentiality and the disclosure of information.⁶⁵

⁶² *Supra* note 40.

⁶³ Act of Oct. 7, 2010 (P.L.484, No.70), § 103.

⁶⁴ The proposed comment to this section clarified that (1) although decrees and court dockets are intended not to be confidential under this section, private information contained in them may be redacted, subject to applicable court rule or as the court determines; (2) the mere filing of a petition for guardianship does not by itself automatically entitle the petitioner to the specified information and (3) redaction may be necessary or appropriate.

⁶⁵ Proposed 20 Pa.C.S. § 5504. *Infra* p. 83.

The proposed legislation also contains a provision that a guardian of an incapacitated person must keep records regarding the guardianship and the incapacitated person, and the failure to do so subjects the guardian to appropriate sanctions.⁶⁶

Notice and Hearing

Upon petition and hearing and the presentation of clear and convincing evidence, the court may find an individual domiciled in Pennsylvania to be incapacitated and appoint a guardian of the person or guardian of the estate for the individual.⁶⁷ The petitioner may be any person interested in the individual's welfare.⁶⁸ The court may dismiss a proceeding if (1) the proceeding has not been instituted to aid or benefit the individual or (2) the petition is incomplete or fails to provide sufficient facts to proceed.⁶⁹

Written notice of the petition and hearing must be given in large type and in simple language to the alleged incapacitated person.⁷⁰ The notice must (1) indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding; (2) include the date, time and place of the hearing and (3) provide 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 (with such counsel paid for if otherwise unaffordable).⁷¹ The Supreme Court must establish a uniform citation for this purpose.⁷² A copy of the petition must be attached to the notice.⁷³

Personal service must be made on the alleged incapacitated person, and the contents and terms of the petition must be explained to the maximum extent possible in language and terms the individual is most likely to understand.⁷⁴ Service must be no less than 20 days in advance of the hearing.⁷⁵

Notice of the petition and hearing must be given in such manner as the court directs to (1) all persons residing within Pennsylvania who are sui juris and would be entitled to share in the estate of the alleged incapacitated person if the person died intestate at that time, (2) the person or institution providing residential services to the alleged incapacitated person and (3) other parties as directed by the court, including other service providers.⁷⁶

⁶⁶ Proposed 20 Pa.C.S. § 5521(c.1). *Infra* p. 117.

⁶⁷ 20 Pa.C.S. § 5511(a) (1st sentence).

⁶⁸ *Id.* (2nd sentence).

⁶⁹ *Id.* (3rd sentence).

⁷⁰ *Id.* (4th sentence).

⁷¹ *Id.* (5th & 6th sentences).

⁷² *Id.* (7th sentence).

⁷³ *Id.* (8th sentence).

⁷⁴ *Id.* (9th sentence).

⁷⁵ *Id.* (10th sentence).

⁷⁶ *Id.* (11th sentence).

The hearing may be closed to the public and without a jury unless the alleged incapacitated person or the person’s counsel objects.⁷⁷ The hearing must be closed and with or without a jury if the person alleged to be incapacitated or the person’s counsel so requests.⁷⁸ The hearing may be held at the residence of the alleged incapacitated person.⁷⁹ The alleged incapacitated person must be present at the hearing unless (1) the court is satisfied, upon the deposition or testimony of or sworn statement by a physician or licensed psychologist, that the person’s physical or mental condition would be harmed by the person’s presence or (2) it is impossible for the person to attend because of the person’s absence from Pennsylvania.⁸⁰ The alleged incapacitated person does not need to be represented by a guardian ad litem in the proceeding.⁸¹

The petitioner must 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 must be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained.⁸²

The Advisory Committee first discussed several discrete amendments to § 5511(a).⁸³

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 or could be readily obtained 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 alleged incapacitated person shall be present at the hearing unless:

(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, but the inability of the alleged incapacitated person to comprehend the proceedings does not, by itself, constitute harm; or

⁷⁷ *Id.* (12th sentence).

⁷⁸ *Id.* (13th sentence).

⁷⁹ *Id.* (14th sentence).

⁸⁰ *Id.* (15th sentence, which includes paragraphs (1) & (2)).

⁸¹ *Id.* (16th sentence, which is the second sentence of paragraph (2)).

⁸² *Id.* (last two sentences).

⁸³ The Advisory Committee approved the amendment of subsection (a) regarding (1) the repeal of “residing within the Commonwealth” and the inclusion of “whose existence and whereabouts are known or could be readily obtained and” and (2) the addition of the phrase “but the inability of the alleged incapacitated person to comprehend the proceedings does not, by itself, constitute harm.” The Working Group recommended these same amendments but slightly rephrased the former: “whose existence and whereabouts are known or *should be known* and” (italics added to reflect difference in the proposed statutory language). Additionally, the Working Group recommended the repeal of the last two sentences of subsection (a), to be replaced by a proposed new subsection concerning the appointment of counsel. *Infra* p. 25.

[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.]

Upon further reflection, the Advisory Committee decided that for organizational purposes, subsection (a) should be re-codified as a new subsection (a.1), with separate paragraphs instead of a series of sentences.⁸⁴ The following table summarizes the statutory basis of each proposed new paragraph and its counterpart in current subsection (a), which the proposed legislation repeals.⁸⁵

Repealed Provision of § 5511(a)	New Provision of § 5511(a.1)
First sentence	Paragraph (1)
Second sentence	Paragraph (2) (first sentence)
Third sentence	Paragraph (3)
Fourth sentence	Paragraph (4)(i)
Fifth sentence	Paragraph (4)(ii)
Sixth sentence	Paragraph (4)(iii), with a new cross-reference to new subsection (a.2)
Seventh sentence	Paragraph (4) introductory language
Eighth sentence	Paragraph (4)(iv)
Ninth and tenth sentences	Paragraph (5)(i)
Eleventh sentence	Paragraph (5)(ii), with the phrase “residing within the Commonwealth” replaced by “whose existence and whereabouts are known or could be readily obtained and”
Twelfth sentence	Paragraph (6)(i)
Thirteenth sentence	Paragraph (6)(ii)
Fourteenth sentence	Paragraph (6)(iii)
Fifteenth sentence - paragraph (1)	Paragraph (7)(i), with the addition of “but the inability of the alleged incapacitated person to comprehend the proceedings does not, by itself, constitute harm”
Fifteenth sentence - paragraph (2)	Paragraph (7)(ii)
Last two sentences	<i>See proposed subsection (a.2) regarding the appointment of counsel</i>

⁸⁴ *Infra* pp. 85-87. Without the structure of separate paragraphs, it is cumbersome to reference the specific statutory provision.

⁸⁵ As shown in the table, the discrete amendments to subsection (a), which the Advisory Committee previously considered, are incorporated into the provisions of proposed subsection (a.1).

The proposed legislation explicitly provides that the court may grant standing to any person on whom the notice and petition are served under this subsection, to eliminate any ambiguity in the statute.⁸⁶ The comment to this proposed section explains that this provision gives the court flexibility to determine whether to grant standing to the specified person. If the person is granted standing, the person may participate in the guardianship proceeding and, among other things, present evidence and cross-examine witnesses.⁸⁷

In addition, the proposed legislation provides that if the petitioner is a guardianship support agency, the petition must disclose the agency's financial information and a list of its current guardianships.⁸⁸

Appointment of Counsel

The Advisory Committee agreed that the provisions regarding the appointment of counsel should be re-codified and clarified.⁸⁹ The proposed legislation includes a new subsection that provides the following:⁹⁰

- (1) If counsel has not been retained by or on behalf of the alleged incapacitated person, the petitioner must notify the court at least seven days prior to the hearing.⁹¹
- (2) The court must appoint counsel to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of the alleged incapacitated person (i) in appropriate cases as the court determines and (ii) in all cases in which the court knows in advance that the alleged incapacitated person is not expected to attend the hearing, either in person or by videoconference.⁹²

⁸⁶ Proposed 20 Pa.C.S. § 5511(a.1)(8). *Infra* p. 87. The current statutory language provides that although notice of the petition and hearing must be given to specified persons, it does not explicitly provide that these persons are therefore granted standing to participate in the hearing.

⁸⁷ *Infra* p. 92.

⁸⁸ Proposed 20 Pa.C.S. § 5511(a.1)(2). *Infra* p. 85.

⁸⁹ The current provisions regarding the appointment of counsel are found in the last two sentences of § 5511(a). *Supra* p. 24.

⁹⁰ The proposed legislation also contains a comment specifying that a court should have as much flexibility as possible to determine which cases merit the appointment of counsel. *Infra* p. 92.

⁹¹ Proposed 20 Pa.C.S. § 5511(a.2)(1). *Infra* p. 87.

⁹² Proposed 20 Pa.C.S. § 5511(a.2)(2). *Infra* pp. 87-88. The Working Group recommended the same statutory addition but slightly rephrased the provision and recommended the appointment of counsel “in all cases if *the alleged incapacitated person will not be present at the hearing*” (italics added to reflect differences in the proposed statutory language). The Advisory Committee discussed how counsel could manipulate this type of provision, thereby defeating the purpose of the provision. Therefore, in recommending its own statutory language, the Advisory Committee agreed that the court should have adequate flexibility to decide the best course of action when the alleged incapacitated person does not attend the scheduled hearing. The Advisory Committee previously discussed an alternative to provide that the court must appoint counsel to represent the alleged incapacitated person in any matter for which

The Advisory Committee acknowledged that a county will incur additional costs in establishing videoconference capabilities. However, this cost to the county will likely be much less than the cost that would otherwise be spent to appoint counsel in all those cases where the alleged incapacitated person does not personally appear in court.

Although the Advisory Committee suggested that the specified matters could be verified by affidavit, instead of holding a hearing to determine whether clear and convincing evidence exists, it noted that it may be difficult for an attorney to affirm the matters.

Appointment of Guardian

The court may appoint the following as guardian: (1) any qualified individual, (2) a corporate fiduciary, (3) a nonprofit corporation, (4) a guardianship support agency or (5) a county agency.⁹³ In the case of a resident of a state facility, the court may also appoint the facility's guardian office, but only as guardian of the estate.⁹⁴ The court may 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."⁹⁵ A family relationship to the individual is not, by itself, considered as an interest adverse to the alleged incapacitated person.⁹⁶ If appropriate, the court must give preference to a nominee of the incapacitated person.⁹⁷

The Advisory Committee decided that § 5511 should be reorganized into two separate subsections concerning who may be and who may not be appointed guardian. Therefore, the proposed legislation repeals the current statutory language of § 5511(f), to be replaced by new statutory language under subsection (f) and a new subsection (g).⁹⁸

counsel has not been retained by or on behalf of the alleged incapacitated person, unless there is clear and convincing evidence that (1) the appointment would cause great hardship or (2) there exists no reasonable expectation that the person is incapable of comprehending the proceeding. With respect to this particular alternative, the Advisory Committee discussed the situation where an alleged incapacitated person is expected to attend a proceeding but then refuses to come to court at the last minute, not because it would cause harm but because it would be disruptive. This statutory language is silent as to whether counsel should be appointed and whether the proceeding should be delayed. The Advisory Committee noted that if counsel would be appointed in such a case, assets would be diverted from the person's estate, even if the proceeding was uncontested.

⁹³ 20 Pa.C.S. § 5511(f) (1st sentence).

⁹⁴ *Id.* (2nd sentence).

⁹⁵ *Id.* (3rd sentence).

⁹⁶ *Id.* (4th sentence).

⁹⁷ *Id.* (5th sentence).

⁹⁸ *Infra* pp. 88-89. Proposed subsections (f) and (g) contain separate paragraphs instead of a series of sentences. Without the structure of separate paragraphs, it is cumbersome to reference the specific statutory provision. This proposed statutory framework and the new statutory language under subsection (f) are the same as that recommended by the Working Group, except that the Advisory Committee added that a corporate entity doing business in Pennsylvania and serving as a guardian of the estate of an incapacitated person must have an office in Pennsylvania. The last sentence of current subsection (f) ("If

Proposed § 5511(f) provides the following:

- (1) The court may appoint any one or more of the following to be an alleged incapacitated person's guardian of the person or guardian of the estate, or both: any qualified individual, a corporate fiduciary,⁹⁹ a nonprofit corporation, a guardianship support agency or a county agency.¹⁰⁰
- (2) If the alleged incapacitated person is a resident of a state facility, the court may appoint the guardian office at the facility as the alleged incapacitated person's guardian of the estate.¹⁰¹

Proposed § 5511(g) generally provides that, unless it is clearly demonstrated that no guardianship support agency or other alternative exists, the court may not appoint the following as the alleged incapacitated person's guardian of the person or guardian of the estate: (1) a person or entity providing residential services for a fee to the alleged incapacitated person or (2) any other person whose interests conflict with those of the alleged incapacitated person.¹⁰² Any family relationship to the alleged incapacitated person is not, by itself, considered in conflict with the interest of the alleged incapacitated person.¹⁰³

appropriate, the court shall give preference to a nominee of the incapacitated person.”) is not part of revised subsection (f) or new subsection (g) but is instead included in proposed new subsection (h). *Infra* pp. 89-90. With respect to subsection (g), the Working Group recommended the following statutory language (italics added to reflect differences with the Advisory Committee's proposed statutory language):

(g) Who may not be appointed guardian.--

(1) Subject to paragraph (2), unless it is clearly demonstrated that no guardianship support agency or other alternative exists, the court may not appoint the following as the alleged incapacitated person's guardian of the estate or guardian of the person:

(i) A person or *employee of the person* providing residential services for a fee to the alleged incapacitated person.

(ii) *A person whose interests conflict with those of the alleged incapacitated person.*

(2) *A person who is related to the alleged incapacitated person by blood, marriage or adoption:*

(i) *is not deemed to have a conflicting interest under paragraph (1)(ii) simply because of that relationship; and*

(ii) *may be appointed the alleged incapacitated person's guardian of the estate or guardian of the person, or both, even though the person provides residential services for a fee to the alleged incapacitated person.*

⁹⁹ If a person is a corporate entity doing business in Pennsylvania and serving as a guardian of the estate of an incapacitated person, the person must have an office in Pennsylvania. Proposed 20 Pa.C.S. § 5511(f)(1)(ii). *Infra* p. 88.

¹⁰⁰ Proposed 20 Pa.C.S. § 5511(f)(1). *Infra* pp. 88-89.

¹⁰¹ Proposed 20 Pa.C.S. § 5511(f)(2). *Infra* p. 89.

¹⁰² Proposed 20 Pa.C.S. § 5511(g)(1). *Infra* p. 89.

¹⁰³ Proposed 20 Pa.C.S. § 5511(g)(2). *Infra* p. 89.

In light of proposed § 5511(f) and (g), the proposed legislation contains a comment reiterating the purpose of Chapter 55¹⁰⁴ and specifying that even though a person does not have a power of attorney or other comparable document, it is presumed that the person retains the greatest amount of autonomy possible and that the person's wishes should be taken into account as much as possible.¹⁰⁵

Preferences Regarding Appointment of Guardian

Although the Advisory Committee acknowledges that the appointment of a guardian can be a contentious area of the law,¹⁰⁶ it recognizes the importance of statutorily providing a more definitive roadmap for the parties and the court regarding the appointment of a guardian and the preferences that should be taken into account. Accordingly, the proposed legislation adds two new subsections within § 5511 regarding the preference in appointing a guardian of the person and a guardian of the estate.¹⁰⁷

- (1) If a nomination regarding guardian of the person has been made in a power of attorney, the court may determine that an adjudication of incapacity is not necessary or that an adjudication of incapacity is necessary but the appointment of a guardian of the person is not necessary. If the court makes an adjudication of incapacity and

¹⁰⁴ This purpose is expressed in 20 Pa.C.S. § 5502:

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.

¹⁰⁵ *Infra* p. 92.

¹⁰⁶ For example, one family member may allege that another family member acting as agent under a power of attorney is abusing his or her authority and may attempt to use the guardianship process to invalidate the agent's authority. In addition, a principal may have executed multiple powers of attorney.

¹⁰⁷ The Working Group, which did not propose a statutory framework regarding preferences in appointing a guardian of the estate, recommended a new subsection (h) (priority in appointing guardian), which provided that in appointing a guardian for an alleged incapacitated person, the court must consider the following order of priority: (1) the nominee of the person, including an agent named in the person's operative power of attorney; (2) a guardian, other than a temporary or emergency guardian, currently acting for the person; (3) the spouse of the person; (4) an adult child of the person; (5) a parent of the person and (6) the nominee of a deceased or living parent of an unmarried alleged incapacitated person. The Working Group's recommendations further provided that (1) with respect to persons having equal priority, the court must select the person that it considers best qualified and (2) in acting in the best interest of the alleged incapacitated person, the court may decline to appoint a person having a higher priority and appoint a person having a lower priority or no priority, but if a nomination has been made in an operative power of attorney, the court must appoint the nominated person in accordance with the terms of the power of attorney, except for good cause or disqualification.

determines that a guardian of the person must be appointed, the court must appoint the nominated person in accordance with the terms of the power of attorney or health care power of attorney, except for good cause or disqualification.¹⁰⁸

- (2) Subject to the previous paragraph, (i) in acting in the best interest of the alleged incapacitated person, the court may decline to appoint a person having a higher preference and appoint a person having a lower preference or no preference¹⁰⁹ and (ii) in appointing a qualified person to be guardian of the person, the court must consider the following order of preference: a guardian (other than a temporary or emergency guardian) currently acting for the estate, the spouse of the person, an adult child of the person, a parent of the person, the nominee of a deceased or living parent of an unmarried alleged incapacitated person, and another suitable and qualified person.¹¹⁰ If persons have equal preference, the court must select the person that it considers best qualified in that class.¹¹¹
- (3) If a nomination regarding guardian of the estate has been made in a power of attorney, the court may determine that an adjudication of incapacity is not necessary or that an adjudication of incapacity is necessary but the appointment of a guardian of the estate is not necessary. Generally, if the court makes an adjudication of incapacity and determines that a guardian of the estate must be appointed, the court must appoint the nominated person in accordance with the terms of the power of attorney, except for good cause or disqualification.¹¹²
- (4) Subject to the previous paragraph, (i) in acting in the best interest of the alleged incapacitated person, the court may decline to appoint a person having a higher preference and appoint a person having a lower preference or no preference¹¹³ and (ii) in appointing a qualified person to be guardian of the estate, the court must generally consider the following order of preference: a guardian (other than a temporary or emergency guardian) currently acting for the person, the spouse of the person, an adult child of the person, a parent of the person, the nominee of a deceased or living parent of an unmarried alleged incapacitated person, and another suitable and qualified person (including a corporate fiduciary, a nonprofit corporation, a guardianship support agency and a county agency).¹¹⁴ If persons

¹⁰⁸ Proposed 20 Pa.C.S. § 5511(h)(1). *Infra* pp. 89-90.

¹⁰⁹ Proposed 20 Pa.C.S. § 5511(h)(4). *Infra* p. 90.

¹¹⁰ Proposed 20 Pa.C.S. § 5511(h)(2). *Infra* p. 90.

¹¹¹ Proposed 20 Pa.C.S. § 5511(h)(3). *Infra* p. 90.

¹¹² Proposed 20 Pa.C.S. § 5511(i)(1). *Infra* pp. 90-91.

¹¹³ Proposed 20 Pa.C.S. § 5511(i)(4). *Infra* p. 91.

¹¹⁴ Proposed 20 Pa.C.S. § 5511(i)(2). *Infra* p. 91.

have equal preference, the court must select the person that it considers best qualified in that class.¹¹⁵

- (5) Notwithstanding the foregoing, the court may appoint a corporate fiduciary or other appropriate person as a guardian of the estate of the incapacitated person in appropriate cases, if the incapacitated person's estate contains substantial assets or involves complex financial matters.¹¹⁶

The proposed legislation contains a comment acknowledging that an incapacitated person may not need a guardian if the incapacity is counterbalanced by friends or family or other support. Therefore, the appointment of a guardian is dependent on both incapacity and the need for guardianship services.¹¹⁷

Review Hearing

The court may schedule a review hearing in its order establishing the guardianship or hold a review hearing at any time that it directs. The court must conduct a review hearing promptly if the incapacitated person, guardian or any interested party petitions the court for a hearing because of (1) a significant change in the person's capacity, (2) a change in the need for guardianship services or (3) the guardian's failure to perform 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.¹¹⁸

An incapacitated person has all the rights enumerated in Chapter 55. Except when the hearing is held to appoint a successor guardian, the burden of proof, by clear and convincing evidence, is on the party advocating continuation of guardianship or expansion of areas of incapacity.¹¹⁹

¹¹⁵ Proposed 20 Pa.C.S. § 5511(i)(3). *Infra* p. 91.

¹¹⁶ Proposed 20 Pa.C.S. § 5511(i)(5). *Infra* p. 91.

¹¹⁷ *Infra* p. 92. See *In re Peery*, 727 A.2d 539, 541 (Pa. 1999).

¹¹⁸ 20 Pa.C.S. § 5512.2(a).

¹¹⁹ *Id.* § 5512.2(b). The Advisory Committee discussed whether the burden of proof should remain as stated in subsection (b) or be on the petitioner seeking the termination of the guardianship in a contested case. The Working Group recommended the amendment of the second sentence of this statutory provision as follows: "Except in an uncontested matter concerning the termination of a guardianship or 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." However, the Advisory Committee disagreed with that approach and instead favored a new § 5512.4 (affidavit in uncontested termination matters), which is discussed on the next page.

The Advisory Committee recommends that, in the current section regarding a review hearing, (1) the term “interested party” be changed to “person interested in the incapacitated person’s welfare”¹²⁰ and (2) a provision be included to address independent evaluations. Accordingly, the proposed legislation:

- (1) Amends the second sentence of § 5512.2.¹²¹
- (2) Adds a new subsection to specify that in a review hearing, the court may order an independent evaluation in accordance with § 5511(d).¹²²

Affidavits in Uncontested Termination Matters

In lieu of amending § 5512.2(b) regarding the burden of proof for a review hearing,¹²³ the proposed legislation adds a new section regarding affidavits in uncontested termination matters. In an uncontested matter concerning the termination of a guardianship, whether or not a hearing is held regarding the termination, the court may terminate the guardianship based on an affidavit of the incapacitated person’s attending physician stating that the guardianship is no longer necessary.¹²⁴

Counsel

In the absence of statutory guidance regarding the role of counsel for an incapacitated person, the Advisory Committee recommends the addition of a new section, and the proposed legislation provides the following:

¹²⁰ The Advisory Committee acknowledges, however, that such an amendment may unintentionally expand who can petition for a hearing.

¹²¹ The amendment is as follows:

The court shall conduct a review hearing promptly if the incapacitated person, guardian or any [interested party] person interested in the incapacitated person’s welfare 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.

Infra p. 93. This proposed amendment is the same as that recommended by the Working Group, except that the Working Group included the modifier “alleged” before “incapacitated person.”

¹²² Proposed 20 Pa.C.S. § 5512.2(c). *Infra* p. 93. This proposed statutory language is the same as that recommended by the Working Group. Section 5511(d) provides the following:

(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.

See infra pp. 101-102 for § 5518.

¹²³ *Supra* note 119.

¹²⁴ Proposed 20 Pa.C.S. § 5512.4. *Infra* pp. 93-94.

- (1) Following an adjudication of incapacity, counsel for the incapacitated person acting as such before the individual was adjudicated incapacitated, or counsel subsequently engaged by or on behalf of the incapacitated person, may act on behalf of the incapacitated person for a matter or at any proceeding regarding the interest of the incapacitated person under Chapter 55.
- (2) For cause shown, the court may terminate the services of counsel acting for an incapacitated person and appoint new counsel or a guardian ad litem for a proceeding involving the incapacitated person's interest.¹²⁵

The proposed legislation contains a comment noting that under Chapter 55, an incapacitated person has standing to participate in any subsequent proceeding of the Orphans' Court, or object to a decision thereof, and generally has the right to choose legal counsel.¹²⁶

Emergency Guardians

The subject of emergency guardianship is currently set forth in 20 Pa.C.S. § 5513.

Notwithstanding § 5511, upon petition and a hearing (at which clear and convincing evidence is shown), the court may appoint an emergency guardian of the person or guardian of the estate of an individual alleged to be incapacitated, when it appears that (1) the individual lacks capacity and is in need of a guardian and (2) a failure to make such appointment will result in irreparable harm to the individual's person or estate.¹²⁷ The provisions of § 5511, including those relating to counsel, are applicable to these proceedings, except when the court finds that it is not feasible in the circumstances.¹²⁸ An emergency guardian has and is subject to only the powers, duties and liabilities (and serve for such time) as the court decrees.¹²⁹

An emergency order appointing an emergency guardian of the person may be effective up to 72 hours.¹³⁰ If the emergency continues, the emergency order may be extended for no more than 20 days from the expiration of the initial emergency order.¹³¹ After expiration of the emergency order or any extension, a full guardianship proceeding

¹²⁵ Proposed 20 Pa.C.S. § 5512.5. *Infra* p. 94.

¹²⁶ *Infra* p. 94. See *In re Estate of Rosengarten*, 871 A.2d 1249 (Pa. Super. 2005). The comment also notes the extension of this section to a proceeding subsequent to the adjudication of incapacity, such as a review hearing under § 5512.2. The appointment of counsel for an alleged incapacitated person is addressed in §§ 5511(a.2) and 5513(d). *Infra* p. 94.

¹²⁷ 20 Pa.C.S. § 5513 (1st sentence).

¹²⁸ 20 Pa.C.S. § 5513 (2nd sentence).

¹²⁹ 20 Pa.C.S. § 5513 (3rd sentence).

¹³⁰ 20 Pa.C.S. § 5513 (4th sentence).

¹³¹ 20 Pa.C.S. § 5513 (5th sentence).

must be initiated under § 5511.¹³² The court may also appoint an emergency guardian of the person under this section for an alleged incapacitated person who is present in Pennsylvania but is domiciled outside Pennsylvania, regardless of whether the alleged incapacitated person has property in Pennsylvania.¹³³

An emergency order appointing an emergency guardian of the estate may not exceed 30 days.¹³⁴ After 30 days, a full guardianship proceeding must be initiated under § 5511.¹³⁵

Because the Advisory Committee recommends the restructuring and reorganization of § 5513, the proposed legislation repeals the current statutory language of § 5513 and adds new subsections. In several instances, the re-codified framework differs substantively from the provisions that are proposed to be repealed.¹³⁶ The proposed legislation contains the following provisions:

- (1) Upon petition and a hearing at which clear and convincing evidence is shown, the court may appoint an emergency guardian or guardians of the person or estate of a person alleged to be incapacitated, when it appears that (i) the person lacks capacity and needs a guardian and (ii) a failure to appoint one will likely result in irreparable harm to the person or estate of the alleged incapacitated person. The court may appoint an emergency guardian of the person for an alleged incapacitated person who is in Pennsylvania but domiciled outside Pennsylvania, regardless of whether the alleged incapacitated person has property here.¹³⁷
- (2) Each provision of § 5511 applies to proceedings under the foregoing, except as otherwise provided or when the court finds that the application of the provision is not feasible under the circumstances. An emergency guardian so appointed for the person or estate of an alleged incapacitated person has, and is subject to, only such powers, duties and liabilities (and only serves for such time) as the court decrees.¹³⁸

¹³² 20 Pa.C.S. § 5513 (6th sentence).

¹³³ 20 Pa.C.S. § 5513 (7th sentence).

¹³⁴ 20 Pa.C.S. § 5513 (8th sentence).

¹³⁵ 20 Pa.C.S. § 5513 (9th sentence).

¹³⁶ This proposed statutory framework and language is comparable to that recommended by the Working Group.

¹³⁷ Proposed 20 Pa.C.S. § 5513(a), which is based on the first sentence of current § 5513. *Infra* pp. 95-96. The inclusion of the word “likely” (“a failure to make such appointment will *likely* result in irreparable harm”) is the only substantive difference between this provision and current law.

¹³⁸ Proposed 20 Pa.C.S. § 5513(b), which is based on the second and third sentences of current § 5513. *Infra* p. 96. The only substantive difference between this provision and current law is the inclusion of the phrase “or as otherwise provided in this section.”

- (3) An initial emergency order appointing an emergency guardian of the person or guardian of the estate may be effective up to 30 days.¹³⁹
- (4) Prior to the expiration of the initial emergency order, the court may appoint counsel for the alleged incapacitated person. If an extension of the emergency order is sought under the following provision, the court must appoint counsel for the alleged incapacitated person.¹⁴⁰
- (5) An emergency order may be extended for not more than an additional 60 days upon the consent of the petitioner, emergency guardian and counsel for the incapacitated person. At any time after the filing of the petition for emergency guardianship, upon a determination that the duration of incapacity of the alleged incapacitated person is likely to extend longer than the permitted emergency guardianship period, the court must direct the petitioner to file a petition for a permanent guardianship of the person or a permanent guardianship of the estate, or both. The period of extension of the emergency order is extended to the date of the order on the permanent guardianship petition.¹⁴¹

The proposed legislation repeals the last three sentences of current § 5513, since they become unnecessary given the proposed restructuring of the section and the proposed amendments.¹⁴²

¹³⁹ Proposed 20 Pa.C.S. § 5513(c). *Infra* p. 96. This provision replaces the fourth sentence of current § 5513 by (1) specifying that the provision concerns an initial emergency order and either an emergency guardian of the person or guardian of the estate and (2) extending the time period from 72 hours to 30 days.

¹⁴⁰ Proposed 20 Pa.C.S. § 5513(d). *Infra* p. 96.

¹⁴¹ Proposed 20 Pa.C.S. § 5513(e). *Infra* p. 97. This provision replaces the fifth sentence of current § 5513. The proposed legislation contains a comment explaining the provision's intent, which is "to avoid multiple, successive emergency guardianships that do not provide the full panoply of procedural guarantees to the alleged incapacitated person. Once the emergency guardianship has been ordered, the only alternative is to file a petition for permanent guardianship." *Infra* p. 97. Although the Working Group recommended the repeal of the fifth sentence of current § 5513, it simply recommended that an emergency order may be extended for no more than an additional 60 days without a full guardianship proceeding under § 5511 upon the consent of petitioner, emergency guardian and counsel for the alleged incapacitated person.

¹⁴² The Advisory Committee approved the repeal of these provisions. Similarly, the Working Group recommended the repeal of the last two sentences of current § 5513. However, the Working Group favored the retention of the sixth sentence of current § 5513 ("After expiration of the emergency order or any extension, a full guardianship proceeding must be initiated pursuant to section 5511."), to be included as a proposed new subsection.

Removal and Discharge of Guardian

Section 5515 lists several provisions in Chapter 55 (specifically regarding a personal representative or a guardian of a minor and their sureties) that apply to a guardian of an incapacitated person and the guardian's surety: §§ 3182 (grounds for removal), 3183 (procedure for and effect of removal), 3184 (discharge of personal representative and surety), 5115 (appointment of guardian in conveyance), 5121 (necessity, form and amount), 5122 (when bond not required) and 5123 (requiring or changing amount of bond).

With respect to the removal and discharge of a guardian, the Advisory Committee reviewed §§ 3182,¹⁴³ 3183,¹⁴⁴ and 3184.¹⁴⁵

¹⁴³ Section 3182 provides the following:

The court shall have exclusive power to remove a personal representative when he:

(1) is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or

(2) (Deleted by amendment).

(3) has become incapacitated to discharge the duties of his office because of sickness or physical or mental incapacity and his incapacity is likely to continue to the injury of the estate; or

(4) has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or

(4.1) has been charged with voluntary manslaughter or homicide, except homicide by vehicle, as set forth in sections 3155 (relating to persons entitled) and 3156 (relating to persons not qualified), provided that the removal shall not occur on these grounds if the charge has been dismissed, withdrawn or terminated by a verdict of not guilty; or

(5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.

¹⁴⁴ Section 3183 provides the following:

The court on its own motion may, and on the petition of any party in interest alleging adequate grounds for removal shall, order the personal representative to appear and show cause why he should not be removed, or, when necessary to protect the rights of creditors or parties in interest, may summarily remove him. Upon removal, the court may direct the grant of new letters testamentary or of administration by the register to the person entitled and may, by summary attachment of the person or other appropriate orders, provide for the security and delivery of the assets of the estate, together with all books, accounts and papers relating thereto. Any personal representative summarily removed under the provisions of this section may apply, by petition, to have the decree of removal vacated and to be reinstated, and, if the court shall vacate the decree of removal and reinstate him, it shall thereupon make any orders which may be appropriate to accomplish the reinstatement.

¹⁴⁵ Section 3184 provides the following:

After confirmation of his final account and distribution to the parties entitled, a personal representative and his surety may be discharged by the court from future liability. The court may discharge only the surety from future liability, allowing the personal representative to continue without surety, upon condition that no further assets shall come into the control of the personal representative until he files another bond with sufficient surety, as required by the register.

The Advisory Committee recommends the elimination of the cross-references in § 5515, to be replaced by substantive provisions in Chapter 55. Current law requires a person to locate the cross-referenced section in 20 Pa.C.S. Chapter 31 or 51 and then interpret the meaning of the statutory language as it relates to a guardian of an incapacitated person. Accordingly, the proposed legislation repeals § 5515 and re-codifies its provisions as three separate sections: §§ 5515.1 (removal and discharge of guardian), 5515.2 (appointment of guardian in conveyance) and 5515.3 (bond). Sections 3182, 3183 and 3184 are re-codified as § 5515.1(a), (b) and (c):¹⁴⁶

- (1) The court has the exclusive power to remove a guardian if the guardian (i) is wasting or mismanaging the estate, (ii) is or is likely to become insolvent, (iii) has failed to perform any duty imposed by law, (iv) has become incapacitated to discharge the duties as guardian and the incapacity is likely to continue to the injury of the estate or the incapacitated person, or (v) has removed from this Commonwealth or has ceased to have a known place of residence therein, without furnishing a security or additional security as the court directs.¹⁴⁷
- (2) In addition to foregoing paragraph (1), the court may remove a guardian if the interests of the estate or the incapacitated person are likely to be jeopardized by the guardian's continuance as guardian.¹⁴⁸
- (3) On the court's own motion or on the petition of any party in interest alleging adequate grounds for removal of a guardian, the court must (i) order the guardian to appear and show cause why the guardian should not be removed or (ii) summarily remove the guardian when necessary to protect the rights of creditors or parties in interest.¹⁴⁹
- (4) Upon removal of a guardian of the person or guardian of the estate, the court must appoint a successor guardian and may appoint a co-guardian and, by summary attachment of the guardian or other appropriate orders, provide for the security and delivery of the assets of the estate, together with all books, accounts and papers relating thereto.¹⁵⁰

¹⁴⁶ However, § 3182(4.1) is inapplicable and not part of the re-codification. Necessary technical changes are also made throughout § 5515.1.

¹⁴⁷ Proposed 20 Pa.C.S. § 5515.1(a)(1), which is based on § 3182(1)-(4). *Infra* p. 98.

¹⁴⁸ Proposed 20 Pa.C.S. § 5515.1(a)(2), which is based on § 3182(5). *Infra* p. 98.

¹⁴⁹ Proposed 20 Pa.C.S. § 5515.1(b)(1), which is based on § 3183 (1st sentence). *Infra* p. 99.

¹⁵⁰ Proposed 20 Pa.C.S. § 5515.1(b)(2), which is based on § 3183 (2nd sentence). *Infra* p. 99.

- (5) Any guardian summarily removed may petition to have the decree of removal vacated and to be reinstated. If the court vacates the decree of removal and reinstates the guardian, it must make any appropriate orders to accomplish the reinstatement.¹⁵¹
- (6) After confirmation of the final account and distribution to the parties entitled, a guardian of the estate and the guardian's surety may be discharged by the court from future liability. The court may discharge only the surety from future liability, allowing the guardian to continue without surety, upon condition that no further assets shall come into the control of the guardian until the guardian files another bond with sufficient surety, if required.¹⁵²

Appointment of Guardian in Conveyance

The Advisory Committee reviewed § 5115 (appointment of guardian in conveyance),¹⁵³ which is cross-referenced in § 5515. The Advisory Committee favors the repeal of § 5515, with § 5115 being re-codified as a new section. Therefore, the proposed legislation adds a new § 5515.2, with statutory language mirroring that of § 5603(q), which concerns the power of an agent to engage in retirement plan transactions. The new section provides that a deed or instrument creating a gift or designating a beneficiary in a life insurance policy, annuity contract, retirement plan¹⁵⁴ or similar arrangements providing for payments to the incapacitated person or to others after the incapacitated person's death, may contain an appointment of a guardian of the estate or interest of each named beneficiary who is incapacitated.¹⁵⁵

¹⁵¹ Proposed 20 Pa.C.S. § 5515.1(b)(3), which is based on § 3183 (3rd sentence). *Infra* p. 99.

¹⁵² Proposed 20 Pa.C.S. § 5515.1(c), which is based on § 3184. *Infra* p. 99.

¹⁵³ Section 5115 provides the following:

Any person, who makes a deed or gift inter vivos or exercises a right under an insurance or annuity policy to designate the beneficiary to receive the proceeds of such policy, may in such deed or in the instrument creating such gift or designating such beneficiary, appoint a guardian of the estate or interest of each beneficiary named therein who shall be a minor or otherwise incapacitated. Payment by an insurance company to the guardian of such beneficiary so appointed shall discharge the insurance company to the extent of such payment to the same effect as payment to an otherwise duly appointed and qualified guardian.

¹⁵⁴ A retirement plan would include, but not be limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account. *Infra* p. 100.

¹⁵⁵ Proposed 20 Pa.C.S. § 5515.2. *Infra* p. 100. Payment by an insurance or other financial services company to the beneficiary's guardian so appointed would discharge the paying company to the same effect as payment to an otherwise duly appointed and qualified guardian. *Infra* p. 100.

Posting of Bond

The Advisory Committee reviewed a number of specific provisions under Chapter 55 regarding the posting of a bond: § 5553(a), which concerns guardianship support agencies,¹⁵⁶ and Subchapter C of Chapter 51, which concerns minors and includes §§ 5121 (necessity, form and amount),¹⁵⁷ 5122 (when bond not required)¹⁵⁸ and 5123 (requiring or changing amount of bond).¹⁵⁹ Current § 5515 (provisions similar to other estates) cross-references §§ 5121, 5122 and 5123, among other sections.¹⁶⁰

¹⁵⁶ Section 5553(a) provides the following:

§ 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.

¹⁵⁷ Section 5121 provides the following:

Except as hereinafter provided, every guardian of the estate of a minor shall execute and file a bond which shall be in the name of the Commonwealth, with sufficient surety, in such amount as the court considers necessary, having regard to the value of the personal estate which will come into the control of the guardian, 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 administer the estate 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 administer the estate according to law, this obligation shall be void as to the guardian or guardians who shall so administer the estate; but otherwise, it shall remain in force.

¹⁵⁸ Section 5122 provides the following:

(a) Guardian named in conveyance.--No bond shall be required of a guardian appointed by or in accordance with the terms of a will, inter vivos instrument, or insurance contract as to the property acquired under the authority of such appointment, unless it is required by the conveyance, or unless the court, for cause shown, deems it advisable.

(b) Corporate guardian.--No bond shall be required of a bank and trust company or of a trust company incorporated in the Commonwealth, or of a national bank having its principal office in the Commonwealth, unless the court, for cause shown, deems it advisable.

(c) Nonresident corporation.--A nonresident corporation or a national bank having its principal office out of the Commonwealth, otherwise qualified to act as guardian, in the discretion of the court, may be excused from giving bond.

(d) Other cases.--In all other cases, the court may dispense with the requirement of a bond when, for cause shown, it finds that no bond is necessary.

¹⁵⁹ Section 5123 provides that “[t]he court, for cause shown, and after such notice, if any, as it shall direct, may require a surety bond, or increase or decrease the amount of an existing bond, or require more or less security therefor.”

¹⁶⁰ *Supra* p. 35.

The Advisory Committee favors the repeal of § 5515, with §§ 5121, 5122 and 5123 being re-codified as a new section. Accordingly, the proposed legislation adds a new § 5515.3 (bond), which provides the following:

- (1) In general, every guardian of the estate must execute and file a bond in the name of the Commonwealth, with sufficient surety, in an amount the court considers necessary, having regard to the value of the personal estate that will come into the control of the guardian, and conditioned in the following form: (i) if the guardian administers the estate well and according to law, this obligation is void, but otherwise it remains in force and (ii) if a co-guardian administers the estate well and according to law, this obligation is void as to that co-guardian who so administers the estate, but otherwise it remains in force.¹⁶¹
- (2) Unless deemed advisable by the court for cause shown, a bond is not required of (i) a guardian appointed by or in accordance with the terms of a will, inter vivos instrument or insurance contract as to the property acquired under the authority of the appointment, unless it is required by the conveyance or (ii) a bank and trust company, a trust company incorporated in Pennsylvania or a national bank having its principal office in Pennsylvania.¹⁶²
- (3) The court has discretion to not require a bond (i) from a nonresident corporation or a national bank having its principal office outside Pennsylvania, otherwise qualified to act as guardian and (ii) in all other cases when, for cause shown, it finds that no bond is necessary.¹⁶³
- (4) For cause shown and after any notice that it directs, the court may require a surety bond or increase or decrease the amount of an existing bond or require more or less security.¹⁶⁴

The Advisory Committee also discussed the need to regulate guardianship support agencies, agreeing that periodic monitoring and oversight are necessary, including the enforcement of the submission of annual reports and auditing. It further acknowledged that although it would be relevant for a court to look into the financial responsibility and qualifications of each guardian, that process would be burdensome. As a result of its deliberations, the Advisory Committee favors amending the last sentence of § 5553(a) to allow the court to require a guardianship support agency to post bond.”¹⁶⁵

¹⁶¹ Proposed 20 Pa.C.S. § 5515.3(a). *Infra* pp. 100-101.

¹⁶² Proposed 20 Pa.C.S. § 5515.3(b). *Infra* p. 101.

¹⁶³ Proposed 20 Pa.C.S. § 5515.3(c). *Infra* p. 101.

¹⁶⁴ Proposed 20 Pa.C.S. § 5515.3(d). *Infra* p. 101.

¹⁶⁵ *Infra* p. 127.

Evidence of Incapacity

To establish incapacity, the petitioner must present testimony¹⁶⁶ establishing “the nature and extent of the alleged incapacities and disabilities and the person’s mental, emotional and physical condition, adaptive behavior and social skills.” The petition must also present evidence regarding (1) the services used 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; (2) the types of assistance required by the person and why no less restrictive alternatives would be appropriate and (3) the probability that the extent of the person’s incapacities may significantly lessen or change.¹⁶⁷

The Advisory Committee recommends the amendment of § 5518 to clarify that procedures differ when incapacity is contested. The proposed legislation provides the following:¹⁶⁸

- (1) To establish incapacity in a proceeding in which the incapacity of the alleged incapacitated person is contested, the petitioner must present the specified testimony in person or by teleconference, videoconference or deposition.
- (2) In a proceeding in which the capacity of the alleged incapacitated person is uncontested and that person (or the person’s counsel) is present, the petitioner may establish incapacity by a sworn statement from the qualified individuals.¹⁶⁹

Cross-Examination of Witnesses

Testimony as to the capacity of the alleged incapacitated person is subject to cross-examination by counsel for the alleged incapacitated person.¹⁷⁰ The proposed legislation specifies that (1) testimony as to the capacity of the alleged incapacitated person is subject to cross-examination except as provided in § 5518 and (2) cross-

¹⁶⁶ The testimony must be presented in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner. 20 Pa.C.S. § 5518.

¹⁶⁷ *Id.*

¹⁶⁸ The proposed statutory language is the same as that recommended by the Working Group, except that references to testimony by teleconference and videoconference are included. As also recommended by the Working Group, the proposed legislation changes the word “petition” in the second sentence of 20 Pa.C.S. § 5518 to “petitioner.”

¹⁶⁹ *Infra* pp. 101-102. The proposed legislation includes a comment specifying that the addition of the references to testimony by teleconference and videoconference is intended to clarify existing law. *Infra* p. 102.

¹⁷⁰ 20 Pa.C.S. § 5518.1.

examination is permitted by individuals other than counsel for the alleged incapacitated person.¹⁷¹

Reports

Section 5521(c) provides a statutory framework for reports that a guardian must file with the court. The introductory language of subsection (c)(1) specifies that “[e]ach guardian of an incapacitated person shall file with the court appointing him a report, at least once within the first 12 months of his appointment and at least annually thereafter.” The Advisory Committee recommends several amendments to this introductory language, including two amendments to make the language gender-neutral. If the proposed legislation is enacted, this introductory language would specify that each guardian of an incapacitated person must file a report with the appointing court within the first 12 months of the appointment and annually thereafter.¹⁷²

With respect to the contents of a guardian’s report, the Advisory Committee recommends additional information regarding a guardian of the person, including the number of times that the guardian’s representative personally visited the incapacitated person and any plans for future care, where appropriate. Accordingly, the proposed legislation amends § 5521(c)(1)(ii) to supplement clause (E) and add a clause (F).¹⁷³

The Advisory Committee also recommends a new provision specifying that the failure to file a timely report subjects the guardian to appropriate sanctions. The proposed legislation adds a new paragraph (3) to current § 5521(c).¹⁷⁴ A comment notes that the purpose of this provision is to assure that the guardian is properly monitoring the incapacitated person and spending an appropriate amount of time and resources on behalf of the incapacitated person. Furthermore, it is intended that the court order appropriate sanctions commensurate with the inappropriate conduct of the guardian, taking into consideration such factors as whether the guardian is an individual or a professional guardian, the relationship between the guardian and the incapacitated person, and the size of the estate.¹⁷⁵

¹⁷¹ *Infra* p. 102. The proposed statutory language involving the stated exception is the same as that recommended by the Working Group. The Advisory Committee additionally recommends the repeal of the phrase “by counsel for the alleged incapacitated person,” to allow other individuals to engage in cross-examination.

¹⁷² *Infra* p. 116. The Working Group recommended no amendments to this introductory language.

¹⁷³ *Infra* p. 116. These amendments differ only slightly from those recommended by the Working Group. The Working Group used the term “agent” instead of “representative” in the amendment of clause (E) and did not include the phrase “where appropriate” in proposed clause (F).

¹⁷⁴ *Infra* p. 117. This new paragraph differs only slightly from that recommended by the Working Group. The Working Group recommended the following language: “Failure of a guardian to file a timely report under this subsection shall be considered a breach of duty.”

¹⁷⁵ *Infra* pp. 120-121.

The proposed legislation includes a comment explaining the plans for future care and gives these examples: a plan for supportive services, an individualized education plan, a behavioral supports plan and a formalized treatment plan. An annual plan could be based on a functional assessment of abilities and limitations of the individual with diminished capacity.¹⁷⁶

Liability

Chapter 55 provides a statutory framework for criminal and civil liability: “[i]n the absence of gross negligence, recklessness or intentional misconduct, a unit of local government, nonprofit corporation or guardianship support agency . . . 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.”¹⁷⁷

Section 430(a)-(d) of the UGPPA addresses personal liability of a conservator in the following manner:

(a) Except as otherwise agreed, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

Using § 430 of the UGPPA as a model, the Working Group recommended the amendment of § 5521(g) to convert the current statutory language into a new paragraph (1) and add separate paragraphs regarding liability.¹⁷⁸

¹⁷⁶ *Infra* p. 120. The proposed comment is the same as that recommended by the Working Group.

¹⁷⁷ 20 Pa.C.S. § 5521(g).

¹⁷⁸ The Working Group proposed new paragraphs (2)-(5) as follows:

(2) Except as otherwise agreed, a guardian of the estate is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the guardian fails to reveal in the contract the representative capacity and identify the estate.

The Working Group also recommended that these provisions replace the cross-reference to § 3331 in § 5521(b).¹⁷⁹

However, the Advisory Committee disfavors the approach of the Working Group and instead recommends separate subsections regarding liability for a guardian of the person and for a guardian of the estate. The proposed legislation amends § 5521(g) to address the liability of a guardian of the person and specifically provide the following:

- (1) Absent gross negligence, recklessness or intentional misconduct, a guardian of the person is not criminally liable or civilly liable for damages for performing duties as a guardian of the person, as authorized under Chapter 55.¹⁸⁰
- (2) Except as otherwise agreed, a guardian of the person is not personally liable on a contract properly entered into by the guardian of the person in a fiduciary capacity.¹⁸¹

(3) A guardian of the estate is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate if the guardian failed to exercise reasonable care, skill and caution.

(4) Claims based on contracts entered into by a guardian in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the guardian in a fiduciary capacity, whether or not the guardian is personally liable.

(5) A question of liability between the estate and the guardian personally may be determined in a proceeding for accounting, surcharge or indemnification, or in another appropriate proceeding or action.

¹⁷⁹ Section 5521(b) provides that the powers, duties and liabilities of a guardian of an incapacitated person are the same as those set forth in specifically cross-referenced sections of the Probate, Estates and Fiduciaries Code, including § 3331, which provides the following:

§ 3331. Liability of personal representative on contracts.

Unless he expressly contracts otherwise, in writing, a personal representative shall not be personally liable on any written contract which is within his authority as personal representative and discloses that he is contracting as personal representative of a named estate. Any action on such a contract shall be brought against the personal representative in his fiduciary capacity only, or against his successor in such capacity, and execution upon any judgment obtained therein shall be had only against property of the estate.

¹⁸⁰ Proposed amendments regarding 20 Pa.C.S. § 5521(g)(1). *Infra* p. 117. The Advisory Committee agreed that subsection (g) should contain the same standard of liability for all persons. Accordingly, it favored eliminating the references in current law to a unit of local government, nonprofit corporation and guardianship support agency. The Advisory Committee noted that the liability standards of a guardian of the person are necessarily different from those of a guardian of the estate. The Advisory Committee also recognized that historically, it has been difficult to find guardians of the person; they generally are “volunteers” or family members, without particular expertise or experience in serving as a guardian. Because subsection (g) applies to non-profit organizations and guardians of the last resort, the Advisory Committee acknowledged that a stricter standard of liability may further reduce the pool of those willing to serve as guardian of the person. Finally, the Advisory Committee observed that § 305 of the Adult Protective Services Act, *supra* note 63, provides that in the absence of willful misconduct or gross negligence, there is no civil or criminal liability.

¹⁸¹ Proposed 20 Pa.C.S. § 5521(g)(2). *Infra* p. 117.

The proposed legislation contains a comment (1) emphasizing that the same standard applies to all guardians of the person (regardless of whether the guardian of the person is an individual, unit of local government, nonprofit corporation or guardianship support agency) and (2) explaining that the provision regarding liability on a contract properly entered into in a fiduciary capacity is intended to cover such circumstances as the guardian of the person's execution of forms (i) for admittance to a nursing home and (ii) regarding informed consent for medical care for the incapacitated person.¹⁸²

The proposed legislation also includes provisions regarding liability of a guardian of the estate:¹⁸³

- (1) Except as otherwise agreed, a guardian of the estate is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the guardian fails to reveal in the contract the representative capacity and identify the estate.¹⁸⁴
- (2) If a guardian of the estate fails to exercise reasonable care, skill and caution for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate, the guardian of the estate may be personally liable to the estate. The court must evaluate reasonable care, skill and caution in the context of the identity, background and experience of the guardian of the estate.¹⁸⁵
- (3) A question of liability between the estate and the guardian personally may be determined in a proceeding for accounting, surcharge or indemnification or in another appropriate proceeding.¹⁸⁶

¹⁸² *Infra* p. 121.

¹⁸³ These principles are based on the recommendations of the Working Group. The Working Group also favored the inclusion of the following statutory language, based on § 430(c) of the UGPPA:

Claims based on contracts entered into by a guardian in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the guardian in a fiduciary capacity, whether or not the guardian is personally liable.

However, the Advisory Committee does not recommend the inclusion of the foregoing provision, and therefore it is omitted from the proposed legislation.

¹⁸⁴ Proposed 20 Pa.C.S. § 5521(h)(1). *Infra* p. 117.

¹⁸⁵ Proposed 20 Pa.C.S. § 5521(h)(2). *Infra* p. 118. The Advisory Committee discussed extensively whether this provision should contain the standard of "good faith, care, competence and diligence" instead of "reasonable care, skill and caution." However, it ultimately agreed that "reasonable care, skill and caution" should be used, which is the same standard used in the Uniform Trust Act. 20 Pa.C.S. § 7774.

¹⁸⁶ Proposed 20 Pa.C.S. § 5521(h)(3). *Infra* p. 118.

Finally, the proposed legislation contains a comment explaining that the liability provisions regarding a guardian of the estate are not intended to change the standard set forth in § 7212 of the prudent investor rule¹⁸⁷ or the law regarding the court's authority. The court must evaluate the application of reasonable care, skill and caution by the guardian of the estate in the context of the identity, background and experience of the guardian of the estate. Therefore, an individual guardian with no particular financial or fiduciary background should not be held to the same standard of reasonable skill, care and caution as a professional fiduciary.¹⁸⁸

In light of the addition of the foregoing amendments to § 5521 regarding the liability of a guardian for certain contracts, the proposed legislation amends § 5521(b) to repeal the cross-reference to § 3331.

Delegation

The Pennsylvania Uniform Trust Act¹⁸⁹ addresses delegation by a trustee in the following manner:

§ 7777. Delegation by trustee.

(a) Standards for delegation.--A trustee may delegate duties and powers that a prudent trustee of comparable skills might delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:

- (1) selecting an agent;
- (2) establishing the scope and specific terms of the delegation, consistent with the purposes and provisions of the trust; and
- (3) reviewing periodically the agent's actions in order to monitor the agent's performance and compliance with the scope and specific terms of the delegation.

(b) Agent's duty.--The agent shall comply with the scope and terms of the delegation and shall exercise the delegated duties and powers with reasonable care, skill and caution and shall be liable to the trust for failure to do so. An agent who represents having special skills or expertise shall use those special skills or that expertise.

(c) Liability.--A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

¹⁸⁷ 20 Pa.C.S. §§ 7201-7214. Section 7212 (degree of care) provides that “[a] fiduciary shall exercise reasonable care, skill and caution in making and implementing investment and management decisions. A fiduciary who represents that he has special investment skills shall exercise those skills.”

¹⁸⁸ *Infra* p. 121.

¹⁸⁹ 20 Pa.C.S. §§ 7701-7790.3.

(d) Jurisdiction.--An agent who accepts the delegation of duties or powers from a trustee who is subject to the jurisdiction of a court of this Commonwealth shall be deemed to have submitted to the jurisdiction of that court even if the terms of the delegation provide for a different jurisdiction or venue.

(e) When one trustee may delegate to another.--A trustee may delegate duties and powers to another trustee if the delegating trustee reasonably believes that the other trustee has greater skills than the delegating trustee with respect to those duties and powers and the other trustee accepts the delegation. The delegating trustee shall not be responsible for the decisions, actions or inactions of the trustee to whom those duties and powers have been delegated if the delegating trustee has exercised reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the performance of the trustee to whom the duties and powers have been delegated and that trustee's compliance with the scope and specific terms of the delegation.

The prudent investor rule¹⁹⁰ also provides for delegation:

§ 7206. Delegation.

(a) Permissible delegation.--A fiduciary may delegate investment and management functions that a prudent investor of comparable skills might delegate under the circumstances.

(b) Duties of fiduciary.--A fiduciary shall not be responsible for the investment decisions or actions of the investment agent to which the investment functions are delegated if the fiduciary exercises reasonable care, skill and caution in selecting the investment agent, in establishing the scope and specific terms of the delegation and in reviewing periodically the investment agent's actions in order to monitor the investment agent's performance and compliance with the scope and specific terms of the delegation.

(c) Duties of investment agent.--The investment agent shall comply with the scope and terms of the delegation and shall exercise the delegated function with reasonable care, skill and caution and shall be liable to the trust for failure to do so. An investment agent who represents that he has special investment skills shall exercise those skills.

(d) Jurisdiction.--An investment agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the jurisdiction of a court of this Commonwealth shall be deemed to have submitted to the jurisdiction of that court even if the delegation agreement provides for a different jurisdiction or venue.

¹⁹⁰ *Supra* note 187.

(e) When cofiduciary may delegate to another cofiduciary.--A cofiduciary may delegate investment and management functions to another cofiduciary if the delegating cofiduciary reasonably believes that the other cofiduciary has greater investment skills than the delegating cofiduciary with respect to those functions. The delegating cofiduciary shall not be responsible for the investment decisions or actions of the other cofiduciary to which the investment functions are delegated if the delegating cofiduciary exercises reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the other cofiduciary's actions in order to monitor the cofiduciary's performance and compliance with the scope and specific terms of the delegation.

(f) Mutual funds.--Investment in a mutual fund is not a delegation of investment function, and neither the mutual fund nor its advisor is an investment agent.

Similarly, the UGPPA provides that “[a] conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.”¹⁹¹ The conservator must exercise reasonable care, skill, and caution in selecting an agent, establishing the scope and terms of a delegation (consistent with the purposes and terms of the conservatorship), periodically reviewing an agent's overall performance and compliance with the terms of the delegation, and redressing an agent's action or decision that would constitute a breach of trust if performed by the conservator.¹⁹² A conservator who complies with the foregoing “is not liable to the protected person or to the estate for the decisions or actions of the agent to whom a function was delegated.”¹⁹³ In performing a delegated function, an agent must exercise reasonable care to comply with the terms of the delegation.¹⁹⁴ By accepting a delegation from a conservator subject to the law of a state, an agent submits to the jurisdiction of the courts of that state.¹⁹⁵

Using 20 Pa.C.S. § 7777 and § 426 of the UGPPA as models, the Working Group recommended a new subsection in § 5521 specifying that a guardian of the estate may delegate powers and duties, and an agent may accept the delegation, subject to several specified provisos.¹⁹⁶

¹⁹¹ Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 426(a).

¹⁹² *Id.* § 426(b).

¹⁹³ *Id.* § 426(c).

¹⁹⁴ *Id.* § 426(d).

¹⁹⁵ *Id.* § 426(e).

¹⁹⁶ The Working Group agreed that any delegation should be subject to the following:

(1) A guardian may not delegate to an agent or another guardian the entire administration of the estate, but a guardian may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(2) A guardian shall exercise reasonable care, skill and caution in the following:

The Advisory Committee favors statutory language more reflective of § 7777. The proposed legislation, therefore, adds a new subsection (i) to § 5521, which sets forth specific provisions regarding the delegation of the duties and powers of a guardian of the estate (and an agent's acceptance of the delegation of those powers and duties).¹⁹⁷

- (1) A guardian of the estate must exercise reasonable care, skill and caution in selecting an agent, establishing the scope and specific terms of the delegation (consistent with the purposes and terms of the guardianship) and reviewing periodically the agent's actions to monitor the agent's performance and compliance with the scope and specific terms of the delegation.¹⁹⁸ A guardian of the estate who so complies is not be liable to the incapacitated person or to the incapacitated person's estate for an action of the agent to whom the function was delegated.¹⁹⁹
- (2) The agent must comply with the scope and terms of the delegation, exercise the delegated duties and powers with reasonable care, skill and caution and be liable to the incapacitated person's estate for failure to do so. An agent who represents having special skills or expertise must use those special skills or that expertise.²⁰⁰

(i) Selecting an agent, including the verification of the agent's financial accountability if the agent will be handling financial matters for the incapacitated person.

(ii) Establishing the scope and terms of a delegation, consistent with the purposes and terms of the guardianship.

(iii) Periodically reviewing an agent's overall performance and compliance with the terms of the delegation.

(iv) Redressing an action or decision of an agent which would constitute a breach of trust if performed by the guardian.

(3) A guardian who complies with paragraphs (1) and (2) is not personally liable to the incapacitated person or to the estate for the decisions or actions of the agent to whom a function was delegated.

(4) An agent shall:

(i) comply with the scope and terms of the delegation;

(ii) exercise reasonable care, skill and caution in performing a delegated function; and

(iii) be liable to the estate for the failure to comply with subparagraph (i) or (ii).

(5) An agent who represents having special skills or expertise must use those special skills or that expertise.

(6) By accepting a delegation from a guardian subject to the law of the Commonwealth, an agent submits to the jurisdiction of the courts of the Commonwealth.

¹⁹⁷ Proposed 20 Pa.C.S. § 5521(i) (introductory language). *Infra* p. 118.

¹⁹⁸ Proposed 20 Pa.C.S. § 5521(i)(1). *Infra* p. 118.

¹⁹⁹ Proposed 20 Pa.C.S. § 5521(i)(3). *Infra* p. 119.

²⁰⁰ Proposed 20 Pa.C.S. § 5521(i)(2). *Infra* p. 118.

- (3) An agent who accepts the delegation of duties or powers from a guardian of the estate who is subject to the jurisdiction of a court of Pennsylvania is deemed to have submitted to the jurisdiction of that court even if the terms of the delegation provide for a different jurisdiction or venue.²⁰¹
- (4) A co-guardian of the estate may delegate duties and powers to another co-guardian of the estate if the delegating co-guardian reasonably believes that the other co-guardian has greater skills than the delegating co-guardian with respect to those duties and powers and the other co-guardian accepts the delegation. The delegating co-guardian is not responsible for the decisions, actions or inactions of the co-guardian to whom those duties and powers have been delegated if the delegating co-guardian has exercised reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in periodically reviewing the performance of the co-guardian to whom the duties and powers have been delegated and that co-guardian's compliance with the scope and specific terms of the delegation.²⁰²

The proposed legislation also contains a comment explaining that (1) the use of the word "agent" in the new subsection does not imply an agency under Chapter 56 (powers of attorney) and (2) if a guardian of the estate delegates powers and duties in compliance with the new subsection, the court must evaluate the guardian's fees charged and the amount expended as a result of the delegation.²⁰³

Section 3319 (power of attorney; delegation of power over subscription rights and fractional shares; authorized delegations), which is cross-referenced in § 5521(b), also provides for delegation:

(a) Power of attorney.--A personal representative may convey real estate, transfer title to personal estate, or perform any other act of administration by an attorney or agent under a power of attorney. Nothing in this subsection authorizes the delegation of any discretionary power.

(b) Delegation of power over subscription rights and fractional shares.--Where there is more than one personal representative, one or more may delegate to another the power to decide whether rights to subscribe to stock should be sold or should be exercised, and also the power to decide whether a fractional share of stock should be sold or should be rounded out to a whole share through the purchase of an additional fraction, and also the power to carry out any such decision. Any delegation may extend to all subscription rights and fractional shares from time to time received by the personal representatives on account of

²⁰¹ Proposed 20 Pa.C.S. § 5521(i)(4). *Infra* p. 119.

²⁰² Proposed 20 Pa.C.S. § 5521(i)(5). *Infra* p. 119.

²⁰³ *Infra* p. 121.

stock held by them, or may be limited to any extent specified in the delegation. No exercise of any delegated power shall be valid, unless:

(1) the stock on which the subscription rights or fractional shares are issued are listed or traded on the New York Stock Exchange or any other exchange approved by the Department of Banking; and

(2) the shares held by the personal representatives on which the subscription rights or fractional shares are issued constitute less than 5% of the total outstanding shares of the same class of the same corporation.

(c) Delegation authorized by governing instrument.--Nothing in this section precludes a delegation authorized by the governing instrument.

The Advisory Committee considered including the substance of § 3319 in § 5521(i), along with the other delegation provisions.²⁰⁴ The Advisory Committee also considered specific language with respect to the delegation of nondiscretionary and discretionary powers.²⁰⁵ However, the Advisory Committee reasoned that such specificity is unnecessary, given the proposed framework for delegation generally and the broad authority for a guardian of the estate to delegate powers and duties. Nevertheless, the Advisory Committee recommends repealing the cross-reference to § 3319 in § 5521(b).

Inventory

The Working Group recommended the amendment of § 5521 to add a new subsection that provides that within 90 days after the order of appointment of an incapacitated person's guardian of the estate, the guardian must prepare and file with the appointing court a detailed inventory of the estate subject to the guardianship, including (1) an inventory and appraisal of the personal estate, (2) a statement of the real estate and (3) a statement of any real or personal estate that the guardian expects to thereafter acquire. The Working Group also recommended that this inventory be filed with an oath or affirmation that it is complete and accurate, based on the available information.²⁰⁶

²⁰⁴ The Advisory Committee discussed providing that, except as otherwise qualified, limited or directed by the court in its order of appointment, and without further court authorization or confirmation, a guardian of the estate may delegate to a co-guardian the power to decide, and carry out a decision, regarding stock transactions, based on § 3319(b).

²⁰⁵ The Advisory Committee discussed providing that, except as otherwise qualified, limited or directed by the court in its order of appointment, and without further court authorization or confirmation, a guardian of the estate may, after receiving court authorization or confirmation to exercise a power, delegate a nondiscretionary power to a co-guardian, an attorney or an agent under a power of attorney to act on that authority. The power of the guardian would therefore be analogous to the power of a personal representative under § 3319(a). Furthermore, the Advisory Committee considered a provision specifying that, with further court authorization or confirmation, a guardian of the estate may delegate a discretionary power.

²⁰⁶ The Working Group also proposed that a guardian must keep records of the administration of the estate and, subject to the other provisions of Chapter 55, make them available for examination on

In reviewing the matter of an inventory by a guardian of the estate, the Advisory Committee reviewed the Working's Group's recommendations, along with § 5142,²⁰⁷ which is cross-referenced in current § 5521(b), and § 419 of the UGPPA.²⁰⁸

Analogous to the Working Group's recommendations, the Advisory Committee proposes a new subsection (j) to § 5521 regarding an inventory. The proposed legislation provides that within 90 days after the order of appointment of an incapacitated person's guardian of the estate, the guardian must prepare and file with the appointing court a detailed inventory of (1) the real and personal property of the estate; (2) other assets in which the incapacitated person has an interest, including, but not limited to, information regarding life insurance, annuities and retirement plans and (3) all income received by the guardian on behalf of the incapacitated person and all funds received from the U.S. Department of Veterans Affairs, Social Security Administration and other periodic retirement or disability payments under private or governmental plans and other periodic payments payable for the life or life expectancy of the incapacitated person.²⁰⁹ This inventory must be filed with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.²¹⁰

In light of the addition of a new § 5521(j) regarding inventories, the proposed legislation amends § 5521(b) to repeal the cross-reference to § 5142.

Persons Dealing with the Guardian

The power of attorney provisions under Chapter 56 provide guidance regarding the issues of liability and immunity. A person who is given instructions by an agent in accordance with the terms of a power of attorney must comply with the instructions, and if the person fails to do so without reasonable cause, the person is subject to civil liability

reasonable request of a person interested in the incapacitated person's welfare. For a discussion of confidentiality and the disclosure of information, *see supra* pp. 18-22.

²⁰⁷ Section 5142 (inventory) provides the following:

Every guardian, within three months after real or personal estate of his ward comes into his possession, shall verify by oath and file with the clerk an inventory and appraisal of such personal estate, a statement of such real estate, and a statement of any real or personal estate which he expects to acquire thereafter.

²⁰⁸ Section 419 of the UGPPA (inventory; records) provides the following:

(a) Within 60 days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

²⁰⁹ Proposed 20 Pa.C.S. § 5521(j)(1). *Infra* pp. 119-120. The statutory language regarding income and funds received from governmental benefits and periodic payments is derived from § 5536(a). *Infra* pp. 122-123.

²¹⁰ Proposed 20 Pa.C.S. § 5521(j)(2). *Infra* p. 120. This proposed language is the same as that recommended by the Working Group.

for damages resulting from the noncompliance.²¹¹ Reasonable cause includes, but is not limited to, “a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment pursuant to section 302 of . . . the Older Adults Protective Services Act.”²¹² In addition, a “person who acts in good faith reliance on a power of attorney shall incur no liability as a result of acting in accordance with the instructions of the agent.”²¹³

Similarly, the UGPPA provides that, in general, a person who assists or deals with a conservator in good faith and for value in any transaction is protected as though the conservator properly exercised the power. Generally, even though a person knowingly deals with a conservator, that does not, by itself, require the person to inquire into the existence of a power or the propriety of its exercise. In addition, a person who pays or delivers assets to a conservator is not responsible for their proper application.²¹⁴

Using § 424 of the UGPPA as a model, the Working Group recommended a new § 5526 (protection of person dealing with guardian).²¹⁵

The Advisory Committee also recommends a new § 5526, but with § 5608 as a model and containing an additional provision regarding the sharing of information with the person to whom instructions are given. Therefore, the proposed legislation provides the following:

- (1) Any person who is given instructions by a guardian in accordance with the terms of a guardianship order must comply with the instructions. Any person who without reasonable cause fails to comply with those instructions is subject to civil liability for any damages resulting from noncompliance. Reasonable cause includes, but is not limited to, a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment under § 302 of either the Older

²¹¹ 20 Pa.C.S. § 5608(a) (1st & 2nd sentences).

²¹² *Id.* § 5608(a) (3rd sentence).

²¹³ *Id.* § 5608(b).

²¹⁴ Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 424(a).

²¹⁵ The Working Group’s proposed section provided the following:

(a) General rule.--A person who assists or deals with a guardian under this chapter in good faith and for value in any transaction is protected as though the guardian properly exercised the power. That a person knowingly deals with a guardian does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but any restriction on the power of the guardian as set forth in the guardianship order shall be effective as to third persons. A person who pays or delivers assets to a guardian is not responsible for their proper application.

(b) Additional protection.--Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the guardianship order and is not a substitute for protection provided to persons assisting or dealing with a guardian by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

Adults Protective Services Act or the Adult Protective Services Act.²¹⁶

- (2) Any person who acts in good faith reliance on a guardianship order incurs no liability for acting in accordance with the instructions of the guardian.²¹⁷
- (3) Upon request, a guardian must (i) give a copy of the guardianship order to the person to whom the guardian gives instructions, along with an affidavit of the guardian certifying that the guardianship order remains effective as written and (ii) inform the person of any restrictions or limitations on the guardian's authority.²¹⁸

Accounts

A guardian must “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.”²¹⁹ Because the Advisory Committee recommends several changes to this provision, the proposed legislation amends § 5531 (when accounting filed).²²⁰ If enacted, § 5531 would read as follows:

§ 5531. When account filed.

A guardian shall file an account of his administration whenever directed to do so by the court and may file an account at any other time.

Distributions During Incapacity

Section 5536(a) generally concerns distributions of income and principal during incapacity:

§ 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

²¹⁶ Proposed 20 Pa.C.S. § 5526(a). *Infra* p. 121.

²¹⁷ Proposed 20 Pa.C.S. § 5526(b). *Infra* p. 122.

²¹⁸ Proposed 20 Pa.C.S. § 5526(c). *Infra* p. 122.

²¹⁹ 20 Pa.C.S. § 5531.

²²⁰ *Infra* p. 122. The proposed amendment of § 5531 is the same as that recommended by the Working Group.

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. For purposes of this subsection, the term "income" means income as determined in accordance with the rules set forth in Chapter 81 (relating to principal and income), other than the power to adjust and the power to convert to a unitrust.

The Advisory Committee favors the restructuring of the provisions under this section into four paragraphs, with each sentence of current § 5536(a) constituting a separate paragraph. The proposed legislation adopts this statutory framework.²²¹

The first sentence of current § 5536(a), which is proposed as new paragraph (1) and amended,²²² was discussed in the context of the distinctions between principal and income on the one hand, and the policy reasons for requiring court approval for the payment of sums in the care and maintenance of the incapacitated person on the other. Social Security and veterans' benefits, along with other private and governmental pensions, have historically been classified as income instead of principal, since such moneys were expected to continue for the life of the incapacitated person and were not expected to be a wasting or depleting asset. In the very technical principal and income sense, the classification of receipts from retirement accounts, annuities and structured settlements is a difficult concept. However, it is consistent with the historical allowance of discretionary payments from the Social Security Administration, the U.S. Department of Veterans Affairs and private and governmental pensions to slightly broaden the list of "income" items by including annuities and structured settlements that are encountered. Therefore, the Advisory Committee recommends expressly allowing payments from the Social Security Administration, the U.S. Department of Veterans' Affairs, pensions, annuities and structured settlements for the care and maintenance of the incapacitated

²²¹ *Infra* pp. 122-123. The Working Group similarly recommended the restructuring of § 5536(a).

²²² The first sentence of proposed 20 Pa.C.S. § 5536(a)(1) reads as follows:

In reasonably exercising discretion, a guardian of the estate of an incapacitated person may expend without court approval for the care and maintenance of the incapacitated person all funds received from the United States Department of Veterans Affairs, Social Security Administration, other periodic retirement or disability payments under private or governmental plans, and other periodic payments payable for the life or life expectancy of the incapacitated person.

person without court approval, when those payments are payable for the life or life expectancy of the incapacitated person.²²³

If, however, periodic payments are payable for a fixed term rather than for life, the Advisory Committee recommends that any disbursement from these payments should require court approval. Since in many instances § 8149²²⁴ would consider a portion or even all of an annuity or other periodic payment to be “income,” it is necessary to except periodic payments that do not extend for the life or life expectancy of the incapacitated person from classification as “income.” Otherwise, that portion could be expended without prior court approval, which is not intended given the policy distinction reflected in proposed § 5536(a)(1). Accordingly, the Advisory Committee recommends an additional amendment to the fourth sentence of current § 5536(a), which is proposed § 5536(a)(4).

The proposed legislation specifies that the power to adjust and the power to convert to a unitrust does not apply, and periodic payments that are not payable for the life or life expectancy of the incapacitated person are considered to be principal under § 5536(a).²²⁵

The proposed legislation contains a comment to this section, which states that § 5536(a)(1) extends guidance to other periodic payments and allows discretionary expenditures without prior court approval for all periodic payments that are payable for the life or life expectancy of the incapacitated person, consistent with the historical allowance of discretionary expenditures of receipts from the Social Security Administration and the U.S. Department of Veterans Affairs. If such payments are very large (e.g., with a structured settlement), the court will likely take those payments into account in the selection of the guardian. The court may limit discretionary expenditures of income prospectively to cover special circumstances, thereby allowing flexibility for the court to frame the guardian’s discretionary authority in the most appropriate manner, consistent with a “budget” that takes into account the particular circumstances of the guardianship and the needs of the incapacitated person.²²⁶

²²³ Proposed 20 Pa.C.S. § 5536(a)(1) (1st sentence). *Infra* pp. 122-123. The proposed legislation also allows the court to limit discretionary expenditures of income where the financial circumstances and needs of the incapacitated person so require. Proposed 20 Pa.C.S. § 5536(a)(1) (2nd sentence). *Infra* p. 123. The Working Group only recommended changing “Veterans’ Administration” to “U.S. Department of Veterans Affairs” and adding “U.S.” as a modifier to “Social Security Administration” in proposed § 5536(a).

²²⁴ This is the section of the Pennsylvania Uniform Principal and Income Act (20 Pa.C.S. §§ 8101-8191) that concerns retirement benefits, individual retirement accounts, deferred compensation, annuities and similar payments.

²²⁵ Proposed 20 Pa.C.S. § 5536(a)(4). *Infra* p. 123.

²²⁶ *Infra* p. 126.

Finally, the proposed legislation adds another new paragraph to § 5536(a), specifying that fees for an incapacitated person's guardian of the person or guardian of the estate may not be paid from the income or principal of the incapacitated person's estate without court approval. However, the court may prospectively authorize a guardian's fees and retain the right to adjust and approve those fees upon review.²²⁷

Estate Plans

Section 5536(b) addresses powers regarding estate plans:

(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.

²²⁷ Proposed 20 Pa.C.S. § 5536(a)(5). *Infra* p. 124. The Working Group recommended the same language contained in the first sentence of this proposed paragraph. The second sentence of the proposed paragraph is based on a comment that the Working Group recommended ("Under subsection (a)(4), the court may prospectively approve a guardian's fees and reserve the right to adjust those fees upon review.").

(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.

The Advisory Committee recommends the amendment of paragraph (8) to conform to similar language in § 5603(q).²²⁸ Therefore, the proposed legislation amends § 5536(b)(8) to provide that the court's power includes the power to exercise all rights and privileges, including the designation of a beneficiary, under life insurance policies, annuity contracts, retirement plans (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account) or other plans or contractual arrangements providing for payments to the incapacitated person or to others after his death.²²⁹

Additionally, the Advisory Committee recommends that § 5536(b) specifically provide that the court may adopt a plan of gifts or authorize any other action, not just one that results in minimizing current or prospective taxes or that carries out a lifetime giving pattern. The Advisory Committee also recommends that the subsection provides that "any other action" explicitly includes an action that "creates or preserves the incapacitated person's eligibility for a benefit, a program or assistance under a statute or regulation."²³⁰

²²⁸ Current law provides that a principal may empower an agent to engage in retirement plan transactions, which means that:

the agent may contribute to, withdraw from and deposit funds in any type of retirement plan (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account), select and change payment options for the principal, make roll-over contributions from any retirement plan to other retirement plans and, in general, exercise all powers with respect to retirement plans that the principal could if present. However, the agent cannot designate himself beneficiary of a retirement plan unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal. An agent and a beneficiary of a retirement plan shall be liable as equity and justice may require to the extent that, as determined by the court, a beneficiary designation made by the agent is inconsistent with the known or probable intent of the principal.

20 Pa.C.S. §§ 5602(a)(18) & 5603(q).

²²⁹ *Infra* p. 125.

²³⁰ *Infra* p. 125. The proposed legislation contains a comment explaining how the amendment of § 5536(b) clarifies existing law. *Infra* p. 126.

Finally, the Advisory Committee favors more clarity in the first sentence of § 5536(b) regarding “all parties in interest,” recommending that that statute specifically set forth those persons entitled to notice. The proposed legislation, therefore, re-structures subsection (b) and adds a new subsection (c). Subsection (b) would provide that “[s]ubject to subsection (c), for good cause shown, the court shall have the power to substitute its judgment . . .”; subsection (c) would specify that “[t]he court may exercise its power under subsection (b) upon petition and with notice to” the following:²³¹

- (1) All persons who are sui juris and would be entitled to share in the incapacitated person’s estate if the incapacitated person died intestate at that time.
- (2) Any person known to the guardian who would be prejudiced by the proposed action.
- (3) Other parties as the court may direct.

Examiners, Mediators and Arbitrators

The orphans’ court division may appoint masters, auditors of accounts of fiduciaries, auditors to state accounts, examiners of assets, guardians and trustees ad litem and certain parties interested in an estate.²³² The Advisory Committee recommends two additional categories of appointees: (1) examiners of actions of a guardian of the estate and (2) mediators or arbitrators.

Specifically, the proposed amendment of § 751 provides that the orphans’ court division may appoint (1) an examiner to make periodic or special examinations of financial records of an incapacitated person’s estate and (2) a mediator or arbitrator if the parties desire mediation or arbitration but do not mutually agree on an independent one.

Furthermore, the proposed legislation provides that (1) the meeting place for the mediation or arbitration must be in Pennsylvania in a location selected by the mediator or arbitrator, (2) the mediator or arbitrator may extend the date of the meeting for good cause shown by either party or upon stipulation of both parties and (3) all files, records, reports, documents or other papers received or prepared by the mediator or arbitrator

²³¹ *Infra* pp. 124-126. This proposed language is analogous to the current language of § 5511(a) (11th sentence), *supra* p. 22, and to the language proposed by the Advisory Committee in its amendment of 20 Pa.C.S. § 5601.2 regarding powers of attorney and special rules for gifts and changes to a principal’s estate plan. Proposed § 5601.2(g)(2), which is part of Senate Bill No. 96 of 2011, provides the following:

- (2) Notice of the petition and hearing shall be given in the manner as the court shall direct to:
 - (i) All persons who are sui juris and would be entitled to share in the principal’s estate if the principal died intestate at that time.
 - (ii) Any person known to the agent who would be prejudiced by the proposed action.
 - (iii) Such other parties as the court may direct.

²³² 20 Pa.C.S. § 751.

while serving as such are confidential. Payment from an incapacitated person's estate for mediation or arbitration is subject to court approval.²³³

Compensation

The Advisory Committee recommends the amendment of § 752 regarding compensation. Therefore, the proposed legislation provides that “[s]ubject to any inconsistent general rule of court, the compensation of any master, auditor, examiner, guardian ad litem or trustee ad litem shall be paid from such source and in such amounts as the court directs.”²³⁴

Education

The Working Group recommended that a prospective guardian should be educated on the responsibilities of serving as guardian, acknowledging that the legal services community has begun placing such information on websites. The Advisory Committee concurs with this recommendation.

Guardianship Support Office

The Working Group also recommended the addition of a new § 5556 concerning a guardianship support office, along with an explanatory comment.²³⁵ The Advisory

²³³ *Infra* p. 81.

²³⁴ *Infra* p. 82.

²³⁵ Proposed § 5556 provided the following:

(a) Establishment.--The Department of Aging and the Department of Public Welfare shall each establish an Office of Guardianship Support, with adequate budget, staff and technical support for its effective administration.

(b) Applicability.--This section applies to services provided through the Office of Guardianship Support:

(1) By the Department of Aging, for individuals who are 60 years of age or older.

(2) By the Department of Public Welfare, for individuals who are at least 18 years of age and less than 60 years of age.

(c) Powers and duties.--The Office of Guardianship Support shall have the following powers and duties:

(1) Provide resources to a guardianship support agency, including an area agency on aging, for services provided under sections 5553 (relating to guardianship services) and 5554 (relating to services to courts, guardians and others).

(2) Collaborate with the Pennsylvania Supreme Court to develop uniform guardianship procedures and data collection practices among courts of common pleas under this chapter.

Committee recognizes that a new section regarding a guardianship support office represents a public policy decision and that consideration of the provisions of such a section is beyond the scope of the Advisory Committee. Accordingly, the Advisory Committee makes no recommendation regarding proposed § 5556.

(3) Provide technical assistance to guardianship support agencies to develop and implement services under this subchapter.

(4) Periodically review and evaluate the effectiveness of services and programs under this subchapter.

(5) Promulgate eligibility criteria based on the economic status of the alleged incapacitated person.

(6) Assist non-guardianship support agencies to develop more community resources for incapacitated persons.

(7) Promulgate regulations necessary to implement this section.

(d) Reimbursement.--

(1) Subject to paragraph (3), an alleged incapacitated person is eligible for services provided through the Office of Guardianship Support without the need to reimburse the Office of Guardianship Support if:

(i) the economic status of the alleged incapacitated party cannot be determined; or

(ii) the alleged incapacitated person is a resident of a State facility and there is no:

(A) other person willing and qualified to become guardian of the estate for the alleged incapacitated person; or

(B) funding for petitioning for, or providing guardianship services to, the alleged incapacitated person under this section.

(2) If an incapacitated person has received services provided through the Office of Guardianship Support and paragraph (1)(i) applied at the time the services were provided, the Office of Guardianship Support shall require the guardian of the estate to submit a report of the economic status of the incapacitated person as soon as the incapacitated person's economic status can be determined.

(3) If the report under paragraph (2) reveals that the incapacitated person has sufficient assets to reimburse the Office of Guardianship Support for services provided, the guardian of the estate shall reimburse the Office of Guardianship Support for the cost of services provided under this section.

Comment

The intent of this section is to encourage the two Offices of Guardianship Support to engage in interdepartmental cooperation and share activities as appropriate. This is especially important for individuals who must transition from one office to the other when they reach age 60.

POWERS OF GUARDIANS OF THE ESTATE

This section of the report summarizes the background information and current law reviewed by the Advisory Committee which formed the basis for the proposed legislation concerning the powers of guardians of the estate under 20 Pa.C.S. § 5521.

Statutory Framework

The specific duties of a guardian of the estate of an incapacitated person are set forth in 20 Pa.C.S. § 5521(b), which contains cross-references to 31 different sections of the Probate, Estates and Fiduciaries Code:

§ 5521. Provisions concerning powers, duties and liabilities.

* * *

(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 agent; 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).
* * *

The Advisory Committee acknowledged that several cross-referenced sections in § 5521(b) are inappropriate, confusing or difficult to understand in the context of the powers, duties and liabilities of a guardian of the estate of an incapacitated person. A person must locate the cross-referenced section in the trust or estate provisions within 20 Pa.C.S. and then interpret the meaning of the statutory language as it relates to a guardianship.²³⁶ Therefore, the Advisory Committee recommends the elimination of the cross-references in § 5521(b),²³⁷ to be replaced by substantive provisions within § 5521, which clarify and modernize the statutory language and specify which guardianship duties require further court approval and which do not.

The proposed legislation contained in this report repeals § 5521(b) and adds new subsections (a.1) and (b.1) through (b.13) to § 5521. Proposed subsection (b.1) identifies the powers of a guardian of the estate of an incapacitated person that do not require further court authorization or confirmation, except as otherwise qualified, limited or directed by the court in its order of appointment.²³⁸ Conversely, proposed subsection (b.2) identifies the powers that are subject to further court authorization or confirmation.²³⁹

²³⁶ In addition, several cross-referenced sections do not actually concern or apply to guardianship powers, duties and liabilities.

²³⁷ In contrast, the Working Group recommended only the repeal of the cross-references to §§ 3331 and 5142, to be replaced by new language elsewhere in § 5521.

²³⁸ *Infra* pp. 104-108.

²³⁹ *Infra* pp. 108-110.

Death or Removal of Guardian

The proposed legislation includes a new subsection in § 5521, which is based on cross-referenced § 3374 (death or removal of fiduciary)²⁴⁰ and applies to both a guardian of the estate and a guardian of the person. The new subsection provides that (1) an action or proceeding in which a guardian of the person or guardian of the estate is a party is not abated by the death or resignation of the guardian or by the termination of the guardian's authority and (2) the guardian's successor may be substituted in the action or proceeding in the manner provided by law.²⁴¹

Powers Generally Not Requiring Further Court Approval

Liability Insurance

With respect to the matter of liability insurance, the Advisory Committee reviewed the provisions of cross-referenced § 3313 (liability insurance),²⁴² the Pennsylvania Uniform Trust Act²⁴³ and the Uniform Guardianship and Protective Proceedings Act (UGPPA). The Pennsylvania Uniform Trust Act allows a trustee to “insure the assets of the trust against damage or loss and, at the expense of the trust, protect the trustee, the trustee's agents and the beneficiaries from liability to third persons arising from the administration of the trust.”²⁴⁴ Similarly, the UGPPA allows “[a] conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation” to “insure the assets of the estate against damage or loss and the conservator against liability” to a third person.²⁴⁵

Using the foregoing provisions as a basis, the proposed legislation provides that, without further court approval except as otherwise provided in the order of appointment, a guardian of the estate may insure the assets of the estate against damage or loss and, at the expense of the estate, protect the incapacitated person, the guardian of the estate, the guardian of the person and any agent or employee of the guardian from liability to a third person that arises from the administration of the incapacitated person's estate. The power to purchase insurance at the expense of the estate excludes insurance to protect the guardian from actions ultimately found to be subject to surcharge.²⁴⁶

²⁴⁰ *Infra* p. 139.

²⁴¹ Proposed § 5521(a.1). *Infra* pp. 102-103.

²⁴² *Infra* p. 133.

²⁴³ 20 Pa.C.S. §§ 7701-7790.3.

²⁴⁴ *Id.* § 7780.6(a)(6).

²⁴⁵ Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 425(b)(18).

²⁴⁶ Proposed § 5521(b.1)(1). *Infra* p. 105.

Claims Against Co-Fiduciary

Based on cross-referenced § 3317 (claims against co-fiduciary),²⁴⁷ the proposed legislation provides that, without further court approval except as otherwise provided in the order of appointment, a co-guardian of the estate may take any legal action against a co-guardian of the estate to protect the estate of the incapacitated person, if one of two or more guardians of the estate is individually liable to the estate.²⁴⁸

Custodianship

The proposed legislation uses 20 Pa.C.S. § 7780.6(a)(23), which is part of the Pennsylvania Uniform Trust Act, as the basis for a new provision regarding custodianship,²⁴⁹ in lieu of cross-referenced § 3321 (nominee registration; corporate fiduciary as agent; deposit of securities in a clearing corporation; book-entry securities).²⁵⁰ The proposed provision specifies that, without further court approval except as otherwise provided in the order of appointment, a guardian of the estate may employ a custodian, hold property unregistered or in the name of a nominee (including the nominee of any institution employed as custodian) without disclosing the fiduciary relationship and without retaining possession and control of securities or other property so held or registered, and pay reasonable compensation to the custodian.²⁵¹

Acceptance of Deed in Lieu of Foreclosure

Based on cross-referenced § 3322 (acceptance of deed in lieu of foreclosure),²⁵² the proposed legislation provides that, without further court approval except as otherwise provided in the order of appointment, a guardian of the estate may take a deed in lieu of foreclosure for the estate from the owner of property encumbered by a mortgage owned by the estate, in which event the real estate shall be considered personalty to the same extent as though title were acquired by foreclosure at sheriff's sale. Any deed previously accepted will be valid in accordance with this provision.²⁵³

²⁴⁷ *Infra* p. 134.

²⁴⁸ Proposed § 5521(b.1)(2). *Infra* p. 105.

²⁴⁹ Section 7780.6(a)(23) allows a trustee to “employ a custodian; hold property unregistered or in the name of a nominee, including the nominee of any institution employed as custodian, without disclosing the fiduciary relationship and without retaining possession and control of securities or other property so held or registered; and pay reasonable compensation to the custodian.”

²⁵⁰ *Infra* pp. 135-136.

²⁵¹ Proposed § 5521(b.1)(3). *Infra* p. 105.

²⁵² *Infra* p. 136.

²⁵³ Proposed § 5521(b.1)(4). *Infra* p. 105.

Investments

Based on cross-referenced § 5145 (investments),²⁵⁴ the proposed legislation provides that, without further court approval except as otherwise provided in the order of appointment, a guardian of the estate may accept, hold, invest in and retain investments as provided by the prudent investor rule.²⁵⁵

Advancing and Borrowing Money

The UGPPA provides the following with respect to borrowing and advancing money:

A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may . . . borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made²⁵⁶

Similarly, the Pennsylvania Uniform Trust Act provides that a trustee may:

advance money for the protection of the trust and for all expenses, losses and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets. The trustee has a lien on the trust assets as against the beneficiary for an advance under this paragraph, including interest on the advance.²⁵⁷

Using the foregoing provisions as a basis, the proposed legislation provides that, without further court approval except as otherwise provided in the order of appointment, a guardian of the estate may advance money for the protection of the estate and for all expenses, losses and liability sustained in the administration of the estate or because of the holding or ownership of any estate asset. For such an advance, the guardian of the estate has a lien on the estate assets, including interest on the advance.²⁵⁸

²⁵⁴ *Infra* p. 140.

²⁵⁵ Proposed § 5521(b.1)(6). *Infra* p. 106. See 20 Pa.C.S. §§ 7201-7214 for the provisions regarding the prudent investor rule.

²⁵⁶ Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 425(b)(19).

²⁵⁷ 20 Pa.C.S. § 7780.6(a)(7).

²⁵⁸ Proposed § 5521(b.1)(7). *Infra* p. 106.

Renouncing Fiduciary Positions

Chapter 56 (powers of attorney) provides that an agent may “renounce any fiduciary position to which the principal has been appointed” and “resign any fiduciary position in which the principal is then serving, and either file an accounting with a court of competent jurisdiction or settle on receipt and release or other informal method as the agent deems advisable.”²⁵⁹

Using the foregoing as a basis, the proposed legislation provides that, without court approval except as otherwise provided in the order of appointment, a guardian of the estate may (1) renounce any fiduciary position to which the incapacitated person has been appointed and (2) resign any fiduciary position in which the incapacitated person is then serving and either file an accounting with a court of competent jurisdiction or settle on receipt and release or other informal method as the guardian of the estate deems advisable.²⁶⁰

Voting Stock by Proxy

With respect to the matter of voting stock by proxy, the Advisory Committee reviewed the provisions of § 3320 (voting stock by proxy)²⁶¹ and the UGPPA, which provides that “[a] conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may . . . vote a security, in person or by general or limited proxy . . .”²⁶²

Based on the foregoing provisions, the proposed legislation provides that a guardian of the estate may, without further court approval, vote a security, in person or by general or limited proxy, with or without power of substitution.²⁶³

Real and Personal Property

The following sections are cross-referenced in § 5521(b) and concern real and personal property: §§ 3356 (purchase by personal representative),²⁶⁴ 5141 (possession of

²⁵⁹ 20 Pa.C.S. §§ 5602(a)(6) & 5603(f)(1). A fiduciary is “deemed to include, without limitation, an executor, administrator, trustee, guardian, agent or officer or director of a corporation.” *Id.* § 5603(f)(2).

²⁶⁰ Proposed § 5521(b.1)(8). *Infra* p. 107. An incapacitated person’s service as fiduciary may include, without limitation, service as an executor, administrator, trustee, guardian, agent or officer or director of a corporation.

²⁶¹ *Infra* p. 134.

²⁶² Unif. Guardianships & Protective Proceedings Act, *supra* note 5, § 425(b)(13).

²⁶³ Proposed § 5521(b.1)(9). *Infra* p. 107.

²⁶⁴ *Infra* p. 138.

real and personal property),²⁶⁵ 5151 (power to sell personal property)²⁶⁶ and 5155 (order of court).²⁶⁷

The following also provide for the possession, sale, acquisition and disposition of real and personal property, as well as real property transactions in general: § 5536 (distributions of income and principal during incapacity),²⁶⁸ which is not cross-referenced in § 5521(b); the power of attorney provisions under Chapter 56; the Pennsylvania Uniform Trust Act; and the UGPPA.

Chapter 56 (powers of attorney) provides that an agent may engage in real property transactions,²⁶⁹ which includes the right to:

(1) Acquire or dispose of real property (including the principal's residence) or any interest therein, including, but not limited to, the power to buy or sell at public or private sale for cash or credit or partly for each; exchange, mortgage, encumber, lease for any period of time; give or acquire options for sales, purchases, exchanges or leases; buy at judicial sale any property on which the principal holds a mortgage.

(2) Manage, repair, improve, maintain, restore, alter, build, protect or insure real property; demolish structures or develop real estate or any interest in real estate.

(3) Collect rent, sale proceeds and earnings from real estate; pay, contest, protest and compromise real estate taxes and assessments.

(4) Release in whole or in part, assign the whole or a part of, satisfy in whole or in part and enforce any mortgage, encumbrance, lien or other claim to real property.

(5) Grant easements, dedicate real estate, partition and subdivide real estate and file plans, applications or other documents in connection therewith.

(6) In general, exercise all powers with respect to real property that the principal could if present.²⁷⁰

The Pennsylvania Uniform Trust Act provides that a trustee may:

sell or exchange any real or personal property at public or private sale, without obligation to repudiate an otherwise binding agreement in favor of better offers. If the trustee has been required to give bond, no proceeds of the sale of real estate, including proceeds arising by the reason of involuntary conversion, shall be paid to the trustee until:

²⁶⁵ *Infra* p. 140.

²⁶⁶ *Infra* p. 141.

²⁶⁷ *Infra* p. 142.

²⁶⁸ *Supra* pp. 53-54 & 56-57.

²⁶⁹ 20 Pa.C.S. § 5602(a)(10).

²⁷⁰ *Id.* § 5603(i).

- (i) the court has made an order excusing the trustee from entering additional security; or
- (ii) the court has made an order requiring additional security and the trustee has entered the additional security.²⁷¹

The UGPPA provides that “[a] conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may” engage in the following actions:

collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another State, until the conservator considers that disposition of an asset should be made; . . . receive additions to the estate; . . . acquire or dispose of an asset of the estate, including real property in another State, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate; . . . pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate; . . . [and] prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties. . . .²⁷²

The Pennsylvania Uniform Trust Act and the UGPPA also provide for the borrowing of money.²⁷³

As a result of the review of the foregoing provisions, the Advisory Committee recommends several new provisions regarding real and personal property.²⁷⁴ The proposed legislation provides that, without further court approval except as otherwise provided in the order of appointment, a guardian of the estate may perform the following functions:

- With respect to the tangible or intangible personal property of the estate, subject to § 5536: (1) acquire, take possession of or dispose of the personal property through the selling or exchanging of the personal property, for cash or on credit, at public or private sale, and without obligation to repudiate an otherwise binding agreement in favor of a better offer and (2) wherever the personal property is located and until the personal property is distributed or sold, maintain and administer the personal property, make all reasonable

²⁷¹ *Id.* § 7780.6(a)(10).

²⁷² Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 425(b)(1), (2), (7), (21) & (24).

²⁷³ A trustee may “borrow funds and mortgage or pledge trust assets as security for repayment of the funds borrowed, including repayments after the trust terminates.” 20 Pa.C.S. § 7780.6(a)(15). *See supra* p. 65 for UGPPA § 425(b)(19).

²⁷⁴ The provisions involving real property that require further court approval are discussed *infra* p. 70.

expenditures necessary to preserve the personal property, and maintain any action with respect to the personal property.²⁷⁵

- With respect to the real property of the estate: (1) manage, repair, improve, maintain, restore, alter, build, protect or insure the property; (2) demolish structures; (3) collect rent, earnings and other proceeds; (4) pay, contest, protest and compromise taxes and assessments; (5) grant and obtain easements; (6) develop, dedicate, partition or subdivide the property; (7) file plans, applications or other documents; (8) release in whole or in part, assign the whole or a part of, satisfy in whole or in part and enforce any mortgage, encumbrance, lien or other claim to real property and (9) generally exercise all powers that a person who is not incapacitated could exercise.²⁷⁶

Powers Requiring Further Court Approval

Continuation of Business

Based on cross-referenced § 3314 (continuation of business),²⁷⁷ the proposed legislation provides that, with further court approval, a guardian of the estate may continue any business in which the incapacitated person has an ownership interest, for the benefit of the incapacitated person's estate, after the court gives due regard to the order of appointment and any other factor deemed relevant, and aided by the report of a master if necessary. The proposed legislation also includes other provisions that mirror § 3314 and concern notice of the order, a petition to revoke or modify the order and the matters for which the order may provide.²⁷⁸

Specifically, (1) an order by the court may be with or without notice; (2) if prior notice is not given to all parties in interest,²⁷⁹ it must be given within five days after the order or within such extended time as the court (for cause shown) allows and (3) a party in interest may, at any time, petition the court to revoke or modify the order.

In addition, the order may provide (1) for the conduct of business, by the guardian of the estate alone or jointly with others, or as a corporation, partnership, limited liability company or other entity to be formed; (2) the extent of the liability of the estate or any part thereof,²⁸⁰ or of the guardian of the estate, for obligations incurred in the

²⁷⁵ Proposed § 5521(b.1)(5). *Infra* p. 106.

²⁷⁶ Proposed § 5521(b.1)(10). *Infra* pp. 107-108.

²⁷⁷ *Infra* p. 133.

²⁷⁸ Proposed § 5521(b.2)(1). *Infra* pp. 108-109.

²⁷⁹ *Dicta* in *In re Estate of Kurkowski*, 409 A.2d 357, 361 (Pa. 1979) suggests that parties in interest are heirs of the estate.

²⁸⁰ Section 3314 allows a court to assign the risk of loss to either the estate or the personal representative. The statute has been worded this way since at least 1949. The official comment from 1949

continuation of the business; (3) whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; (4) the period of time the business may be conducted; (5) for the compensation of the guardian of the estate actively managing, supervising or engaging in the operation of an entity or business, from the estate's assets or from the entity or business, as appropriate, provided that the compensation is reasonably based upon the actual responsibilities assumed and performed,²⁸¹ and (6) other regulations, including accountings, as the court deems advisable.

Incorporation of Estate's Business

Based on cross-referenced § 3315 (incorporation of estate's business),²⁸² the proposed legislation provides that, with further court approval, a guardian of the estate may (1) organize a corporation or form a partnership, limited liability company or other entity to carry on the business of the incapacitated person, whether the business was owned solely or with others, with the guardian of the estate exercising this power alone or jointly with others and (2) contribute for stock of the corporation, as capital, or for an interest in a partnership, limited liability company or other entity, all or part of the property of the incapacitated person that was invested in the business.²⁸³

Real Property

With respect to the real property of the estate, the proposed legislation provides that, with further court approval, a guardian of the estate may (1) sell or buy any real property at public, private or judicial sale, exchange any real property or grant or obtain an option for the sale, purchase or exchange of any real property,²⁸⁴ (2) join with the spouse of the incapacitated person to perform any of the foregoing acts with respect to property held by the entireties; (3) release the right of the incapacitated person in the real property of the person's spouse and join in the deed of the spouse on behalf of the incapacitated person and (4) abandon any real property.²⁸⁵

suggests that this statutorily modified the common law, which had placed the "liability for any loss arising from continuance of the decedent's business" on the personal representative.

²⁸¹ This compensation provision is not explicitly included in § 3314.

²⁸² *Infra* p. 133.

²⁸³ Proposed § 5521(b.2)(2). *Infra* p. 109. The proposed legislation provides that the stated actions may occur only after notice to all parties in interest and after the court gives due regard to the order of appointment and any other factor deemed relevant. The court may also be aided by the report of a master, if necessary. Unlike § 3315, this proposed language explicitly permits the guardian of the estate to organize a corporation *or form a partnership, limited liability company or other entity* to carry on the business.

²⁸⁴ The court may direct the terms and security for any of these powers and the reasonable notice to the parties in interest, including heirs of the incapacitated person.

²⁸⁵ Proposed § 5521(b.2)(3). *Infra* pp. 109-110. This statutory language is based on current 20 Pa.C.S. §§ 3356, 5141, 5155(1) & (2) & 7780.3(a)(15). *See supra* pp. 66-69 for a discussion of real and personal property. The Advisory Committee discussed whether further court approval should be necessary for the real estate transactions specified in proposed § 5521(b.2)(3), particularly in the case of the purchase of real

Revival of Judgment

Based on cross-referenced § 3318 (revival of judgments against personal representative),²⁸⁶ the proposed legislation provides that when the estate holds a judgment that is a lien on the real estate of the guardian, any person interested in the incapacitated person's estate may bring an appropriate action to revive it and to continue its lien.²⁸⁷

Death or Incapacity

Based on cross-referenced § 3324 (death or incapacity of fiduciary),²⁸⁸ the proposed legislation provides that the personal representative of the estate of a deceased guardian of the estate or the guardian of an incapacitated guardian of the estate by reason of the position so held may not succeed to the administration of, or have the right to possess, any asset of the estate that was being administered by the deceased or incapacitated guardian of the estate, except to protect it pending its delivery to the person entitled to it. The account of the deceased or incapacitated guardian of the estate may be filed by the fiduciary of the guardian's estate and must be filed if the court directs. The court may direct the fiduciary of a deceased or incapacitated guardian of the estate to make the distribution and to make the transfers and assignments necessary to carry into effect a decree of distribution.²⁸⁹

Surviving or Remaining Guardians

Based on cross-referenced § 3327 (surviving or remaining personal representatives),²⁹⁰ the proposed legislation provides that unless the order of appointment specifies otherwise, surviving or remaining guardians of the estate have all the powers of the original guardians of the estate.²⁹¹

property as an investment. The Advisory Committee also debated whether the statute should specify the nature of the real property involved in the transaction (*e.g.*, should further court approval be necessary only if the guardian of the estate decides to sell the incapacitated person's principal residence?). After much consideration, the Advisory Committee decided on a statutory framework that requires further court approval when the guardian of the estate, among other things, decides to sell, buy or exchange real property of the estate (or grant an option for the sale, purchase or exchange of such real property), regardless of the nature of the real property.

²⁸⁶ *Infra* p. 134.

²⁸⁷ Proposed § 5521(b.3). *Infra* p. 110. Unlike § 3318, this proposed subsection does not include the following sentence: "Any judgment so revived shall remain for the use of all parties in interest."

²⁸⁸ *Infra* p. 137.

²⁸⁹ Proposed § 5521(b.4). *Infra* p. 110.

²⁹⁰ *Infra* p. 137.

²⁹¹ Proposed § 5521(b.5). *Infra* p. 111.

Disagreements

Based on cross-referenced § 3328 (disagreement or personal representative),²⁹² the proposed legislation specifies that if a dispute arises among multiple guardians of the estate of an incapacitated person, the decision of the majority of the guardians controls, unless otherwise provided by the court. A dissenting guardian of the estate (1) must join with the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court and (2) is not liable for the consequences of any majority decision even though the guardian joins in carrying it out, if the dissent is expressed promptly in writing to all the other guardians of the estate (however, liability for failure to join in the further administration of the estate or to prevent a breach of fiduciary duty cannot be avoided). In addition, if a dispute arises among guardians of the estate as to the exercise or nonexercise of any of their powers and there is no majority agreement, the court may direct the exercise or nonexercise of the power for the best interest of the estate.²⁹³

Filing of Decree

Based on cross-referenced § 3359 (record of proceedings; county where real estate lies),²⁹⁴ the proposed legislation provides that if a guardian of the estate has the power to engage in a transaction involving the real estate of an incapacitated person, a certified copy of the decree appointing the guardian of the estate may be recorded in the office for the recording of deeds in any county where the real estate, which is subject to that power, is located.²⁹⁵

Inadequacy of Consideration or Better Offer; Brokers' Commissions

Based on cross-referenced § 3360(a) (contracts, inadequacy of consideration or better offer; brokers' commissions),²⁹⁶ the proposed legislation generally provides that when a guardian of the estate makes a contract, the inadequacy of consideration or the receipt of an offer to deal on other terms does not (1) relieve the guardian of the estate of the obligation to perform the contract, except as otherwise agreed by the parties; or (2) constitute ground for any court to set aside the contract or refuse to enforce it by specific performance or otherwise. The proposed legislation also specifies that this provision does not (1) affect or change the inherent right of the court to set aside a

²⁹² *Infra* p. 137.

²⁹³ Proposed § 5521(b.6). *Infra* p. 111.

²⁹⁴ *Infra* p. 138.

²⁹⁵ Proposed § 5521(b.7). *Infra* p. 111.

²⁹⁶ *Infra* p. 139.

contract for fraud, accident or mistake or (2) affect the liability of a guardian of the estate for surcharge on the ground of negligence or bad faith in making a contract.²⁹⁷

The proposed legislation does not re-codify § 3360(b), which concerns brokers' commissions.²⁹⁸ The Advisory Committee stated that the substantive provisions regarding the payment of commissions to a real estate broker and the apportionment of commissions to multiple brokers seem misplaced in 20 Pa.C.S. Chapter 55. In addition, the Advisory Committee does not favor the resurrection of the "higher offer rule," which is also part of this subsection.

Substitution of Party

Based on cross-referenced § 3372 (substitution of personal representative in pending action or proceedings),²⁹⁹ the proposed legislation provides that if a party to a pending action or proceeding has a guardian of the estate appointed, the guardian of the estate of the incapacitated person may be substituted as a party as provided by law.³⁰⁰

The proposed legislation also contains a comment³⁰¹ explaining that the Pennsylvania Rules of Civil Procedure govern substitution of parties,³⁰² the substitution of a person to whom a voluntary transfer is made,³⁰³ a guardian of a minor³⁰⁴ and a guardian ad litem of an incapacitated person,³⁰⁵ a successor becoming a party to a pending action³⁰⁶ and the rights and liabilities of a successor.³⁰⁷

²⁹⁷ Proposed § 5521(b.8). *Infra* p. 112. Subsection (a) of § 3360 deals with "inadequacy of consideration or better offer." Unlike § 3360(a), this proposed subsection does not reference "a contract not requiring approval of court, or when the court shall approve a contract of a personal representative requiring approval of the court."

²⁹⁸ *Infra* p. 139. The act of February 19, 1980 (P.L.15, No.9), known as the Real Estate Licensing and Registration Act, establishes the State Real Estate Commission and provides for the licensing of real estate brokers and salesmen. *See, e.g.*, § 608.1 of the act and 49 Pa. Code Ch. 35 (State Real Estate Commission).

²⁹⁹ *Infra* p. 139.

³⁰⁰ Proposed § 5521(b.9). *Infra* p. 112.

³⁰¹ *Infra* p. 120.

³⁰² Pa.R.C.P. Nos. 2351-2375.

³⁰³ *Id.* No. 2004.

³⁰⁴ *Id.* No. 2033.

³⁰⁵ *Id.* No. 2060.

³⁰⁶ The rules provide that "[t]he successor may become a party to a pending action by filing of record a statement of the material facts on which the right to substitute is based." *Id.* No. 2352(a). An action is "any civil action or proceeding brought in or appealed to any court of record which is subject to these rules" *Id.* No. 2351. A successor is "anyone who by operation of law, election or appointment has succeeded to the interest or office of a party to an action." *Id.*

³⁰⁷ The successor then has "all the rights and liabilities of a party to the action. The court may order such continuances and extensions as may be necessary to afford the successor a reasonable opportunity to appear and prosecute or defend the action." *Id.* No. 2354.

Specific Performance of Contracts

Based on cross-referenced § 3390 (specific performance of contracts),³⁰⁸ the proposed legislation provides that if a person enters an agreement to purchase or sell real or personal estate and a guardian of the estate is appointed for the person before the consummation of the agreement, the guardian of the estate may consummate the agreement. If, however, the guardian of the estate does not consummate the agreement, the court may order specific performance of the agreement (1) on the application of any party in interest; (2) after such notice and with such security, if any, as the court may direct and (3) if the agreement would have been enforced specifically had the guardian of the estate not been appointed.³⁰⁹

The guardian of the estate or another person directed by the court must execute any necessary deed or transfer regarding the agreement under these provisions. The title of any purchaser under an agreement in which the incapacitated person was the vendor is the same as though the incapacitated person had conveyed or transferred the property prior to the appointment of the guardian of the estate.³¹⁰

When any petition for specific performance of an agreement to purchase or sell real estate is filed, the prothonotary who receives a certificate of such fact by the clerk of the court must enter the petition upon either the judgment or ejectment and miscellaneous indexes against the defendants as directed by local rules of court and must certify it as *lis pendens* in any certificate of search that the prothonotary is required to make.³¹¹

Abandonment of Property

Based on cross-referenced § 5143 (abandonment of property),³¹² the proposed legislation generally provides that a guardian of the estate may abandon property of the incapacitated person if the property is so burdensome or encumbered or in such condition that it is of no value to the estate. The court may authorize the guardian of the estate to transfer, renounce or release property of the incapacitated person without consideration if (1) the property cannot be abandoned without transfer of title to another or without a formal renunciation or release and (2) the court finds that the transfer, renunciation or release will be for the best interests of the estate.³¹³

³⁰⁸ *Infra* pp. 139-140.

³⁰⁹ Proposed § 5521(b.10)(1). *Infra* pp. 112-113.

³¹⁰ Proposed § 5521(b.10)(2). *Infra* p. 113.

³¹¹ Proposed § 5521(b.10)(3). *Infra* p. 113.

³¹² *Infra* p. 140.

³¹³ Proposed § 5521(b.11). *Infra* pp. 113-114.

Title of Purchaser

With respect to the matter of the passing of title, the Advisory Committee reviewed the provisions of cross-referenced § 5154 (title of purchaser),³¹⁴ the UGPPA³¹⁵ and the Pennsylvania Uniform Trust Act.³¹⁶

Based on § 5154, the proposed legislation provides that if the guardian of the estate of an incapacitated person has given the required bond, any sale, pledge, mortgage or exchange by the guardian of the estate (whether pursuant to a decree or to the exercise of a power) passes the full title of the incapacitated person, free of any right of the incapacitated person's spouse, unless otherwise specified. Persons dealing with the guardian of the estate have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the incapacitated person. A sale or exchange by a guardian of the estate pursuant to a decree under the provision regarding the sale of real property of the estate³¹⁷ has the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law if the holder of the mortgage consents by writing filed in the proceeding. No sale, mortgage, exchange or conveyance is prejudiced by the subsequent dismissal of the guardian of the estate if the person dealt with the guardian in good faith.³¹⁸

³¹⁴ *Infra* pp. 141-142.

³¹⁵ “A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may . . . grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset . . .” Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 425(b)(12).

³¹⁶ The Pennsylvania Uniform Trust Act provides the following regarding the title of a purchaser:

If the trustee has given a bond as required in accordance with this title, any sale, pledge, mortgage or exchange by a trustee, whether pursuant to a decree or to the exercise of a power conferred by the trust instrument or of a power under this title, shall pass the full title of the trust in the property, unless otherwise specified. Persons dealing with the trustee shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the trust. A sale or exchange by a trustee pursuant to a decree under section 3353 (relating to order of court) shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law if the holder of the mortgage consents by writing filed in the proceeding. No sale, mortgage, exchange or conveyance shall be prejudiced by the subsequent dismissal of the trustee. No sale, mortgage, exchange or conveyance by a testamentary trustee shall be prejudiced by the terms of a will or codicil thereafter probated if the person dealing with the trustee did so in good faith.

20 Pa.C.S. § 7794.

³¹⁷ Proposed § 5521(b.2)(3). *Infra* pp. 109-110.

³¹⁸ Proposed § 5521(b.12). *Infra* p. 114.

Compromise of Controversies

Based on cross-referenced § 3323 (compromise of controversies),³¹⁹ the proposed legislation enables a guardian of the estate to compromise or settle any claim by or against the estate, through litigation or otherwise, without court approval. However, the guardian may seek court approval of the compromise or settlement, subject to specified conditions and provisions regarding when the court may enter a decree authorizing the compromise or settlement, the payment of counsel fees and other expenses, the filing of the court order, and when the guardian may receive the proceeds of the compromise or settlement.³²⁰

Specifically, the court may enter a decree authorizing the compromise or settlement to be made on petition by the guardian of the estate or any party in interest setting forth all the facts and circumstances, after notice as the court directs and aided if necessary by the report of a master. For a compromise or settlement of an action in which damages are sought on behalf of the estate, the court that has jurisdiction and in which the action is pending may approve the compromise or settlement, including an agreement for the payment of counsel fees and other proper expenses incident to the action, upon oral motion by plaintiff's counsel of record in the action or upon petition by the guardian of the estate. The order of the court approving the compromise or settlement or the agreement for the payment of counsel fees and other expenses is not subject to collateral attack in the orphans' court division. The guardian of the estate must file a copy of the order of the court approving the compromise or settlement with the clerk of the court having jurisdiction of the estate. When the guardian of the estate has been required to give bond, the guardian may not receive the proceeds of the compromise or settlement until (1) the court of the county having jurisdiction of the estate has made an order excusing the guardian from entering additional security or (2) the guardian has entered the additional security that is required by the court of the county having jurisdiction of the estate.

Inherent Powers and Duties

The proposed legislation contains a comment to § 5521, based on cross-referenced § 3332 (inherent powers and duties),³²¹ specifying that the section is not intended to limit any additional powers or duties of a guardian of the estate that may otherwise be provided by law.³²²

³¹⁹ *Infra* pp. 136-137.

³²⁰ Proposed § 5521(b.13). *Infra* pp. 114-115.

³²¹ *Infra* p. 138.

³²² *Infra* p. 120.

Restraint of Sale

The proposed legislation does not re-codify cross-referenced § 3355 (restraint of sale).³²³ The Advisory Committee agrees that proposed subsection (b.2)(3)³²⁴ adequately addresses the substance of § 3355 with respect to real property.

Guardian Named in Conveyance

The Advisory Committee agreed that the substantive provisions of cross-referenced § 5146 (guardian named in conveyance)³²⁵ are adequately addressed in proposed new § 5521(b.1)(10) and (b.9), which are respectively based on §§ 5141 (possession of real and personal property) and 3372 (substitution of personal representative in pending action or proceedings).³²⁶ Accordingly, the proposed legislation does not re-codify § 5146.

Proceedings Against Guardian

Cross-referenced § 5147 (proceedings against guardian)³²⁷ authorizes a proceeding to be brought against a guardian (or the surety on the guardian's bond) in the court having jurisdiction of the estate. If the guardian does not reside in the county, process may be served on the guardian personally, or by (1) a duly deputized sheriff of the Pennsylvania county in which the guardian is a resident or (2) the sheriff of the county of the court having jurisdiction of the estate, when the guardian is not a resident of Pennsylvania.

Because the Advisory Committee does not recommend the incorporation of the provisions of § 5147 into the new statutory framework for § 5521, the proposed legislation does not re-codify § 5147.

³²³ *Infra* p. 138.

³²⁴ *Infra* pp. 109-110.

³²⁵ *Infra* p. 141. This section provides generally that the powers, duties and liabilities of a guardian not appointed by the court as to a minor's property to which the guardian's appointment lawfully extends are the same as those of a court-appointed guardian, except as the instrument making the appointment provides otherwise. In addition, § 5146 provides for substituted or succeeding guardians and for the effect of removal or of probate of a later will or a codicil.

³²⁶ *Infra* pp. 107-108, 112, 139 & 140.

³²⁷ *Infra* p. 141.

Power to Lease

Although § 5522 (power to lease) is not cross-referenced in § 5521(b), it allows a guardian to “lease any real or personal property of the incapacitated person for a term not exceeding five years after its execution.”³²⁸

The proposed legislation does not amend § 5522, but instead retains the current statutory language.

Environmental Oversight

The Pennsylvania Uniform Trust Act provides that, with respect to possible liability for violation of environmental law, a trustee has the power

- (i) to inspect or investigate property the trustee holds or has been asked to hold or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
- (ii) to take action to prevent, abate or otherwise remedy any actual or potential violation of environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
- (iii) to decline to accept property into trust or disclaim a power with respect to property that is or may be burdened with liability for violation of environmental law;
- (iv) to compromise claims against the trust which may be asserted for an alleged violation of environmental law; and
- (v) to pay the expense of inspection, review, abatement or remedial action to comply with environmental law.³²⁹

³²⁸ The Working Group recommended the amendment of § 5522 as follows, noting that there is no statutory maximum term for a lease under the proposed amendments: “A guardian may [lease any real or personal property of the incapacitated person for a term not exceeding five years after its execution] enter for any purpose into a lease as lessor or lessee, with or without an option to purchase or renew, for a term within or extending beyond the term of the guardianship.” These recommendations were based on UGPPA § 425(b)(10), which provides that “[a] conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may . . . enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship” Section 425(b)(11) of the uniform act also concerns leases “for exploration and removal of minerals or other natural resources.”

³²⁹ 20 Pa.C.S. § 7780.6(a)(18).

The Advisory Committee discussed the inclusion of this type of statutory language into § 5521 but noted that the inclusion may create unintended consequences and impose obligations for the guardian of the estate.³³⁰ Accordingly, the proposed legislation does not include a comparable provision.

***Other Powers Under the Uniform Guardianship and
Protective Proceedings Act***

The UGPPA also provides that “[a] conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may” engage in the following actions:

acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest; . . . invest assets of the estate as though the conservator were a trustee . . . deposit money of the estate in a financial institution, including one operated by the conservator; . . . make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings; . . . subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration; . . . pay calls, assessments, and any other sums chargeable or accruing against or on account of securities; . . . sell or exercise stock subscription or conversion rights; . . . allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources; . . . pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee . . . to the guardian of the distributee . . . [,] to a distributee’s custodian under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act][,] or . . . if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee; . . . [and] execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.³³¹

³³⁰ The Advisory Committee specifically considered a provision analogous to 20 Pa.C.S. § 7780.6(a)(18)(iii) as part of proposed § 5521(b.2) (powers of a guardian of the estate with further court approval).

³³¹ Unif. Guardianship & Protective Proceedings Act, *supra* note 5, § 425(b)(4), (5), (6), (8), (9), (14), (15), (22), (23) & (25).

The Advisory Committee did not recommend the inclusion of the foregoing provisions into § 5521. Therefore, the proposed legislation does not contain such statutory language.³³²

³³² Specifically, the Advisory Committee notes that UGPPA § 425(b)(8) (regarding such powers as making repairs or alterations in buildings or other structures) is covered by proposed § 5521(b.1)(10), which is based on current § 5141. *Infra* pp. 107-108 & 140.

PROPOSED LEGISLATION

Title 20 of the Pennsylvania Consolidated Statutes (the Probate, Estates and Fiduciaries Code) is amended as follows:

§ 751. Appointment; purpose.

The orphans' court division may appoint:

* * *

(7) Examiners of actions of guardian of estate.--By general rule or special order, an examiner to make periodic or special examinations of expenditures, disbursements and withdrawals of a guardian of the estate of an incapacitated person and to require the guardian of the estate to present financial records for examination.

(8) Mediators or arbitrators.--A mediator or arbitrator if the parties desire mediation or arbitration but do not mutually agree on an independent mediator or arbitrator. The meeting place shall be in this Commonwealth in a location selected by the mediator or arbitrator. The mediator or arbitrator may extend the date of the meeting for good cause shown by either party or upon stipulation of both parties. All files, records, reports, documents or other papers received or prepared by the mediator or arbitrator while serving as such shall be classified as confidential. Payment from an incapacitated person's estate for mediation or arbitration shall be subject to approval by the court.

§ 752. Compensation.

[The compensation of any master, auditor, examiner, guardian ad litem, or trustee ad litem, subject to any inconsistent general rule shall be paid from such source as the court shall direct] Subject to any inconsistent general rule of court, the compensation of any master, auditor, examiner, guardian ad litem or trustee ad litem shall be paid from such source and in such amounts as the court directs.

* * *

§ 5503. Venue.

(a) Applicability.--This section is subject to Chapter 59 (relating to uniform adult guardianship and protective proceedings jurisdiction).

(b) Guardian of person.--Venue for a guardianship proceeding for an incapacitated person or an alleged incapacitated person is in the judicial district of this Commonwealth in which the person resides and, if the person has been admitted to an institution by order of a court of competent jurisdiction, in the judicial district in which the institution is located. Venue for the appointment of an emergency guardian of an incapacitated person or an alleged incapacitated person is also in the judicial district in which the person is present.

(c) Guardian of estate.--Venue for a proceeding regarding a guardianship of the estate of an incapacitated person or alleged incapacitated person is in the judicial district of this Commonwealth in which the incapacitated person or alleged incapacitated person resides, whether or not a guardian of the person has been appointed in another place or, if the person does not reside in this Commonwealth, in any judicial district of this Commonwealth in which property owned by the person is located.

(d) Multiple judicial districts.--If a proceeding under this chapter is brought in more than one judicial district in this Commonwealth, the court of the judicial district in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

Comment

This section replaces former § 5512 and concerns venue. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Chapter 59) addresses jurisdiction.

This section refers to residence instead of domicile. The term domicile is distinguishable from residence in that domicile is the true, fixed, principal and permanent home to which the individual intends to return and remain even though currently residing elsewhere.

§ 5504. Confidentiality and disclosure of information.

Confidentiality and the disclosure of information under this chapter shall be governed by applicable court rule or as the court determines. The Supreme Court may prescribe uniform rules relating to confidentiality and the disclosure of information.

* * *

§ 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 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:

- (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

(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.]

(a.1) Resident.--

(1) Upon petition and hearing and the presentation of clear and convincing evidence, the court may find an individual domiciled in this Commonwealth to be incapacitated and appoint a guardian of the person or guardian of the estate for the individual.

(2) The petitioner under this subsection may be any person interested in the alleged incapacitated person's welfare. If the petitioner is a guardianship support agency, the petition shall disclose the agency's financial information and a list of its current guardianships.

(3) The court may dismiss a proceeding if it determines that:

(i) the proceeding has not been instituted to aid or benefit the alleged incapacitated person; or

(ii) the petition is incomplete or fails to provide sufficient facts to proceed.

(4) The Supreme Court shall establish a uniform citation for the written notice of the petition and hearing, which shall:

(i) Be given in large type and in simple language to the alleged incapacitated person.

(ii) Indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding.

(iii) Include the date, time and place of the hearing and an explanation of all rights, including the appointment of counsel as set forth in subsection (a.2).

(iv) Be attached to the petition.

(5) Service of the petition and notice shall be as follows:

(i) Personal service of the petition and notice shall be made on the alleged incapacitated person. The contents and terms of the petition shall be explained to the maximum extent possible in language and terms the person is most likely to understand. Service shall be not less than 20 days in advance of the hearing.

(ii) Notice of the petition and hearing shall be given to the following in the manner as the court directs:

(A) Any person:

(I) whose existence and whereabouts are known or could be readily obtained;

(II) who is sui juris; and

(III) who would be entitled to share in the estate of the alleged incapacitated person if the person died intestate at that time.

(B) The person or institution providing residential services to the alleged incapacitated person.

(C) Another party as the court directs, including another service provider.

(6) The hearing:

(i) may be closed to the public and without a jury, unless the alleged incapacitated person or the person's counsel objects;

(ii) shall be closed to the public and with or without a jury, if the alleged incapacitated person or the person's counsel so requests; or

(iii) may be held at the residence of the alleged incapacitated person.

(7) The alleged incapacitated person shall be present at the hearing unless:

(i) upon the deposition or testimony of or sworn statement by a physician or licensed psychologist, the court is satisfied that the person's physical or mental condition would be harmed by being present, but the inability of the person to comprehend the proceedings does not, by itself, constitute harm; or

(ii) it is impossible for the person to be present because of the person's absence from this Commonwealth. It shall not be necessary for the person to be represented by a guardian ad litem in the proceeding.

(8) The court may grant standing to any person on whom the notice and petition are served under paragraph (5).

(a.2) Appointment of counsel.--

(1) If counsel has not been retained by or on behalf of the alleged incapacitated person, the petitioner under subsection (a) shall notify the court at least seven days prior to the hearing.

(2) The court shall appoint counsel to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of the alleged incapacitated person:

(i) in appropriate cases as the court determines; and

(ii) in all cases in which the court knows in advance that the alleged incapacitated person is not expected to be present at the hearing, either in person or by videoconference.

* * *

(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.]

(1) The court may appoint any one or more of the following to be an alleged incapacitated person's guardian of the person or guardian of the estate, or both:

(i) Any qualified individual.

(ii) A corporate fiduciary. If a person is a corporate entity doing business in this Commonwealth and serving as a guardian of the estate of an incapacitated person, the person shall have an office in this Commonwealth.

(iii) A nonprofit corporation.

(iv) A guardianship support agency under Subchapter F (relating to guardianship support).

(v) A county agency.

(2) If the alleged incapacitated person is a resident of a State facility, the court may appoint the guardian office at the facility as the alleged incapacitated person's guardian of the estate.

(g) Who may not be appointed guardian.--

(1) Subject to paragraph (2), unless it is clearly demonstrated that no guardianship support agency or other alternative exists, the court may not appoint the following as the alleged incapacitated person's guardian of the person or guardian of the estate:

(i) A person or entity providing residential services for a fee to the alleged incapacitated person.

(ii) Any other person whose interests conflict with those of the alleged incapacitated person.

(2) Any family relationship to the alleged incapacitated person shall not, by itself, be considered in conflict with the interest of the alleged incapacitated person.

(h) Preference in appointing guardian of person.--

(1) If a nomination regarding guardian of the person has been made in a power of attorney, the court may determine that an adjudication of incapacity is not necessary or that an adjudication of incapacity is necessary but the appointment of a guardian of the person is not necessary. If the court makes an adjudication of incapacity and determines that a guardian of the person shall be appointed, the court shall appoint the

nominated person in accordance with the terms of the power of attorney or health care power of attorney, except for good cause or disqualification.

(2) Subject to paragraph (1), in appointing a qualified person to be guardian of the person, the court shall consider the following order of preference:

(i) A guardian, other than a temporary or emergency guardian, currently acting for the estate.

(ii) The spouse of the person.

(iii) An adult child of the person.

(iv) A parent of the person.

(v) The nominee of a deceased or living parent of an unmarried alleged incapacitated person.

(vi) Another suitable and qualified person.

(3) With respect to persons having equal preference, the court shall select the person or persons that it considers best qualified in that class.

(4) Subject to paragraph (1), in acting in the best interest of the alleged incapacitated person, the court may decline to appoint a person having a higher preference and appoint a person having a lower preference or no preference.

(i) Preference in appointing guardian of estate.--

(1) If a nomination regarding guardian of the estate has been made in a power of attorney, the court may determine that an adjudication of incapacity is not necessary or that an adjudication of incapacity is necessary but the appointment of a guardian of the estate is not necessary. Subject to paragraph (5), if the court makes an adjudication of incapacity and determines that a guardian of the estate shall be

appointed, the court shall appoint the nominated person in accordance with the terms of the power of attorney, except for good cause or disqualification.

(2) Subject to paragraphs (1) and (5), in appointing a qualified person to be guardian of the estate, the court shall consider the following order of preference:

(i) A guardian, other than a temporary or emergency guardian, currently acting for the person.

(ii) The spouse of the person.

(iii) An adult child of the person.

(iv) A parent of the person.

(v) The nominee of a deceased or living parent of an unmarried alleged incapacitated person.

(vi) Another suitable and qualified person, including a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F and a county agency.

(3) With respect to persons having equal preference, the court shall select the person or persons that it considers best qualified in that class.

(4) Subject to paragraph (1), in acting in the best interest of the alleged incapacitated person, the court may decline to appoint a person having a higher preference and appoint a person having a lower preference or no preference.

(5) The court may appoint a corporate fiduciary or other appropriate person as a guardian of the estate of the incapacitated person in appropriate cases, if the incapacitated person's estate contains substantial assets or involves complex financial matters.

Comment

An incapacitated person may not need a guardian if the incapacity is counterbalanced by friends or family or other support. Therefore, the appointment of a guardian is dependent on both incapacity and the need for guardianship services. *In re Peery*, 727 A.2d 539, 541 (Pa. 1999). Consistent with the purpose of Chapter 55, as set forth in § 5502, even though a person does not have a power of attorney or other comparable document, it is presumed that the person retains the greatest amount of autonomy possible and that the person's wishes should be taken into account as much as possible.

Subsection (a.1)(8) provides the court with flexibility to determine whether to grant standing to a person on whom the notice and petition are served pursuant to subsection (a.1)(5). If a person is granted standing under subsection (a.1)(8), the person may participate in the guardianship proceeding and, among other things, present evidence and cross-examine witnesses.

Under subsection (a.2), a court should have as much flexibility as possible to determine which cases merit the appointment of counsel.

[§ 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.]

Comment

Former § 5512 is replaced by § 5503.

* * *

§ 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] person interested in the incapacitated person's welfare 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.

* * *

(c) Independent evaluation.--In a review hearing under this section, the court may order an independent evaluation in accordance with section 5511(d) (relating to petition and hearing; independent evaluation).

* * *

§ 5512.4. Affidavit in uncontested termination matters.

In an uncontested matter concerning the termination of a guardianship, whether or not a hearing is held regarding the termination, the court may terminate the guardianship

based on an affidavit of the incapacitated person's attending physician stating that the guardianship is no longer necessary.

§ 5512.5. Counsel.

Following an adjudication of incapacity, counsel for the incapacitated person acting as such before the individual was adjudicated incapacitated, or counsel subsequently engaged by or on behalf of the incapacitated person, may act on behalf of the incapacitated person for a matter or at any proceeding regarding the interest of the incapacitated person under this chapter. For cause shown, the court may terminate the services of counsel acting for an incapacitated person and appoint new counsel or a guardian ad litem for a proceeding for which the incapacitated person's interest is involved.

Comment

This section concerns counsel for the incapacitated person in a proceeding subsequent to the adjudication of incapacity, such as a review hearing under § 5512.2. The appointment of counsel for an alleged incapacitated person is addressed in §§ 5511(a.2) and 5513(d). Under Chapter 55, an incapacitated person has standing to participate in any subsequent proceeding of the Orphans' Court, or object to a decision thereof, and generally has the right to choose legal counsel. *In re Estate of Rosengarten*, 871 A.2d 1249 (Pa. Super. 2005).

§ 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 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.]

(a) Appointment.--

(1) Notwithstanding the provisions of section 5511 (relating to petition and hearing; independent evaluation), upon petition and a hearing at which clear and convincing evidence is shown, the court may appoint an emergency guardian or guardians of the person or estate of a person alleged to be incapacitated, when it appears that:

(i) the person lacks capacity and is in need of a guardian; and

(ii) a failure to make such appointment will likely result in irreparable harm to the person or estate of the alleged incapacitated person.

(2) The court may appoint an emergency guardian of the person under this section for an alleged incapacitated person who is present in this Commonwealth but domiciled outside this Commonwealth, regardless of whether the alleged incapacitated person has property in this Commonwealth.

(b) Procedures and powers generally.--

(1) Each provision of section 5511 shall apply to proceedings under subsection (a), except:

(i) when the court has found that the application of the provision is not feasible under the circumstances; or

(ii) as otherwise provided in this section.

(2) 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.

(c) Duration of initial order.--An initial emergency order appointing an emergency guardian of the person or guardian of the estate may be in effect for up to 30 days.

(d) Appointment of counsel.--

(1) Prior to the expiration of the initial emergency order, the court may appoint counsel for the alleged incapacitated person.

(2) If an extension of the emergency order is sought under subsection (e), the court shall appoint counsel for the alleged incapacitated person.

(e) Extension of order.--An emergency order may be extended for not more than an additional 60 days upon the consent of the petitioner, emergency guardian and counsel for the incapacitated person. At any time after the filing of the petition for emergency guardianship, upon a determination that the duration of incapacity of the alleged incapacitated person is likely to extend longer than the period of emergency guardianship permitted by this section, the court shall direct that the petitioner file a petition for a permanent guardianship of the person or a permanent guardianship of the estate, or both. In such a case, the period of extension of the emergency order shall be extended to the date of the order on the permanent guardianship petition.

Comment

Subsection (e) is intended to avoid multiple, successive emergency guardianships that do not provide the full panoply of procedural guarantees to the alleged incapacitated person. Once the emergency guardianship has been ordered, the only alternative is to file a petition for permanent guardianship.

* * *

[§ 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).]

Comment

Former § 5515 is replaced by §§ 5515.1, 5515.2 and 5515.3.

§ 5515.1. Removal and discharge of guardian.

(a) Conditions.--The court has the exclusive power to remove a guardian of the person or guardian of the estate if either paragraph (1) or (2) applies:

(1) The guardian:

(i) is wasting or mismanaging the estate;

(ii) is or is likely to become insolvent;

(iii) has failed to perform any duty imposed by law;

(iv) has become incapacitated to discharge the duties as guardian because of sickness or physical or mental incapacity and the incapacity is likely to continue to the injury of the estate or the incapacitated person; or

(v) has removed from this Commonwealth or has ceased to have a known place of residence therein, without furnishing a security or additional security as the court directs.

(2) For any reason other than that set forth in paragraph (1), the interests of the estate or the incapacitated person are likely to be jeopardized by the guardian's continuance as guardian.

(b) Procedure.--

(1) On the court's own motion or on the petition of any party in interest alleging adequate grounds for removal of a guardian of the person or guardian of the estate, the court shall:

(i) order the guardian to appear and show cause why the guardian should not be removed; or

(ii) summarily remove the guardian when necessary to protect the rights of creditors or parties in interest.

(2) Upon removal of a guardian of the person or guardian of the estate, the court shall appoint a successor guardian and may appoint a co-guardian under section 5514 (relating to to fill vacancy; co-guardian) and, by summary attachment of the guardian or other appropriate orders, provide for the security and delivery of the assets of the estate, together with all books, accounts and papers relating thereto.

(3) Any guardian of the person or guardian of the estate summarily removed under this section may petition to have the decree of removal vacated and to be reinstated. If the court vacates the decree of removal and reinstates the guardian, it shall thereupon make any appropriate orders to accomplish the reinstatement.

(c) Discharge of guardian and surety.--After confirmation of the final account and distribution to the parties entitled, a guardian of the estate and the guardian's surety may be discharged by the court from future liability. The court may discharge only the surety from future liability, allowing the guardian to continue without surety, upon condition that no further assets shall come into the control of the guardian until the guardian files another bond with sufficient surety, if required.

Comment

This section and §§ 5515.2 and 5515.3 replace former § 5515.

§ 5515.2. Appointment of guardian in conveyance.

A deed or instrument creating a gift or designating a beneficiary in a life insurance policy, annuity contract, retirement plan, including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account, or another plan or contractual arrangement providing for payments to the incapacitated person or to others after the incapacitated person's death, may contain an appointment of a guardian of the estate or interest of each named beneficiary who is incapacitated. Payment by an insurance or other financial services company to the beneficiary's guardian so appointed discharges the paying company to the same effect as payment to an otherwise duly appointed and qualified guardian.

Comment

This section and §§ 5515.1 and 5515.3 replace former § 5515.

§ 5515.3. Bond.

(a) General rule.--Except as provided in this section, every guardian of the estate shall execute and file a bond in the name of the Commonwealth, with sufficient surety, in an amount the court considers necessary, having regard to the value of the personal estate which will come into the control of the guardian, and conditioned in the following form:

(1) If the guardian administers the estate well and according to law, this obligation shall be void, but otherwise it remains in force.

(2) If a co-guardian administers the estate well and according to law, this obligation shall be void as to that co-guardian who so administers the estate, but otherwise it remains in force.

(b) Exceptions.--Unless deemed advisable by the court for cause shown, no bond is required of the following:

(1) A guardian appointed by or in accordance with the terms of a will, inter vivos instrument or insurance contract as to the property acquired under the authority of the appointment, unless it is required by the conveyance.

(2) A bank and trust company, a trust company incorporated in this Commonwealth or a national bank having its principal office in this Commonwealth.

(c) Court discretion.--The court has discretion to not require a bond:

(1) from a nonresident corporation or a national bank having its principal office outside this Commonwealth, otherwise qualified to act as guardian; and

(2) in all other cases when, for cause shown, it finds that no bond is necessary.

(d) Amount.--For cause shown and after such notice, if any, as it directs, the court may require a surety bond or increase or decrease the amount of an existing bond or require more or less security.

Comment

This section and §§ 5515.1 and 5515.2 replace former § 5515.

* * *

§ 5518. Evidence of incapacity.

To establish incapacity in a proceeding in which the incapacity of the alleged incapacitated person is contested, the petitioner must present testimony, in person or by

teleconference, videoconference or 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 and at which the person or the person's counsel is present, the petitioner may establish incapacity by a sworn statement from the 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 addition of the references to testimony by teleconference and videoconference is intended to clarify existing law.

§ 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].

§ 5521. Provisions concerning powers, duties and liabilities.

* * *

(a.1) Death or removal of guardian.--

(1) An action or proceeding in which a guardian of the person or guardian of the estate is a party is not abated by the death or resignation of the guardian or by the termination of the guardian's authority.

(2) The successor of the guardian may be substituted in the action or proceeding in the manner provided by law.

[(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 agent; 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).]

(b.1) Powers of guardian of the estate without further court approval.--Except as otherwise qualified, limited or directed by the court in its order of appointment, a

guardian of the estate of an incapacitated person, without further court authorization or confirmation, shall have the following powers:

(1) Insure the assets of the estate against damage or loss and, at the expense of the estate, protect the incapacitated person, the guardian of the estate, the guardian of the person and any agent or employee of the guardian from liability to a third person that arises from the administration of the incapacitated person's estate. The power to purchase insurance at the expense of the estate does not include insurance to protect the guardian of the estate from any action ultimately found to be subject to surcharge.

(2) Take any legal action against a co-guardian of the estate to protect the estate of the incapacitated person, if one of two or more guardians of the estate is individually liable to the estate.

(3) Employ a custodian, hold property unregistered or in the name of a nominee, including the nominee of any institution employed as custodian, without disclosing the fiduciary relationship and without retaining possession and control of securities or other property so held or registered and pay reasonable compensation to the custodian.

(4) Take for the estate from the owner of property encumbered by a mortgage owned by the estate a deed in lieu of foreclosure, in which event the real estate shall be considered personalty to the same extent as though title were acquired by foreclosure at sheriff's sale. Any deed previously accepted is hereby valid in accordance with this paragraph.

(5) With respect to the tangible or intangible personal property of the estate and subject to section 5536 (relating to distributions of income and principal during incapacity):

(i) Acquire, take possession of or dispose of the personal property through the selling or exchanging of the personal property:

(A) For cash or on credit.

(B) At public or private sale.

(C) Without obligation to repudiate an otherwise binding agreement in favor of a better offer.

(ii) Wherever the personal property is located and until the personal property is distributed or sold:

(A) Maintain and administer the personal property.

(B) Make all reasonable expenditures necessary to preserve the personal property.

(C) Maintain any action with respect to the personal property.

(6) Accept, hold, invest in and retain investments as provided by Chapter 72 (relating to prudent investor rule).

(7) Advance money for the protection of the estate and for all expenses, losses and liability sustained in the administration of the estate or because of the holding or ownership of any estate asset. The guardian of the estate has a lien on the estate assets for an advance under this paragraph, including interest on the advance.

(8) With respect to an incapacitated person's service as fiduciary, which may include, without limitation, as an executor, administrator, trustee, guardian, agent or officer or director of a corporation:

(i) Renounce any fiduciary position to which the incapacitated person has been appointed.

(ii) Resign any fiduciary position in which the incapacitated person is then serving and:

(A) file an accounting with a court of competent jurisdiction; or

(B) settle on receipt and release or other informal method as the guardian of the estate deems advisable.

(9) Vote a security, in person or by general or limited proxy, with or without power of substitution.

(10) With respect to the real property of the estate:

(i) Manage, repair, improve, maintain, restore, alter, build, protect or insure.

(ii) Demolish structures.

(iii) Collect rent, earnings and other proceeds.

(iv) Pay, contest, protest and compromise taxes and assessments.

(v) Grant and obtain easements.

(vi) Develop, dedicate, partition or subdivide.

(vii) File plans, applications or other documents.

(viii) Release in whole or in part, assign the whole or a part of, satisfy in whole or in part and enforce any mortgage, encumbrance, lien or other claim to real property.

(ix) Subject to subsection (b.2)(3) and section 5536, generally exercise all powers that a person who is not incapacitated could exercise.

(b.2) Powers of guardian of the estate with further court approval.--A guardian of the estate of an incapacitated person may have the following powers only with further court authorization or confirmation:

(1) Continue any business in which the incapacitated person has an ownership interest, for the benefit of the incapacitated person's estate, after the court gives due regard to the order of appointment and any other factor deemed relevant, and aided by the report of a master if necessary. An order by the court under this paragraph may be with or without notice. If prior notice is not given to all parties in interest, it shall be given within five days after the order or within such extended time as the court, for cause shown, shall allow. Any party in interest may, at any time, petition the court to revoke or modify the order. The order may provide:

(i) for the conduct of business, by the guardian of the estate alone or jointly with others, or as a corporation, partnership, limited liability company or other entity to be formed;

(ii) the extent of the liability of the estate or any part thereof, or of the guardian of the estate, for obligations incurred in the continuation of the business;

(iii) whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole;

(iv) the period of time the business may be conducted;

(v) for the compensation of the guardian of the estate actively managing, supervising or engaging in the operation of an entity or business, from the estate's assets or from the entity or business, as appropriate, provided that the compensation is reasonably based upon the actual responsibilities assumed and performed; and

(vi) other regulations, including accountings, as the court shall deem advisable.

(2) After notice to all parties in interest and after the court gives due regard to the order of appointment and any other factor deemed relevant and aided by the report of a master if necessary:

(i) Organize a corporation or form a partnership, limited liability company or other entity to carry on the business of the incapacitated person, whether the business was owned solely or with others, with the guardian of the estate exercising this power alone or jointly with others.

(ii) Contribute for stock of the corporation, as capital, or for an interest in a partnership, limited liability company or other entity, all or part of the property of the incapacitated person that was invested in the business.

(3) With respect to the real property of the estate:

(i) Sell or buy any real property at public, private or judicial sale, exchange any real property or grant or obtain an option for the sale, purchase or exchange of any real property. The court may direct:

(A) The terms and security for any of these powers.

(B) The reasonable notice to the parties in interest, including heirs of the incapacitated person.

(ii) Join with the spouse of the incapacitated person in the performance of any of the acts under subparagraph (i) with respect to property held by the entirety.

(iii) Release the right of the incapacitated person in the real property of the person's spouse and join in the deed of the spouse on behalf of the incapacitated person.

(iv) Abandon any real property.

(b.3) Revival of judgment.--When the estate holds a judgment that is a lien on the real estate of the guardian, any person interested in the incapacitated person's estate may bring an appropriate action to revive it and to continue its lien.

(b.4) Death or incapacity of guardian of estate.--The personal representative of the estate of a deceased guardian of the estate or the guardian of an incapacitated guardian of the estate by reason of the position so held shall not succeed to the administration of, or have the right to possess, any asset of the estate that was being administered by the deceased or incapacitated guardian of the estate, except to protect it pending its delivery to the person entitled to it. The account of the deceased or incapacitated guardian of the estate may be filed by the fiduciary of the guardian's estate and shall be filed if the court shall so direct. The court may direct the fiduciary of a deceased or incapacitated guardian of the estate to make the distribution and to make the transfers and assignments necessary to carry into effect a decree of distribution.

(b.5) Surviving or remaining guardians.--Unless the order of appointment specifies otherwise, surviving or remaining guardians of the estate shall have all the powers of the original guardians of the estate.

(b.6) Disagreement of guardians of the estate.--If a dispute arises among guardians of the estate, the decision of the majority shall control unless otherwise provided by the court. A dissenting guardian of the estate shall join with the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting guardian of the estate shall not be liable for the consequences of any majority decision even though the guardian joins in carrying it out, if the dissent is expressed promptly in writing to all the other guardians of the estate, but liability for failure to join in the further administration of the estate or to prevent a breach of fiduciary duty may not be thus avoided. If a dispute arises among guardians of the estate as to the exercise or nonexercise of any of their powers and there is no agreement of a majority of them, unless otherwise provided by the court, the court, upon petition filed by any of the guardians of the estate or by any party in interest, aided if necessary by the report of a master, in its discretion, may direct the exercise or nonexercise of the power as the court shall deem for the best interest of the estate.

(b.7) Filing of decree.--If a guardian of the estate has the power to engage in a transaction involving the real estate of an incapacitated person, a certified copy of the decree appointing the guardian of the estate may be recorded in the office for the recording of deeds in any county where the real estate, which is subject to that power, is located.

(b.8) Inadequacy of consideration.--

(1) Except as provided in paragraphs (2) and (3), when a guardian of the estate makes a contract, the inadequacy of consideration or the receipt of an offer to deal on other terms does not:

(i) relieve the guardian of the estate of the obligation to perform the contract, except as otherwise agreed by the parties; or

(ii) constitute a basis for any court to set aside the contract or refuse to enforce it by specific performance or otherwise.

(2) This subsection does not affect or change the inherent right of the court to set aside a contract for fraud, accident or mistake.

(3) Nothing in this subsection shall affect the liability of a guardian of the estate for surcharge on the ground of negligence or bad faith in making a contract.

(b.9) Substitution of party.--If a party to a pending action or proceeding has a guardian of the estate appointed, the guardian of the estate of the incapacitated person may be substituted as a party as provided by law.

(b.10) Specific performance of contracts.--

(1) If a person enters into an agreement to purchase or sell real or personal estate and a guardian of the estate is appointed for the person before the consummation of the agreement, the guardian of the estate may consummate the agreement. If the guardian of the estate does not consummate the agreement, the court may order specific performance of the agreement:

(i) on the application of any party in interest;

(ii) after such notice and with such security, if any, as the court may direct;
and

(iii) if the agreement would have been enforced specifically had the guardian of the estate not been appointed.

(2) The guardian of the estate or such other person as the court directs shall execute any necessary deed or transfer regarding the agreement under this subsection. The title of any purchaser under an agreement in which the incapacitated person was the vendor shall be the same as though the incapacitated person had conveyed or transferred the property prior to the appointment of the guardian of the estate.

(3) When any petition for specific performance of an agreement to purchase or sell real estate is filed, the prothonotary of the court of common pleas where the real estate or any part of it lies, upon the receipt of a certificate of such fact by the clerk of the court where the petition was filed, shall enter the petition upon either the judgment or ejectment and miscellaneous indexes against the defendants as directed by local rules of court and shall certify it as lis pendens in any certificate of search that the prothonotary is required to make.

(b.11) Abandonment of property.--Subject to subsection (b.2)(3):

(1) A guardian of the estate may abandon property of the incapacitated person if the property is so burdensome or encumbered or in such condition that it is of no value to the estate.

(2) The court may authorize the guardian of the estate to transfer, renounce or release property of the incapacitated person without consideration if:

(i) the property cannot be abandoned without transfer of title to another or without a formal renunciation or release; and

(ii) the court finds that the transfer, renunciation or release will be for the best interests of the estate.

(b.12) Title of purchaser.--If the guardian of the estate of an incapacitated person has given a bond as required in accordance with this title, any sale, pledge, mortgage or exchange by the guardian of the estate, whether pursuant to a decree or to the exercise of a power under this title, shall pass the full title of the incapacitated person, free of any right of the incapacitated person's spouse, unless otherwise specified. Persons dealing with the guardian of the estate shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the incapacitated person. A sale or exchange by a guardian of the estate pursuant to a decree under subsection (b.2)(3) shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law if the holder of the mortgage consents by writing filed in the proceeding. No sale, mortgage, exchange or conveyance shall be prejudiced by the subsequent dismissal of the guardian of the estate if the person dealing with the guardian did so in good faith.

(b.13) Compromise or settlement.--A guardian of the estate may compromise or settle any claim by or against the estate, through litigation or otherwise, without court approval. The guardian may seek court approval of any such compromise or settlement, subject to the following:

(1) The court may enter a decree authorizing the compromise or settlement to be made:

(i) On petition by the guardian of the estate or any party in interest setting forth all the facts and circumstances.

(ii) After notice as the court directs.

(iii) Aided if necessary by the report of a master.

(2) For a compromise or settlement of an action in which damages are sought on behalf of the estate, the court that has jurisdiction and in which the action is pending may approve the compromise or settlement, including an agreement for the payment of counsel fees and other proper expenses incident to the action, upon:

(i) oral motion by plaintiff's counsel of record in the action; or

(ii) petition by the guardian of the estate.

(3) The order of the court approving the compromise or settlement or the agreement for the payment of counsel fees and other expenses shall not be subject to collateral attack in the orphans' court division.

(4) The guardian of the estate shall file a copy of the order of the court approving the compromise or settlement with the clerk of the court having jurisdiction of the estate. When the guardian of the estate has been required to give bond, the guardian may not receive the proceeds of the compromise or settlement until:

(i) the court of the county having jurisdiction of the estate has made an order excusing the guardian from entering additional security; or

(ii) the guardian has entered the additional security that is required by the court of the county having jurisdiction of the estate.

(c) Reports.--

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

(i) Guardian of the estate:

(A) current principal and how it is invested;

(B) current income;

(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.

(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 or the guardian's representative personally visited the incapacitated person in the past year; and

(F) plans for future care, where appropriate.

(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.

(3) Failure of a guardian to file a timely report under this subsection shall subject the guardian to appropriate sanctions.

(c.1) Records of guardian.--Each guardian of an incapacitated person shall keep records regarding the guardianship and the incapacitated person. Failure of a guardian to keep records under this subsection shall subject the guardian to appropriate sanctions.

* * *

(g) [Criminal and civil immunity] Liability of guardian of person.--

(1) 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 of the person shall not be criminally liable or civilly liable for damages for performing duties as a guardian of the person, as authorized under this chapter.

(2) Except as otherwise agreed, a guardian of the person is not personally liable on a contract properly entered into by the guardian of the person in a fiduciary capacity.

(h) Liability of guardian of estate.--

(1) Except as otherwise agreed, a guardian of the estate is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the guardian fails to reveal in the contract the representative capacity and identify the estate.

(2) If a guardian of the estate fails to exercise reasonable care, skill and caution for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate, the guardian of the estate may be personally liable to the estate. The court shall evaluate the application of reasonable care, skill and caution in the context of the identity, background and experience of the guardian of the estate.

(3) A question of liability between the estate and the guardian personally may be determined in a proceeding for accounting, surcharge or indemnification or in another appropriate proceeding.

(i) Delegation by guardian of estate.--A guardian of the estate may delegate powers and duties, including discretionary powers and duties, and an agent may accept the delegation of powers and duties, subject to the following:

(1) A guardian of the estate shall exercise reasonable care, skill and caution in:

(i) Selecting an agent.

(ii) Establishing the scope and specific terms of the delegation, consistent with the purposes and terms of the guardianship.

(iii) Reviewing periodically the agent's actions in order to monitor the agent's performance and compliance with the scope and specific terms of the delegation.

(2) The agent shall comply with the scope and terms of the delegation, exercise the delegated duties and powers with reasonable care, skill and caution and be liable to the incapacitated person's estate for failure to do so. An agent who represents having special skills or expertise shall use those special skills or that expertise.

(3) A guardian of the estate who complies with paragraph (1) is not liable to the incapacitated person or to the incapacitated person's estate for an action of the agent to whom the function was delegated.

(4) An agent who accepts the delegation of duties or powers from a guardian of the estate who is subject to the jurisdiction of a court of this Commonwealth shall be deemed to have submitted to the jurisdiction of that court even if the terms of the delegation provide for a different jurisdiction or venue.

(5) A co-guardian of the estate may delegate duties and powers to another co-guardian of the estate if the delegating co-guardian reasonably believes that the other co-guardian has greater skills than the delegating co-guardian with respect to those duties and powers and the other co-guardian accepts the delegation. The delegating co-guardian shall not be responsible for the decisions, actions or inactions of the co-guardian to whom those duties and powers have been delegated if the delegating co-guardian has exercised reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the performance of the co-guardian to whom the duties and powers have been delegated and that co-guardian's compliance with the scope and specific terms of the delegation.

(j) Inventory.--

(1) Within 90 days after the order of appointment of an incapacitated person's guardian of the estate, the guardian shall prepare and file with the appointing court a detailed inventory of:

(i) The real and personal property of the estate.

- (ii) Other assets in which the incapacitated person has an interest, including, but not limited to, information regarding life insurance, annuities and retirement plans.
- (iii) All income received by the guardian on behalf of the incapacitated person and all funds received from the United States Department of Veterans Affairs, Social Security Administration and other periodic retirement or disability payments under private or governmental plans and other periodic payments payable for the life or life expectancy of the incapacitated person.
- (2) The inventory under paragraph (1) shall be filed with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

Comment

This section is not intended to limit any additional powers or duties of a guardian of the estate that may otherwise be provided by law. With respect to subsection (b.9), Rules 2351-2375 of the Pennsylvania Rules of Civil Procedure govern substitution of parties. In addition, the rules provide for the substitution of a person to whom a voluntary transfer is made, a guardian of a minor and a guardian ad litem of an incapacitated person, a successor becoming a party to a pending action, and the rights and liabilities of a successor. See Rules 2004, 2033, 2060, 2351, 2352(a) and 2354.

Examples of plans for future care under subsection (c)(1)(ii)(F) include a plan for supportive services, an individualized education plan, a behavioral supports plan and a formalized treatment plan. An annual plan could be based on a functional assessment of abilities and limitations of the individual with diminished capacity.

The purpose of subsection (c)(3) is to assure that the guardian is properly monitoring the incapacitated person and spending an appropriate amount of time and resources on behalf of the incapacitated person. It is intended that the court order appropriate sanctions commensurate with the inappropriate conduct of the guardian, taking into consideration such factors as (1) whether the guardian is an individual or a professional guardian, (2) the

relationship between the guardian and the incapacitated person and (3) the size of the estate.

Subsection (g)(1) applies the same standard to all guardians of the person. Subsection (g)(2) is intended to cover such circumstances as the guardian of the person's execution of forms (1) for the admittance of the incapacitated person to a nursing home or facility and (2) regarding informed consent for medical care for the incapacitated person.

Subsection (h)(2) is not intended to change the standard set forth in § 7212 under the prudent investor rule or the law regarding the court's authority. Under subsection (h)(2), the court must evaluate the application of reasonable care, skill and caution by the guardian of the estate in the context of the identity, background and experience of the guardian of the estate. Therefore, an individual guardian with no particular financial or fiduciary background may not be held to the same standard of reasonable skill, care and caution as a professional fiduciary.

The use of the word "agent" under subsection (i) is not intended to imply an agency under Chapter 56 (powers of attorney). If a guardian of the estate delegates powers and duties in compliance with subsection (i), the court must evaluate the guardian's fees charged and the amount expended as a result of the delegation.

* * *

§ 5526. Protection of person dealing with guardian.

(a) Third party liability.--Any person who is given instructions by a guardian in accordance with the terms of a guardianship order shall comply with the instructions. Any person who without reasonable cause fails to comply with those instructions shall be subject to civil liability for any damages resulting from noncompliance. Reasonable cause under this subsection shall include, but not be limited to, a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment under section 302 of the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or section 302 of the act of October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

(b) Third party immunity.--Any person who acts in good faith reliance on a guardianship order shall incur no liability as a result of acting in accordance with the instructions of the guardian.

(c) Information regarding guardianship.--Upon request, a guardian shall:

(1) Give a copy of the guardianship order to the person to whom the guardian gives instructions, along with an affidavit of the guardian certifying that the guardianship order remains effective as written.

(2) Inform the person of any restrictions or limitations on the guardian's authority.

§ 5531. When [accounting] account filed.

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

* * *

§ 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.]

(1) In reasonably exercising discretion, a guardian of the estate of an incapacitated person may expend without court approval for the care and maintenance

of the incapacitated person all funds received from the United States Department of Veterans Affairs, Social Security Administration, other periodic retirement or disability payments under private or governmental plans, and other periodic payments payable for the life or life expectancy of the incapacitated person. The court may limit discretionary expenditures of income where the financial circumstances and needs of the incapacitated person so require.

(2) 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.

(3) 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.

(4) For purposes of this subsection, the term "income" means income as determined in accordance with the rules set forth in Chapter 81 (relating to principal and income), [other than] but the power to adjust and the power to convert to a unitrust shall not apply, and periodic payments that are not payable for the life or life expectancy of the incapacitated person are considered to be principal under this subsection.

(5) Fees for an incapacitated person's guardian of the person or guardian of the estate may not be paid from the income or principal of the incapacitated person's estate without court approval. However, the court may prospectively authorize a guardian's fees and retain the right to adjust and approve those fees upon review.

(b) Estate plan.--[The court, upon petition and with notice to all parties in interest and for good cause shown,] Subject to subsection (c), for good cause shown, the court 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, including the designation of a beneficiary, under life insurance policies, annuity contracts, retirement plans, including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account 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] or authorize any other action, including, but not limited to, an action set forth in this subsection that minimizes current or prospective taxes, [or which] carries out a lifetime giving pattern or creates or preserves the incapacitated person's eligibility for a benefit, a program or assistance under a statute or regulation. The court in exercising its judgment shall consider the testamentary and inter vivos intentions of the incapacitated person insofar as they can be ascertained.

(c) Petition and notice.--The court may exercise its power under subsection (b) upon petition and with notice to:

(1) All persons who are sui juris and would be entitled to share in the incapacitated person's estate if the incapacitated person died intestate at that time.

(2) Any person known to the guardian who would be prejudiced by the proposed action.

(3) Other parties as the court may direct.

Comment

Consistent with the historical allowance of discretionary expenditures of receipts from the Social Security Administration and the U.S. Department of Veterans Affairs, subsection (a)(1) extends guidance to other periodic payments and allows discretionary expenditures without prior court approval for all periodic payments that are payable for the life or life expectancy of the incapacitated person. If such payments are very large, as may be the case with some structured settlements, it is expected that the court will take those payments into account in the selection of the guardian. The court is explicitly empowered to limit discretionary expenditures of income prospectively to cover special circumstances. This allows flexibility for the court to frame the guardian's discretionary authority in the most appropriate manner, consistent with a "budget" that takes into account the particular circumstances of the guardianship and the needs of the incapacitated person.

The amendment of subsection (b) clarifies existing law and specifically provides that the court may authorize any other action, not just one that results in minimizing current or prospective taxes or that carries out a lifetime giving pattern. Subsection (b) also provides that the specified action may involve creating or preserving the incapacitated person's eligibility for a benefit, a program or assistance under a statute or regulation.

Subsection (c) specifies that the court may exercise its power to substitute its judgment for that of the incapacitated person upon petition and notice to certain persons, not just to "all parties in interest."

* * *

§ 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] may be required to post bond as the court directs.

* * *

TRANSITIONAL LANGUAGE

APPLICABILITY

The amendment of 20 Pa.C.S. shall apply to all guardianship petitions that are filed, proceedings that occur and orders that are made on or after the effective date of this act.

EFFECTIVE DATE

The amendment of 20 Pa.C.S. and the foregoing applicability provisions shall take effect in 60 days.

SOURCE TABLE

New Subsection in § 5521	New Paragraph	Cross-Reference under Former § 5521(b)	20 Pa.C.S. Basis for New Subsection	UGPPA ³³³ Basis for New Subsection
(a.1)	--	§ 3374	§ 3374	--
(b.1)	(1)	§ 3313	§ 7780.6(a)(6)	§ 425(b)(18)
	(2)	§ 3317	§ 3317	--
	(3)	§ 3321	§ 7780.6(a)(23)	--
	(4)	§ 3322	§ 3322	--
	(5)	§ 5151	§§ 5151 and 7780.6(a)(10)	§ 425(b)(7)
	(6)	§ 5145	§ 5145	--
	(7)	--	§ 7780.6(a)(7)	§ 425(b)(19)
	(8)	--	§§ 5602(a)(6) and 5603(f)(1)	--
	(9)	§ 3320	§ 3320	§ 425(b)(13)
	(10)	§ 5141	§§ 5141 and 5603(i)	--
(b.2)	(1)	§ 3314	§ 3314	--
	(2)	§ 3315	§ 3315	--
	(3)	§§ 3355, 3356 and 5155	§§ 3355, 3356, 5155(1), 5155(2), 5603(i) and 7780.6(a)(15)	--
(b.3)	--	§ 3318	§ 3318	--
(b.4)	--	§ 3324	§ 3324	--
(b.5)	--	§ 3327	§ 3327	--
(b.6)	--	§ 3328	§ 3328	--
(b.7)	--	§ 3359	§ 3359	--
(b.8)	--	§ 3360	§ 3360(a)	--
(b.9)	--	§ 3372	§ 3372	--
(b.10)	--	§ 3390	§ 3390	--
(b.11)	--	§ 5143	§ 5143	--
(b.12)	--	§ 5154	§§ 5154 and 7794	--
(b.13)	--	§ 3323	§ 3323	--

³³³ Unif. Guardianship & Protective Proceedings Act, *supra* note 5.

SELECT PROVISIONS FROM THE PROBATE, ESTATES AND FIDUCIARIES CODE

The following sections are cross-referenced in 20 Pa.C.S. § 5521(b):

§ 3313. Liability insurance.

The personal representative, at the expense of the estate, may protect himself, his employees and the beneficiaries by insurance from liability to third persons arising from the administration of the estate.

§ 3314. Continuation of business.

The court, aided by the report of a master if necessary, may authorize the personal representative to continue any business of the estate for the benefit of the estate and in doing so the court, for cause shown, may disregard the provisions of the governing instrument, if any. The order may be with or without notice. If prior notice is not given to all parties in interest, it shall be given within five days after the order or within such extended time as the court, for cause shown, shall allow. Any party in interest may, at any time, petition the court to revoke or modify the order. The order may provide:

- (1) for the conduct of business, by the personal representative alone or jointly with others, or, unless restricted by the terms of the governing instrument, as a corporation to be formed;
- (2) the extent of the liability of the estate or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;
- (3) whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole;
- (4) the period of time the business may be conducted; and
- (5) such other regulations, including accountings, as the court shall deem advisable.

§ 3315. Incorporation of estate's business.

After notice to all parties in interest, aided by the report of a master if necessary, the court, unless restricted by the terms of the governing instrument, may authorize the personal representative alone or jointly with others, to organize a corporation to carry on the business of the estate, whether the business was owned solely or with others, and may contribute for stock of the corporation, as capital, all or part of the property of the estate which was invested in the business.

§ 3317. Claims against co-fiduciary.

When one of two or more personal representatives shall be individually liable to the estate, the other or others shall take any legal action against him necessary to protect the estate.

§ 3318. Revival of judgments against personal representative.

When the estate holds a judgment which is a lien on the real estate of the personal representative, any party in interest may suggest his interest in the judgment upon the record thereof and bring an appropriate action to revive it and to continue its lien. Any judgment so revived shall remain for the use of all parties in interest.

§ 3319. Power of attorney; delegation of power over subscription rights and fractional shares; authorized delegations.

(a) Power of attorney.--A personal representative may convey real estate, transfer title to personal estate, or perform any other act of administration by an attorney or agent under a power of attorney. Nothing in this subsection authorizes the delegation of any discretionary power.

(b) Delegation of power over subscription rights and fractional shares.--Where there is more than one personal representative, one or more may delegate to another the power to decide whether rights to subscribe to stock should be sold or should be exercised, and also the power to decide whether a fractional share of stock should be sold or should be rounded out to a whole share through the purchase of an additional fraction, and also the power to carry out any such decision. Any delegation may extend to all subscription rights and fractional shares from time to time received by the personal representatives on account of stock held by them, or may be limited to any extent specified in the delegation. No exercise of any delegated power shall be valid, unless:

(1) the stock on which the subscription rights or fractional shares are issued are listed or traded on the New York Stock Exchange or any other exchange approved by the Department of Banking; and

(2) the shares held by the personal representatives on which the subscription rights or fractional shares are issued constitute less than 5% of the total outstanding shares of the same class of the same corporation.

(c) Delegation authorized by governing instrument.--Nothing in this section precludes a delegation authorized by the governing instrument.

§ 3320. Voting stock by proxy.

The personal representatives or a majority of them, either in person or by proxy, may vote stock owned by the estate.

§ 3321. Nominee registration; corporate fiduciary as agent; deposit of securities in a clearing corporation; book-entry securities.

(a) Corporate personal representative.--A bank and trust company or a trust company incorporated in the Commonwealth, or a national bank with trust powers having its principal office in the Commonwealth, may keep investments or fractional interests in investments held by it, either as sole personal representative or jointly with other personal representatives, in the name or names of the personal representatives or in the name of the nominee of the corporate personal representative: Provided, That the consent thereto of all the personal representatives is obtained: And provided further, That all such investments shall be so designated upon the records of the corporate personal representative that the estate to which they belong shall appear clearly at all times.

(b) Individual personal representative.--A personal representative serving jointly with a bank and trust company or a trust company incorporated in the Commonwealth, or with a national bank having its principal office in the Commonwealth, may authorize or consent to the corporate personal representative having exclusive custody of the assets of the estate and to the holding of such investments in the name of a nominee of such corporate personal representative, to the same extent and subject to the same requirements that the corporate personal representative, if it were the sole personal representative, would be authorized to hold such investments in the name of its nominee.

(c) Corporate fiduciary as agent.--An individual personal representative may employ a bank and trust company or a trust company incorporated in the Commonwealth, or a national bank with trust powers having its principal office in the Commonwealth, to act as his agent under a power of attorney in the performance of ministerial duties, including the safekeeping of estate assets, and such agent, when so acting, may be authorized to hold such investments in the name of its nominee to the same extent and subject to the same requirements that such agent, if it were the personal representative, would be authorized to hold such investments in the name of the nominee.

(d) Deposit of securities in a clearing corporation.--A personal representative holding securities in its fiduciary capacity, any bank and trust company, trust company or National bank holding securities as an agent pursuant to subsection (c) of this section, is authorized to deposit or arrange for the deposit of such securities in a clearing corporation (as defined in Division 8 of Title 13 (relating to investment securities)). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank and trust company, trust company or National bank acting as an agent under a power of attorney for a personal representative shall at all times show the name of the party for whose account the securities are so deposited. Title to such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank and trust company, trust company or National bank so depositing securities pursuant to this section shall be subject to such rules and regulations as, in the case of State chartered institutions, the Department of Banking and, in the case of National banking associations, the comptroller of the currency may from

time to time issue including, without limitation, standards for, or the method of making a determination of, the financial responsibility of any clearing corporation in which securities are deposited. A bank and trust company, trust company or National bank acting as custodian for a personal representative shall, on demand by the personal representative, certify in writing to the personal representative the securities so deposited by such bank and trust company, trust company or National bank in such clearing corporation for the account of such personal representative. A personal representative shall, on demand by any party to a judicial proceeding for the settlement of such personal representative's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such personal representative in such clearing corporation for its account as such personal representative.

(e) Accounting for book-entry securities.--With respect to securities which are available in book-entry form as an alternative to securities in definitive form, the receipt, holding or transfer of such securities in book-entry form by a bank and trust company, trust company or National bank acting as a sole or joint personal representative, or as an attorney-in-fact for a personal representative, is for all purposes equivalent to the receipt, holding or transfer of such securities in definitive form and no segregation of such book-entry securities shall be required other than by appropriate accounting records to identify the accounts for which such securities are held.

§ 3322. Acceptance of deed in lieu of foreclosure.

The personal representative may take for the estate from the owner of property encumbered by a mortgage owned by the estate, a deed in lieu of foreclosure, in which event the real estate shall be considered personalty to the same extent as though title were acquired by foreclosure at sheriff's sale. Any deed or deeds heretofore so accepted are hereby made valid in accordance with the provisions hereof.

§ 3323. Compromise of controversies.

(a) In general.--Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against an estate, or to compromise or settle any question or dispute concerning the validity or construction of any governing instrument, or the distribution of all or any part of any estate, or any other controversy affecting any estate, the court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.

(b) Pending court action.--

(1) Court order.--Whenever it is desired to compromise or settle an action in which damages are sought to be recovered on behalf of an estate, any court or division thereof in which such action is pending and which has jurisdiction thereof may, upon oral motion by plaintiff's counsel of record in such action, or upon petition by the personal representative of such decedent, make an order approving such compromise or settlement. Such order may approve an agreement for the payment of counsel fees and other proper expenses incident to such action.

(2) Order not subject to collateral attack.--The order of the court approving such compromise or settlement or an agreement for the payment of counsel fees and other expenses shall not be subject to collateral attack in the orphans' court division in the settlement of an estate.

(3) Filing copy of order; additional security.--The personal representative shall file a copy of the order of the court approving such compromise or settlement in the office of the register of wills or clerk of the court having jurisdiction of the estate. When the personal representative has been required to give bond, he shall not receive the proceeds of any such compromise or settlement until the court of the county having jurisdiction of his estate has made an order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

§ 3324. Death or incapacity of fiduciary.

The personal representative of the estate of a deceased fiduciary or the guardian of an adjudged incapacitated fiduciary by reason of his position shall not succeed to the administration of, or have the right to possess, any asset of an estate which was being administered by the deceased or incapacitated fiduciary, except to protect it pending its delivery to the person entitled to it. The account of the deceased or incapacitated fiduciary may be filed by the fiduciary of his estate and it shall be filed if the court shall so direct. The court may direct the fiduciary of a deceased or incapacitated fiduciary to make the distribution and to make the transfers and assignments necessary to carry into effect a decree of distribution.

§ 3327. Surviving or remaining personal representatives.

Surviving or remaining personal representatives shall have all the powers of the original personal representatives, unless otherwise provided by the governing instrument.

§ 3328. Disagreement of personal representatives.

(a) Decision of majority.--If a dispute shall arise among personal representatives, the decision of the majority shall control unless otherwise provided by the governing instrument, if any. A dissenting personal representative shall join with the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting personal representative shall not be liable for the consequences of any majority decision even though he joins in carrying it out, if his dissent is expressed promptly to all the other personal representatives: Provided, That liability for failure to join in administering the estate or to prevent a breach of trust may not be thus avoided.

(b) When no majority.--When a dispute shall arise among personal representatives as to the exercise or nonexercise of any of their powers and there shall be no agreement of a majority of them, unless otherwise provided by the governing instrument, the court, upon petition filed by any of the personal representatives or by any party in interest, aided if necessary by the report of a master, in its discretion, may direct the exercise or nonexercise of the power as the court shall deem for the best interest of the estate.

§ 3331. Liability of personal representative on contracts.

Unless he expressly contracts otherwise, in writing, a personal representative shall not be personally liable on any written contract which is within his authority as personal representative and discloses that he is contracting as personal representative of a named estate. Any action on such a contract shall be brought against the personal representative in his fiduciary capacity only, or against his successor in such capacity, and execution upon any judgment obtained therein shall be had only against property of the estate.

§ 3332. Inherent powers and duties.

Except as otherwise provided in this title, nothing in this title shall be construed to limit the inherent powers and duties of a personal representative.

§ 3355. Restraint of sale.

The court, on its own motion or upon application of any party in interest, in its discretion, may restrain a personal representative from making any sale under an authority not given by the governing instrument or from carrying out any contract of sale made by him under an authority not so given. The order may be conditioned upon the applicant giving bond for the protection of parties in interest who may be prejudiced thereby. The order shall be void as against a bona fide grantee of, or holder of a lien on, real estate unless the decree restraining the sale, or a duplicate original or certified copy thereof, is recorded in the deed book in the office of the recorder of deeds in the county in which such real estate lies, before the recording or entering of the instrument or lien under which such grantee or lienholder claims.

§ 3356. Purchase by personal representative.

In addition to any right conferred by a governing instrument, if any, the personal representative, in his individual capacity, may bid for, purchase, take a mortgage on, lease, or take by exchange, real or personal property belonging to the estate, subject, however, to the approval of the court, and under such terms and conditions and after such reasonable notice to parties in interest as it shall direct. The court may make an order directing a co-fiduciary, if any, or the court's clerk to execute a deed or other appropriate instrument to the purchasing personal representative.

§ 3359. Record of proceedings; county where real estate lies.

Certified copies of proceedings of any court of the Commonwealth relating to or affecting real estate may be recorded in the office for the recording of deeds in any county in which the real estate lies.

§ 3360. Contracts, inadequacy of consideration or better offer; brokers' commissions.

(a) Inadequacy of consideration or better offer.--When a personal representative shall make a contract not requiring approval of court, or when the court shall approve a contract of a personal representative requiring approval of the court, neither inadequacy of consideration, nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the personal representative of the obligation to perform his contract or shall constitute ground for any court to set aside the contract, or to refuse to enforce it by specific performance or otherwise: Provided, That this subsection shall not affect or change the inherent right of the court to set aside a contract for fraud, accident or mistake. Nothing in this subsection shall affect the liability of a personal representative for surcharge on the ground of negligence or bad faith in making a contract.

(b) Brokers' commissions.--When a personal representative shall enter into an agreement of sale of real estate in good faith, which is not binding under subsection (a) of this section and which is set aside upon receipt of a higher offer for such real estate, he shall not be relieved from the payment of real estate broker or broker's commissions to the broker who had procured such agreement of sale, and in the event that more than one real estate broker is entitled to commissions for said agreements of sale, then such commissions shall be equally divided between or among such real estate brokers: Provided further, That the total aggregate commission paid as a percentage of the gross consideration of the final sale shall in no event exceed a fair commission for a single sale of the property involved.

§ 3372. Substitution of personal representative in pending action or proceedings.

Substitution of the personal representative of a deceased party to a pending action or proceeding shall be as provided by law.

§ 3374. Death or removal of fiduciary.

An action or proceeding to which a fiduciary is a party is not abated by his death or resignation or by the termination of his authority. The successor of the fiduciary may be substituted in the action or proceeding in the manner provided by law.

§ 3390. Specific performance of contracts.

(a) Application to court.--If any person makes a legally binding agreement to purchase or sell real or personal estate and dies before its consummation, his personal representative shall have power to consummate it, but if he does not do so, the court, on the application of any party in interest and after such notice and with such security, if any, as it may direct, in its discretion, may order specific performance of the agreement if it would have been enforced specifically had the decedent not died.

(b) Execution and effect of deed or transfer.--Any necessary deed or transfer shall be executed by the personal representative or by such other person as the court shall direct. The title of any purchaser under an agreement in which the decedent was the vendor shall

be the same as though the decedent had conveyed or transferred such property in his lifetime.

(c) Indexing in judgment or ejectment and miscellaneous indexes.--When any petition for specific performance of an agreement to purchase or sell real estate is filed, the prothonotary of the court of common pleas where the real estate or any part of it lies, upon the receipt of a certificate of such fact by the clerk of the court where the petition was filed, shall enter the petition upon either the judgment or ejectment and miscellaneous indexes against the defendants as directed by local rules of court and shall certify it as lis pendens in any certificate of search which he is required to make by virtue of his office.

§ 5141. Possession of real and personal property.

The guardian of the estate of a minor appointed by the court until it is distributed or sold shall have the right to, and shall take possession of, maintain and administer, each real and personal asset of the minor to which his appointment extends, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain any action with respect to such real or personal property of the minor.

§ 5142. Inventory.

Every guardian, within three months after real or personal estate of his ward comes into his possession, shall verify by oath and file with the clerk an inventory and appraisal of such personal estate, a statement of such real estate, and a statement of any real or personal estate which he expects to acquire thereafter.

§ 5143. Abandonment of property.

When any property is so burdensome or is so encumbered or is in such condition that it is of no value to the estate, the guardian may abandon it. When such property cannot be abandoned without transfer of title to another or without a formal renunciation, the court may authorize the guardian to transfer or renounce it without consideration if it shall find that this will be for the best interests of the estate.

§ 5145. Investments.

Subject only to the provisions of a governing instrument, if any, a guardian may accept, hold, invest in and retain investments as provided by Chapter 72 (relating to prudent investor rule).

§ 5146. Guardian named in conveyance.

(a) In general.--The powers, duties and liabilities of a guardian not appointed by the court as to property of the minor to which his appointment lawfully extends shall be the same as the powers, duties and liabilities of a court appointed guardian, except as the instrument making the appointment shall provide otherwise.

(b) Substituted or succeeding guardian.--A substituted or succeeding guardian, except as otherwise provided by the instrument, if any, appointing the original guardian, in addition to the powers of a guardian appointed by the court, shall have all the powers, duties and liabilities of the original guardian. He shall have the power to recover the assets of the minor from his predecessor in administration or from the fiduciary of such predecessor and, except as otherwise provided in an applicable instrument, shall stand in the predecessor's stead for all purposes, except that he shall not be personally liable for the acts of his predecessor.

(c) Effect of removal, or of probate of later will or codicil.--No act of administration performed by a testamentary guardian in good faith shall be impeached by the subsequent revocation of the probate of the will from which he derives his authority, or by the subsequent probate of a later will or of a codicil, or by the subsequent dismissal of the guardian: Provided, That regardless of the good or bad faith of the testamentary guardian, no person who deals in good faith with a testamentary guardian shall be prejudiced by the subsequent occurrence of any of these contingencies.

§ 5147. Proceedings against guardian.

Any proceeding may be brought against a guardian or the surety on his bond in the court having jurisdiction of the estate, and if he does not reside in the county, process may be served on him personally, or as follows:

(1) When resident of another county.--By a duly deputized sheriff of any other county of the Commonwealth in which he shall be found.

(2) When a nonresident of the Commonwealth.--By the sheriff of the county of the court having jurisdiction of the estate.

§ 5151. Power to sell personal property.

A guardian appointed by the court may sell, at public or private sale, any personal property of the minor.

§ 5154. Title of purchaser.

If the guardian has given the bond, if any, required in accordance with this title, any sale, pledge, mortgage, or exchange by him, whether pursuant to a decree or to a power under this title, shall pass the full title of the minor therein, free of any right of his spouse, unless otherwise specified. Persons dealing with the guardian shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the minor. Any sale or exchange by a guardian pursuant to a decree under section 5155 (relating to order of court) shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien

of any mortgage otherwise preserved from discharge by existing law, if the holder of such mortgage shall consent by writing filed in the proceeding. No such sale, mortgage, exchange, or conveyance shall be prejudiced by the subsequent dismissal of the guardian, nor shall any such sale, mortgage, exchange, or conveyance by a testamentary guardian be prejudiced by the terms of any will or codicil thereafter probated, if the person dealing with the guardian did so in good faith.

§ 5155. Order of court.

Whenever the court finds it to be for the best interests of the minor, a guardian may, for any purpose of administration or distribution, and on the terms, with the security and after the notice directed by the court:

- (1) sell at public or private sale, pledge, mortgage, lease or exchange any real or personal property of the minor;
- (2) grant an option for the sale, lease or exchange of any such property;
- (3) join with the spouse of the minor in the performance of any of the foregoing acts with respect to property held by the entireties; or
- (4) release the right of the minor in the property of his spouse and join in the deed of the spouse in behalf of the minor.

**PROBATE, ESTATES AND FIDUCIARIES CODE (20 PA.C.S.) - UNIFORM
ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION
Act of Jul. 5, 2012, P.L. 975, No. 108**

Session of 2012
No. 2012-108

HB 1720

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, providing for uniform adult guardianship and protective proceedings jurisdiction.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 59
UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS
JURISDICTION

Subchapter

- A. General Provisions
- B. Jurisdiction
- C. Transfer of Guardianship or Conservatorship
- D. Registration and Recognition of Orders from Other States
- E. Miscellaneous Provisions

SUBCHAPTER A
GENERAL PROVISIONS

Sec.

- 5901. Short title of chapter.
- 5902. Definitions.
- 5903. International application of chapter.
- 5904. Communication between courts.
- 5905. Cooperation between courts.
- 5906. Taking testimony in another state.

§ 5901. Short title of chapter.

This chapter shall be known and may be cited as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

§ 5902. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Adult.” An individual who has attained 18 years of age.

“Conservator.” A person appointed by the court to administer the property of an adult, including a person appointed under Chapter 55 (relating to incapacitated persons) as the guardian of the estate of an adult.

“Guardian.” A person appointed by the court to make decisions regarding the person of an adult, including a person appointed under Chapter 55 (relating to incapacitated persons) as the guardian of the person of an adult.

“Guardianship order.” An order appointing a guardian.

“Guardianship proceeding.” A judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

“Incapacitated person.” An adult for whom a guardian has been appointed.

“Party.” The respondent, petitioner, guardian, conservator or any other person allowed by the court to participate in a guardianship or protective proceeding.

“Person.” Notwithstanding 1 Pa.C.S. § 1991 (relating to definitions) and except in the term “incapacitated person” or “protected person,” any:

- (1) individual;
- (2) corporation;
- (3) business trust;
- (4) estate;
- (5) trust;
- (6) partnership;
- (7) limited liability company;
- (8) association;
- (9) joint venture;
- (10) public corporation;
- (11) government or governmental subdivision, agency or instrumentality; or
- (12) other legal or commercial entity.

“Protected person.” An adult for whom a protective order has been issued.

“Protective order.” An order appointing a conservator or other order related to management of an adult’s property.

“Protective proceeding.” A judicial proceeding in which a protective order is sought or has been issued.

“Record.” Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

“Respondent.” An adult for whom a protective order or the appointment of a guardian is sought.

“State.” A state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe or any territory or insular possession subject to the jurisdiction of the United States.

§ 5903. International application of chapter.

A court of this Commonwealth may treat a foreign country as if it were a state for the purpose of applying this subchapter and Subchapters B (relating to jurisdiction), C (relating to transfer of guardianship or conservatorship) and E (relating to miscellaneous provisions).

§ 5904. Communication between courts.

(a) Authorization.--A court of this Commonwealth may communicate with a court in another state concerning a proceeding arising under this chapter. The court may allow the parties to participate in the communication. Except as otherwise provided in subsection (b), the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

(b) Exception.--Courts may communicate concerning schedules, calendars, court records and other administrative matters without making a record.

§ 5905. Cooperation between courts.

(a) Initiation.--In a guardianship or protective proceeding in this Commonwealth, a court of this Commonwealth may request the appropriate court of another state to do any of the following:

- (1) Hold an evidentiary hearing.
- (2) Order a person in that state to produce evidence or give testimony pursuant to procedures of that state.
- (3) Order that an evaluation or assessment be made of the respondent.
- (4) Order any appropriate investigation of a person involved in a proceeding.
- (5) Forward to the court of this Commonwealth a certified copy of the transcript or other record of a hearing under paragraph (1) or any other proceeding, any evidence otherwise produced under paragraph (2) and any evaluation or assessment prepared in compliance with an order under paragraph (3) or (4).
- (6) Issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person.
- (7) Issue an order authorizing the release of medical, financial, criminal or other relevant information in that state, including protected health information as defined in 45 CFR 160.103 (relating to definitions).
- (8) Take or refrain from taking any other action to facilitate the prompt and fair resolution of matters subject to this chapter.

(b) Response.--If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (a), a court of this Commonwealth has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

§ 5906. Taking testimony in another state.

(a) General procedures.--In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this Commonwealth for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) Means.--In a guardianship or protective proceeding, a court in this Commonwealth may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this Commonwealth shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

SUBCHAPTER B JURISDICTION

Sec.

5911. Definitions; significant connection factors.

5912. Exclusive basis.

5913. Jurisdiction.

5914. Special jurisdiction.

5915. Exclusive and continuing jurisdiction.

5916. Appropriate forum.

5917. Jurisdiction declined by reason of conduct.

5918. Notice of proceeding.

5919. Proceedings in more than one state.

§ 5911. Definitions; significant connection factors.

(a) Definitions.--The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Emergency.” A circumstance:

(1) which likely will result in substantial harm to a respondent’s health, safety or welfare; and

(2) for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent’s behalf.

“Home state.” One of the following:

(1) The state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian.

(2) If the requirement of paragraph (1) is not met, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

“Significant-connection state.” A state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(b) Significant connection factors.--In determining under sections 5913 (relating to jurisdiction) and 5921(e) (relating to transfer of guardianship or conservatorship to another state) whether a respondent has a significant connection with a particular state, the court shall consider all of the following:

(1) The location of the respondent’s family and other persons required to be notified of the guardianship or protective proceeding.

(2) The length of time the respondent at any time was physically present in the state and the duration of any absence.

(3) The location of the respondent’s property.

(4) The extent to which the respondent has ties to the state. This paragraph includes voting registration, state or local tax return filing, vehicle registration, driver’s license, social relationship and receipt of services.

§ 5912. Exclusive basis.

Notwithstanding any inconsistent provisions of Chapter 55 (relating to incapacitated persons), this subchapter provides the exclusive jurisdictional basis for a court of this Commonwealth to appoint a guardian or issue a protective order for an adult.

§ 5913. Jurisdiction.

A court of this Commonwealth has jurisdiction to appoint a guardian or issue a protective order for a respondent if one of the following paragraphs applies:

(1) This Commonwealth is the respondent’s home state.

(2) On the date the petition is filed, all of the following subparagraphs apply:

(i) This Commonwealth is a significant-connection state.

(ii) One of the following clauses applies:

(A) The respondent does not have a home state, or a court of the respondent’s home state has declined to exercise jurisdiction because this Commonwealth is a more appropriate forum or has declined to exercise jurisdiction in a manner not inconsistent with a determination that this Commonwealth is a more appropriate forum.

(B) The respondent has a home state; a petition for an appointment or order is not pending in a court of that state or another significant-connection state; and, before the court makes the appointment or issues the order:

(I) a petition for an appointment or order is not filed in the respondent’s home state;

(II) an objection to the court’s jurisdiction is not filed by a person required to be notified of the proceeding; and

(III) the court in this Commonwealth concludes that it is an appropriate forum under the factors set forth in section 5916 (relating to appropriate forum).

(3) All of the following subparagraphs apply:

(i) This Commonwealth does not have jurisdiction under either paragraph (1) or (2).

(ii) The respondent's home state and all significant-connection states have declined to exercise jurisdiction because this Commonwealth is the more appropriate forum or has declined to exercise jurisdiction in a manner not inconsistent with a determination that this Commonwealth is a more appropriate forum.

(iii) Jurisdiction in this Commonwealth is consistent with the Constitution of the United States and the Constitution of Pennsylvania.

(4) The requirements for special jurisdiction under section 5914 (relating to special jurisdiction) are met.

§ 5914. Special jurisdiction.

(a) Scope.-- Notwithstanding the requirements of section 5513 (relating to emergency guardian) as it relates to limiting the duration of an order appointing an emergency guardian of the person or estate, a court of this Commonwealth lacking jurisdiction under section 5913(1), (2) or (3) (relating to jurisdiction) has special jurisdiction to do any of the following:

(1) Appoint a guardian in an emergency for a term not exceeding 90 days for a respondent who is physically present in this Commonwealth.

(2) Issue a protective order with respect to real or tangible personal property located in this Commonwealth, including, in an emergency, a protective order for a term not exceeding 90 days.

(3) Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to section 5921 (relating to transfer of guardianship or conservatorship to another state).

(b) Dismissal.--If a petition for the appointment of a guardian in an emergency is brought in this Commonwealth and this Commonwealth was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

§ 5915. Exclusive and continuing jurisdiction.

Except as otherwise provided in section 5914 (relating to special jurisdiction), a court that has appointed a guardian or issued a protective order consistent with this chapter has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

§ 5916. Appropriate forum.

(a) Decline to exercise jurisdiction.--A court of this Commonwealth having jurisdiction under section 5913 (relating to jurisdiction) to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) Procedure.--If a court of this Commonwealth declines to exercise its jurisdiction under subsection (a), it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(c) Consideration.--In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

- (1) any expressed preference of the respondent;
- (2) whether abuse, neglect or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect or exploitation;
- (3) the length of time the respondent was physically present in or was a legal resident of this Commonwealth or another state;
- (4) the distance of the respondent from the court in each state;
- (5) the financial circumstances of the respondent's estate;
- (6) the nature and location of the evidence;
- (7) the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- (8) the familiarity of the court of each state with the facts and issues in the proceeding; and
- (9) if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

§ 5917. Jurisdiction declined by reason of conduct.

(a) Judicial options.--If a court of this Commonwealth determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may exercise an option under any of the following paragraphs:

- (1) Decline to exercise jurisdiction.
- (2) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to:
 - (i) ensure the health, safety and welfare of the respondent or the protection of the respondent's property; or
 - (ii) prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction.
- (3) Continue to exercise jurisdiction after considering:
 - (i) the extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;
 - (ii) whether it is a more appropriate forum than the court of any other state under the factors set forth in section 5916(c) (relating to appropriate forum); and
 - (iii) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 5913 (relating to jurisdiction).

(b) Costs and fees.--If a court of this Commonwealth determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney fees, investigative fees, court costs, communication expenses, witness fees and expenses and travel expenses. The court may not assess fees, costs or expenses of any kind against the Commonwealth, a political subdivision or an instrumentality of the Commonwealth unless authorized by law other than this chapter.

§ 5918. Notice of proceeding.

If a petition for the appointment of a guardian or issuance of a protective order is brought in this Commonwealth and this Commonwealth was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this Commonwealth, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this Commonwealth.

§ 5919. Proceedings in more than one state.

Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this Commonwealth under section 5914(a)(1) or (2) (relating to special jurisdiction), if a petition for the appointment of a guardian or issuance of a protective order is filed in this Commonwealth and in another state and neither petition has been dismissed or withdrawn, all of the following apply:

(1) If the court in this Commonwealth has jurisdiction under section 5913 (relating to jurisdiction), it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to section 5913 before the appointment or issuance of the order.

(2) If the court in this Commonwealth does not have jurisdiction under section 5913, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this Commonwealth shall dismiss the petition unless the court in the other state determines that the court in this Commonwealth is a more appropriate forum.

SUBCHAPTER C TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

Sec.

5921. Transfer of guardianship or conservatorship to another state.

5922. Accepting guardianship or conservatorship transferred from another state.

§ 5921. Transfer of guardianship or conservatorship to another state.

(a) Petition.--A guardian or conservator appointed in this Commonwealth may petition the court to transfer the guardianship or conservatorship to another state.

(b) Notice.--Notice of a petition under subsection (a) must be given to the persons that would be entitled to notice of a petition in this Commonwealth for the appointment of a guardian or conservator.

(c) Hearing.--The court shall hold a hearing on a petition filed under subsection (a):

(1) on its own motion; or

(2) on request of:

(i) the guardian or conservator;

(ii) the incapacitated or protected person; or

(iii) another person required to be notified of the petition.

(d) Provisional guardianship order.--The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(1) the incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(3) plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(e) Provisional conservatorship order.--The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(1) the protected person is physically present in or is reasonably expected to move permanently to the other state or the protected person has a significant connection to the other state considering the factors in section 5911(b) (relating to definitions; significant connection factors);

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(3) adequate arrangements will be made for management of the protected person's property.

(f) Final order.--The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(1) a provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to section 5922 (relating to accepting guardianship or conservatorship transferred from another state); and

(2) the documents required to terminate a guardianship or conservatorship in this Commonwealth.

§ 5922. Accepting guardianship or conservatorship transferred from another state.

(a) Petition.--To confirm transfer of a guardianship or conservatorship transferred to this Commonwealth under provisions similar to section 5921 (relating to transfer of guardianship or conservatorship to another state), the guardian or conservator must petition the court in this Commonwealth to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(b) Notice.--Notice of a petition under subsection (a) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this Commonwealth. The notice must be given in the same manner as notice is required to be given in this Commonwealth.

(c) Hearing.--The court shall hold a hearing on a petition filed under subsection (a):

(1) on its own motion; or

(2) on request of:

(i) the guardian or conservator;

(ii) the incapacitated or protected person; or

(iii) another person required to be notified of the petition.

(d) Provisional order.--The court shall issue an order provisionally granting a petition filed under subsection (a) unless:

(1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(2) the guardian or conservator is ineligible for appointment in this Commonwealth.

(e) Final order.--The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this Commonwealth upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to section 5921 transferring the proceeding to this Commonwealth.

(f) Modification.--Not later than 90 days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship requires modification to conform to the laws of this Commonwealth.

(g) Recognition of order from other state.--In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(h) Effect of denial.--The denial by a court of this Commonwealth of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this Commonwealth under Chapter 55 (relating to incapacitated persons) if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

SUBCHAPTER D
REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

Sec.

5931. Registration of guardianship orders.

5932. Registration of protective orders.

5933. Effect of registration.

§ 5931. Registration of guardianship orders.

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this Commonwealth, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this Commonwealth by filing as a foreign judgment in a court, in any appropriate judicial district of this Commonwealth, certified copies of the order and letters of office.

§ 5932. Registration of protective orders.

If a conservator has been appointed in another state and a petition for a protective order is not pending in this Commonwealth, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this Commonwealth by filing as a foreign judgment in a court of this Commonwealth, in any judicial district in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

§ 5933. Effect of registration.

(a) Powers.--Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this Commonwealth all powers authorized in the order of appointment except as prohibited under the laws of this Commonwealth, including maintaining actions and proceedings in this Commonwealth and, if the guardian or conservator is not a resident of this Commonwealth, subject to any conditions imposed upon nonresident parties.

(b) Relief authorized.--A court of this Commonwealth may grant any relief available under this chapter and other law of this Commonwealth to enforce a registered order.

SUBCHAPTER E
MISCELLANEOUS PROVISIONS

Sec.

5991. Uniformity of application and construction.

5992. Relation to Electronic Signatures in Global and National Commerce Act.

§ 5991. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 5992. Relation to Electronic Signatures in Global and National Commerce Act.

(a) General rule.--Except as set forth in subsection (b), this chapter modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act (Public Law 106-229, 15 U.S.C. § 7001 et seq.).

(b) Exceptions.--

(1) This chapter does not modify, limit or supersede section 101(c) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 (c)).

(2) This chapter does not authorize electronic delivery of any of the notices described in section 103(b) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7003 (b)).

Section 2. Applicability is as follows:

(1) Subject to paragraph (2), the addition of 20 Pa.C.S. Ch. 59 applies to guardianship and protective proceedings begun on or after the effective date of this act.

(2) The addition of the following provisions of 20 Pa.C.S. Ch. 59 apply to proceedings begun before the effective date of this section, regardless of whether a guardianship or protective order has been issued:

- (i) Subchapter A.
- (ii) Subchapter C.
- (iii) Subchapter D.
- (iv) Subchapter E.

Section 3. This act shall take effect in 60 days.

APPROVED--The 5th day of July, A.D. 2012.

TOM CORBETT

**Joint State Government Commission
Advisory Committee on Decedents' Estates Laws**

(Member / County / Service)

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Richard J. Ashby, Jr., Esq.	Lancaster	1983 - 1993 2001 - 2008
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Mark Bookman, Esq.	Allegheny	2000 -
Honorable Hugh C. Boyle	Allegheny	1959 - 1986
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Norman H. Brown, Esq.	Philadelphia	1971 - 1985
Mitchell E. Chadrow, Esq.	Montgomery	2005 -
Robert Clofine, Esq.	York	2010 -
Paul E. Clouser, Esq.	Dauphin	1971 - 1989
Reuben E. Cohen, Esq.	Philadelphia	1949 - 1988

³³⁴ Chair, 1945-57.

Ira B. Coldren, Jr., Esq.	Fayette	1992 - 2006
William R. Cooper, Esq.	Montgomery	1997 -
William J. Copeland, Esq.	Allegheny	1971 - 1975
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Robert I. Friedman, Esq.	Philadelphia	2009 -
Honorable Ethan A. Gearhart	Lehigh	1945 - 1983
J. Frederick Gehr, Esq.	Lycoming	1971 - 1990
G. Donald Gerlach, Esq.	Allegheny	1975 - 2000
W. Pitt Gifford, Esq.	Erie	1945 - 1961
Jay C. Glickman, Esq.	Montgomery	2002 -
H. Amos Goodall, Jr., Esq.	Centre	2011 -
Edward J. Greene, Esq.	Allegheny	1992 - 2003

³³⁵ Chair, 1973-81.

Richard L. Grossman, Esq.	Montgomery	1971 -
George J. Hauptfuhrer, Jr., Esq. ³³⁶	Philadelphia	1971 - 1993
Neil E. Hendershot, Esq.	Dauphin	1992 -
Thomas O. Hiscott, Esq.	Montgomery	2007 -
Honorable Andrew Hourigan	Luzerne	1945 - 1951
William McC. Houston, Esq. ³³⁷	Allegheny	1971 - 2001
James A. Humphreys, III, Esq.	Lancaster	1984 - 1998
Honorable David G. Hunter	Philadelphia	1945 - 1961
A.J. White Hutton, Esq.	Franklin	1945 - 1961
Frederick F. Jones, Esq.	Erie	1971 - 1977
David J. Kaufman, Esq.	Philadelphia	1985 - 2009
Honorable Robert A. Kelly	Allegheny	2002 - 2010
William H. Latimer, Jr., Esq.	Allegheny	1975 - 1981
Honorable Anne E. Lazarus	Pennsylvania Superior Court	2004 -
Honorable Mark E. Lefever ³³⁸	Philadelphia	1945 - 1973
Robert P. Leiby, Jr., Esq.	Philadelphia	1975 - 1996
Shippen Lewis, Esq.	Philadelphia	1945 - 1951
Honorable William W. Litke	Centre	1945 - 1991
John J. Lombard, Jr., Esq.	Philadelphia	1992 -
Alan S. Loose, Esq.	Carbon	1945 - 1972
Honorable J. Paul MacElree	Chester	1945 - 1971
James F. Mannion, Esq.	Montgomery	2006 -

³³⁶ Chair, 1981-93.

³³⁷ Chair, 1993-2001.

³³⁸ Chair, 1958-73.

Honorable Frederick A. Marx	Berks	1945 - 1961
Benjamin G. McFate, Esq.	Venango	1975 - 1983
Edwin L.R. McKean, Esq.	Erie	1992 - 2007
Ralph D. McKee, Esq.	Allegheny	1945 - 1975
Richard G. Miller, Esq.	Washington	1945 - 1949
John F. Meck, Esq.	Allegheny	2001 -
Michael J. Mullaugh, Esq.	Allegheny	1994 -
R. Thomas Murphy, Esq.	Franklin	2010 -
Honorable Lawrence O'Toole	Allegheny	2010 -
Honorable Paula Francisco Ott	Pennsylvania Superior Court	2001 -
Honorable Stanley R. Ott	Montgomery	2010 -
Honorable Edmund S. Pawelec	Philadelphia	1978 - 2004
Richard L. Placey, Esq.	Dauphin	1985 -
Raymond M. Remick, Esq.	Philadelphia	1945 - 1949
Honorable Karl E. Richards	Dauphin	1945 - 1961
William Campbell Ries, Esq.	Allegheny	1983 -
William M. Robinson, Esq.	Allegheny	1945 - 1961
Bruce A. Rosenfield, Esq.	Philadelphia	1992 -
Michael J. Saile, Esq.	Bucks	2003 -
Honorable Edwin H. Satterthwaite	Bucks	1971 - 1985
James G. Schmidt, Esq.	Philadelphia	1949 - 1995
Pam H. Schneider, Esq.	Philadelphia	1992 - 2011
Dean John J. Sciullo	Allegheny	1978 - 2000

Arthur M. Scully, Esq.	Allegheny	1945 - 1949
Clarence L. Shaver, Esq.	Somerset	1945 - 1961
Honorable Louis Sherman	Philadelphia	1977 - 1984
K.L. Shirk, Jr., Esq.	Lancaster	1983 - 2006
M. Paul Smith, Esq.	Montgomery	1947 - 1998
Boyd Lee Spahr, Esq.	Philadelphia	1945 - 1961
Thomas Stokes, Esq.	Philadelphia	1945 - 1951
J. Pennington Straus, Esq.	Philadelphia	1971 - 1996
Honorable Lee F. Swope	Dauphin	1971 - 1991
Honorable Alfred L. Taxis	Montgomery	1971 - 1985
Regina O. Thomas, Esq.	Philadelphia	1985 - 2011
Honorable Robert W. Tredinnick	Montgomery	1985 - 1987
Honorable Thomas P. Trimble	Allegheny	1945 - 1951
Honorable Edward L. Van Roden	Delaware	1949 - 1972
Paul C. Wagner, Esq.	Philadelphia	1945 - 1979
Donald R. Waisel, Esq.	Dauphin	1978 - 2008
Edward M. Watters, III, Esq. ³³⁹	Chester	1992 -
Robert B. Wolf, Esq.	Allegheny	2000 -
Lenard Wolffe, Esq.	Philadelphia	1977 - 1978
Honorable Lawrence E. Wood	Chester	1992 - 2002
W. Steven Woodward, Esq.	Chester	2011 -
C. Thomas Work, Esq.	Berks	1985 -
Honorable A. Kirk Wrenshall	Washington	1945 - 1972

³³⁹ Chair, 2001-present.

Honorable J. Colvin Wright	Pennsylvania Superior Court	1945 - 1978
Honorable Vincent X Yakowicz	Cumberland	1971 - 2010
Honorable Paul R. Zavarella	Allegheny	1985 - 2002
Adolph L. Zeman, Esq.	Washington	1945 - 1976