

Ethical Responsibilities of Agents and Guardians

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- Research suggests one out of every 10 people, age 60 and older who live at home, suffer abuse, neglect, or exploitation.
 - Only one in 24 cases of elder abuse is reported to authorities
- 44% of nursing home residents report having been abused, and 95% report that they or another resident had been neglected.*

* Elder Law Task Force

POA vs. Guardianship

When an individual attains 18 years of age, the law permits him or her to make legal decisions for himself or herself with regard to his or her health care and finances.

Financial POA

- “The purpose is to give the person you designate broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.”
 - THE LAW PERMITS YOU, IF YOU CHOOSE, TO GRANT BROAD AUTHORITY TO AN AGENT UNDER A POWER OF ATTORNEY, INCLUDING THE ABILITY TO GIVE AWAY ALL OF YOUR PROPERTY WHILE YOU ARE ALIVE OR TO SUBSTANTIALLY CHANGE HOW YOUR PROPERTY IS DISTRIBUTED AT YOUR DEATH.
 - Agent’s standard of care
 - Must act in accordance with principal’s reasonable expectations to the extent known, and if not known, in the principal’s best interest
 - Must act in good faith and only within the scope of the authority granted in the document

Health Care POA

- 3 tiered approach to decision making
 - Agent should discuss specifics of proposed medical care and treatment with principal if principal can communicate in any meaningful way;
 - If principal cannot give informed consent, agent shall give or withhold consent to treatment based upon choices principal made while competent;
 - If no preferences were expressed by principal, agent should make the decision based on what agent believes to be in principal's best interests.

Guardianship

- When an individual over age 18 is incapable of making medical decisions or handling his or her financial affairs, and is unable to appoint an Agent, a petition must be filed to have a judge declare the person incapacitated and appoint a guardian of the person and/or estate.
 - 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 health and safety.” 20 Pa.C.S. § 5501.
 - Guardianships – expensive, lengthy, intrusive, more restrictive

Client Representation

- **Rule 1.14 Client with Diminished Capacity**

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Client Representation

- **Rule 2.1 Advisor**

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

POAs

- **20 Pa. C.S. § 5601.3 Agent's duties**
- Cannot waive:
 - Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest.
 - Act in good faith.
 - Act only within the scope of authority granted in the power of attorney (gifts and trust, 5601.4)
- Can waive:
 - Act loyally for the principal's benefit
 - Separate funds
 - Create conflict of interest
 - Ordinary care, competence, and diligence exercised by agents
 - Recordkeeping
 - Preserve estate plan (if preserve plan consistent with principal's best interest, including taxes and government benefits)
- Liability Protection:
 - Not liable to beneficiary of estate if act in good faith
 - If act with care, competence, and diligence, not liable if benefit
 - Absent a breach of duty to the principal, decline in property value

A COURT CAN TAKE AWAY THE
POWERS OF YOUR AGENT IF IT
FINDS YOUR AGENT IS NOT ACTING
PROPERLY. 20 Pa. C.S. Section 5601

Who can ask for an accounting?

Statute

- **20 Pa. C.S. Section 5601.3(d)(1) under “Agent’s duties”**
- “Except as otherwise provided in the power of attorney, an agent shall not be required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by”
 1. Principal
 2. A guardian
 3. Conservator
 4. Another fiduciary acting for the principal
 5. Governmental agency having authority to protect the welfare of the principal
 6. Upon death:
 - The personal representative of the principal’s estate;
 - The successor in interest of the principal’s estate
- What is a successor interest?
- Also 20 Pa.C.S. Section 5610: shall file account “whenever directed to do so” by the court (same as prior law)

Uniform Power of Attorney Act

Section 116(a):

1. The principal or agent
2. Guardian, conservator, or other fiduciary acting for the principal
3. A person authorized to make health care decisions for the principal
4. The principal's spouse, parent, or descendant
5. An individual who would qualify as a presumptive heir of the principal
6. A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate
7. A governmental agency having regulatory authority to protect the welfare of the principal
8. The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare;
9. A person asked to accept the power of attorney

116(b): on motion by principal, petition shall be dismissed, unless principal lacks capacity

Elder Law Task Force recommendation 100, to
legislative branch, ask that UPOAA Section 116
on standing be enacted

CASE LAW

- BENEFICIARIES demanding an accounting

Beneficiaries Prevail

- *In re: Fiedler*, 2015 Pa.Super. 10
- *Haskins v. Carrol*, 25 Fid. Rep. 2d. 361 (O.C. Bradford 2005)

Beneficiaries Denied

- *Griggs Estate (No. 2)*, Chester County O.C. Docket No. 1512-0953; at mannionprior.com
- *Golub Trust*, 27 Fiduc. Rep. 2d 260, 265 (O.C. Philadelphia Co. 2006)
- *Rosewater Estate*, 25 Fiduc.Rep. 2d 83, 85 (O.C. Montgomery Co. 2005)

PRINCIPAL/Executor

- *In re: Estate of Slomski*, 987 A.2d 141 (Pa. 2009)
- *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010)

**INFORMATION THAT MUST BE
REVEALED**

- Waive record keeping:
 - 20 Pa.C.S. Section 5601.3(b): “except as otherwise provided,” an agent shall (4) “keep a record of all receipts, disbursements and transactions made on behalf of the principal”

If accounting requested by party with standing:

- 5601.3(d)(1), must disclose receipts, disbursements, or transactions conducted on behalf of the principal
- 5601.3(d)(2), within 30 days of request, agent shall either comply with request or provide a writing or other record substantiating the reason additional time is needed, then agent receives another 30 days

Principals of law and equity:

- 20 Pa.C.S. Section 5612: unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter

Old law:

- 20 Pa.C.S. Section 5601.2(e), agent and donee liable as equity and justice require if gift by agent is inconsistent with prudent estate planning or financial management, or with known or probable intent of principal with respect to disposition of estate

Old Law

- 20 Pa.C.S. Section 5601(e)(4), duty to keep records
- 20 Pa.C.S. Section 5605(d), discovery of information and records pertaining to acts of agent

REMEDIES

- *In re: Estate of Slomski*, 987 A.2d 141 (Pa. 2009)
- *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010)
- *In re: Fiedler*, 2015 Pa.Super. 10
- *In re: Newcomer*: No. 653 WDA 2014 (Pa.Super. 2015)

Guardianships

- Parties in interest, 20 Pa.C.S. Section 5511, notice given to all people in the commonwealth who are sui juris if died without a will.

20 Pa. C.S. Section 5533, notice to parties in interest, same administration of decedent's or minor's estate, 5534, judge or auditor rule on administrative expenses, guardian and attorney, all others claim against estate.

- Parties in interest include next of kin and spouse when confirmation of a guardian account is sought. *In re: Painter*, 45 Pa. D. & C., 404 (Erie Cnty. 1943).
- An auditor can be appointed to review a guardian's account. *In re: Davidson's Estate*, 185 A. 782 (Pa.Super. 1936).

Elder Law Task Force

- **To Supreme Court:**
 - 4: review when limited guardianship appropriate
 - 10: judges be informed if OAPSA previously involved
 - 11: training for judges on assessment of capacity, conflicts of interest, evidence of elder abuse
 - 17: Clerks of orphans court or court administration, responsible for failure to file reports
 - 26: Bill of Rights of incapacitated person, time when served with petition
 - 55: Revision of Orphans Court rules, assets of IP used for maintaining best possible quality of life
 - To Office of Elder Justice in the Courts and Advisory Council on Elder Justice in the Courts
 - 72: Training for individual guardians on liability and ethics
- **To legislature:**
 - 99: Procedure for removing and replacing guardians be adopted into the probate code

New Orphans Court rules:

- Rule 14, petition consistent with state statute
- Rule 14.5, notice form shall be used

INFORMATION

- Annual report, 20 Pa.C.S. Section 5521(c), principal and income and how invested, income, expenditures, needs for which guardian provided

REMEDIES

- *In Re: Falluco*, 791 A.2d 1177 (Pa.Super. 2002)
- *Griffith v. Commonwealth*, 399 A.2d 1191 (Pa.Comm.w. 1979)
- *In Re: Estate of Schram*, 696 A.2d 1206 (Pa.Comm.w. 1997)
- *Wilhelm v. Wilhelm*, 657 A.2d 34 (Pa.Super. 1995)

The moral of the story? A fiduciary must be chosen carefully!

Agent under a power of attorney

- When advising a client, encourage them to choose an Agent who is best suited to carry out the duties and responsibilities, and adhere to the wishes of the principal (or in the absence of known wishes, to act in the principal's best interest).
 - Avoid making choices solely to prevent hurt feelings or so that all children feel included and involved.

Guardian

- “The court has the power to place total control of a person’s affairs in the hands of another. This great power creates the opportunity for great abuse.” *In re Hyman*, 811 A.2d 605 (Pa.Super. 2002).

- When a guardian of the person is required, courts should favor the appointment of a family member, when possible
 - “Family member” should not be limited to immediate family.
 - Courts should favor an individual who has been designated as a health care representative and if that person is not available, the Courts should consult 20 Pa.C.S. § 5461(d)(1) for guidance:
 - Spouse, unless action for divorce is pending
 - Adult child
 - Parent
 - Adult brother or sister
 - Adult grandchild
 - An adult who has knowledge of the principal’s preferences and values, including religious and moral beliefs, to assess how the principal would make health care decisions

- When a guardian of the estate is required, courts should favor the appointment of a family member when the estate consists of *minimal* asset, or when the proposed guardian has the skills and experience necessary to manage the estate and is able to obtain a bond or provide other assurance of financial responsibility.
 - In all other instances, the Elder Law Task Force Committee recommends that a qualified attorney, accountant, financial advisor, institutional trustee, or agency be proposed as the guardian of the estate.
 - Easier said than done!

Qualification and screening of guardians

- 20 Pa.C.S. § 5511(f) – “The court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency.”
 - This statute does not define what constitutes a “qualified individual.”
 - No minimum education level, prior experience, special certification required
 - The Elder Law Task Force Committee recommended that all individual guardians, family and professional, be required to undergo Pennsylvania State Police criminal record check and an FBI clearance check.

Guardian's scope of liability

- The guardian, as a fiduciary, shall manage the financial affairs of the person under guardianship in a way that maximizes the dignity, autonomy, and self-determination of the person
- There is currently no mandatory training for guardians regarding their ethical obligations and potential liabilities.

- 20 Pa.C.S. § 5521(g) – In 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.

– What about individuals?

- Prior proposed legislative change would have lowered the standard for liability of a non-agency guardian of the person by requiring proof of gross negligence before the guardian could be held liable for his/her actions.
- Sharp divide among Elder Law Task Force committee members
 - Those opposed to the change pointed to the fact that the incapacitated person would have less protection and attracting people who will only serve if they have less responsibility is not in the best interests of the incapacitated person.
 - Those in favor of the change argued that where a guardian is making difficult health care decisions as an agent of the court, he or she should enjoy the limited immunities in the proposed legislation, otherwise family members might be unwilling to take on such difficult responsibilities.

In exercising the duties enumerated in 20 Pa.C.S. § 5521(b), a guardian of the estate must use the standard of care that a person of ordinary prudence would practice in the care of his own estate. *In re Estate of Rosengarten*, 871 A.2d 1249 (Pa.Super. 2005).