

UPDATE

The Stage is Well Set: The Pennsylvania Legislature's Important Role in Guardianship Reform

Pennsylvania Senate Bill 884 (2017-18 Session)

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I. Status and Timing

[Pennsylvania Senate Bill 884](#) (Printer's No. 1147) presents an important opportunity to enact key reforms of Pennsylvania's Guardianship Laws. The bill is based on long-standing recommendations from the Pennsylvania Joint State Government Commission. The Senate unanimously passed an earlier identical measure, S.B. 568, during the last legislative session (2015-16). The current bill was approved and voted out of Senate committee in June 2018, but then tabled. Although the schedule is tight, there is still time for action by both house before the end of the session in November. If not fully passed and signed this year, a new bill must be introduced in the next legislative session.

The Pennsylvania Senate has scheduled session days before the November election on September 24, 25, and 26 and October 1, 2, 3, 15, 16, and 17. The Pennsylvania House of Representatives also has scheduled session days for September 24, 25 and 25, and October 9, 10, 15, 16 and 17. If S.B. 884 is passed by the Senate in September, it appears there may be adequate opportunity for the House to move the legislation through the House Judiciary Committee and to the floor for final passage.

II. Steps Toward Reform

In 2013-14, the Pennsylvania Supreme Court formed an Elder Law Task Force to study law-related matters relevant to the growing population of older persons in Pennsylvania. The team included members of all levels of courts in the Commonwealth, plus private attorneys, criminal law specialists, and perhaps most importantly, members of organizations who work directly with vulnerable adults, including but not limited to seniors. Guardianship reform quickly became a major focus of the study.²

¹ The Penn State community includes a wide range of faculty members and researchers who contribute to an open, public dialogue on important issues across the state, nation and world. Opinions expressed within this testimony represent solely my views and do not represent the views of The Pennsylvania State University or Dickinson Law.

² I was also on the task force, selected because of my prior experience as director of the Elder Law and Consumer Protection Clinic at Dickinson Law, Pennsylvania State University. Members were organized into three subject matter-focused committees: Guardian and Counsel Committee; Guardianship Monitoring Committee and the Elder

Statistics available to the Task Force in 2014 show that some 3,000 new guardianship petitions are filed with the Pennsylvania Courts each year, of which approximately 65% are for alleged incapacitated persons over the age of 60. The number of new petitions can be expected to increase in the very near future. During the last six years, the cohort of Pennsylvania's population between the ages 64 and 70 grew by a record 31.9%. Soon, that aging cohort will reach the years of greatest vulnerability with the increased potential for age-related cognitive impairments or physical frailty. Appointment of a guardian is usually a choice of last resort, sometimes necessary because of an emergency illness or because individuals have delayed using other means, such as execution of a power of attorney or trust, to designate personally-chosen surrogate decision-makers.

When a determination is made that an individual is incapacitated (as defined by statute) and in need of certain assistance (again, as defined by law), courts have the duty and power to appoint a person or an entity as the "guardian." Once appointed by a court, guardians can be given significant powers, such as the power to determine all health care treatment, to decide where the individual lives, and to allocate how money can be spent. While Pennsylvania law states a preference for "limited guardianships," in reality, especially if no legal counsel is appointed to represent the individual to advocate for limited authority, it is more typical to see a guardian be given extensive powers over both the "person" and the "estate."

The Task Force began its work by undertaking a candid self-assessment of existing guardianship processes. Based on its review of the history of guardianships in Pennsylvania, the Task Force issued detailed findings as part of its final Report released in November 2014, including the following:

- Guardianship monitoring is weak, if it occurs at all.
- Training is not mandated for professional or non-professional guardians.
- Non-professional guardians are not adequately advised as to the duties and responsibilities of managing the affairs of an IP [incapacitated person].
- The quality of guardianship services varies widely, placing our most vulnerable citizens at great risk.³

The Pennsylvania Supreme Court identified a need for better information about the actions of appointed guardians; such information would be central to all recommended reforms. The Task Force recommended a new system enabling statewide accountability and consistent oversight.

Following the Task Force Report and Recommendations, and under the leadership of the Supreme Court, the Administrative Office of the Pennsylvania Courts began working on procedural reforms, beginning with creation of an Office of Elder Justice in the Courts. The Courts developed a new, online Guardianship Tracking System, and in June 2018 the Supreme Court adopted new Orphans Court rules (14.1 through 14.14) that establish certain procedural safeguards for guardianships and require use of uniform, state-wide forms and reporting standards for all guardians. These rules are scheduled to become fully effective by July 2019.

Pursuant to a Judicial Administration Rule adopted August 31, 2018, the Supreme Court mandated a phased implementation of the tracking system, with workshops offering training for guardians

Abuse and Neglect Committee, of which I was a member. The task force as a whole came together frequently to discuss common issues and the final report and recommendations.

³ Supreme Court of Pennsylvania, Report and Recommendations of the Elder Law Task Force, November 2014, available at <http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force>.

on how to use the system to file inventory and annual reports. See [Guardianship Tracking System Workshop](#).

Not all recommended reforms, however, can be accomplished by the Courts adopting procedural rules. Key substantive reforms require legislative action. Senator Stewart Greenleaf, the chair of the Senate’s Judiciary Committee and a frequent sponsor of child and adult protective measures, introduced Senate Bill 884 (and its predecessor). After many years of service and leadership in the Capitol, Senator Greenleaf is retiring this year; therefore, any necessary renewal of the legislation must attract new leadership.

There is still time to enact Senate Bill 884. The Bill does not appear to be controversial for either party. It largely addresses well-identified gaps in coverage. The reforms include provisions that:

- Enable the courts to appoint “examiners of actions” of guardians and to use mediation or arbitration for disputes;
- Fix a long-festering question about the authority of guardians to make certain end-of-life health care decisions (by bringing guardians’ authority into conformity with decision-making powers held by other health care agents);
- Establish clearer grounds for when agents are required to be bonded;
- Establish priority appointment for family members (or persons otherwise preferred by the incapacitated person to serve as agents) as guardians;
- Create a presumption of confidentiality for proceedings, that can be waived for certain specified reasons;
- Establish a more precise process, with better procedural rights for the alleged incapacitated person, during applications for emergency appointments;
- Establish a clear right for all alleged incapacitated persons to have legal counsel to represent them in the guardianship proceedings; and
- Establish a clear right for adults who regain capacity to seek termination of a guardianship.

III. The Public Interest in Reform

Troubled histories have emerged across the nation. Public concern has grown around the need for more careful consideration of the roles played by guardians. For example, events in recent years have highlighted the following problems:

- In Las Vegas, Nevada, uncritical reliance on a few individuals to serve as appointed “professional” guardians was linked to manipulation and abuse of the incapacitated wards and misuse of the wards’ financial resources. Concerned family members alleged corruption and their advocacy drove a reluctant system to examine the history of appointments, leading to the indictment and arrests of a frequently appointed guardian, members of her staff and a police officer in February 2018.
- In New Mexico, two nonprofit agencies used for guardianship services were investigated; principals were indicted by the U.S. Attorney for thousands of dollars in theft from the estates of incapacitated individuals. This in turn triggered a massive call for emergency reform of New Mexico guardianship law, with the new laws coming into effect in July 2018.⁴

⁴ “New Mexico Lags in Guardianship Reform,” published March 18, 2017 by the *Albuquerque Journal*, comparing New Mexico’s failure to make reforms and to more closely supervise “corporate” guardians with more proactive

- In Florida, complaints by family members and others presented to the Florida Legislature over several years, resulted in three successive years of reforms to Florida guardianship law. One dramatic example was a particular court's uncritical reliance on "friends" of the court to be appointed as guardians and paid out of the wards' estates. In some instances the court rejected appointment of available family members. In 2017, a jury awarded a verdict of \$16.4 million against lawyers for breaching their fiduciary duties and charging unnecessary and excessive fees.⁵

The New Yorker magazine published a feature article in October 2017 on the Las Vegas history, criticizing the state's reluctance to investigate and make timely changes in its systems for appointment and monitoring of so-called professional guardians. The title of the article is eye catching: [How the Elderly Lose Their Rights](#), by Rachael Aviv.

While location-specific news stories of scandals come and go, the persistence of guardianship problems points to systemic weaknesses that require modern, uniform standards. Thirty years ago, the Associated Press published a six-part national investigative series entitled [Guardians of the Elderly: An Ailing System](#). The series revealed frequent failures to appoint counsel to represent an alleged incapacitated person and the lack of clear standards for guardians who serve as fiduciaries. Perhaps most ominously, the articles condemned the seeming indifference of states to calls for modernization of systems and warned about the emergence of a new industry of paid "entrepreneurs" who handle and bill hundreds of wards' estates for services that may or may not be warranted.

Public outcry is growing and increasingly points to weak processes for appointment and review of guardians. This is especially true in the case of repeat players, sometimes referred to as "professional" guardians, a label that can cause confusion as the individuals may or may not have any professional training or certification. In addition, families may complain about seemingly arbitrary or manipulative actions by family members who are appointed as guardians in individual cases; evidence from across the nation indicates that such complaints may be ignored or resolved in unsatisfactory, nontransparent ways, especially when no mandatory review processes are in place.

Pennsylvania recently joined the states that are high-profile targets for specific public concerns about appointment and supervision of guardians for incapacitated persons. In 2017-18 the news media, including the [Reading Eagle](#) (articles by Nicole Brambila), the [Philadelphia Inquirer](#) (including an editorial titled "*Pennsylvania is Allowing Elderly to be Prey for Financial Scammers*"), and television investigative news programs, reported on a dramatic series of cases in Eastern Pennsylvania. The coverage revealed that an individual, Gloria Byars, who was appointed as a guardian in cases filed in several counties, had a criminal history of fraud, forgery, and bad checks in another state. She allegedly exploited the very individuals she was charged to protect in Pennsylvania. In a court opinion summarizing findings of Byar's misconduct in one case, the court examined how the inappropriate appointment occurred, and concluded with a warning:

efforts in Texas and California, available at <https://www.abqjournal.com/972033/guardianship-system-in-nm-cloaked-in-secrecy.html>.

⁵ "Jury Hits Lawyers With \$16.4M For Doing Senior Wrong in Guardianship," by John Pacenti, Palm Beach Post, August 17, 2017, available at <https://www.mypalmbeachpost.com/news/jury-hits-lawyers-with-for-doing-senior-wrong-guardianship/6CnikAZ7x3K9z960lz09BN/>.

“Perhaps most troublingly . . . [an authorized agency’s] failure to discover that the guardian it nominated in some many cases was plainly unfit to serve has shaken the public’s faith in the guardianship system, which is vital to protecting incapacitated people throughout Pennsylvania.”⁶

While it can be tempting to argue about whether individual appointments have been fairly or unfairly criticized, and to point to the many sound, responsible individual and professionals who do serve as guardians, it seems clear that all states, including Pennsylvania, now have substantial evidence of the need for clearer, fairer procedures for appointment, for more carefully considered education for guardians, and for a system that facilitates active oversight, especially for guardians handling estates for multiple individuals.

IV. What is Next

Will the Pennsylvania Senate and House move forward on Senate Bill 884? The bill, in its current form, does not address all concerns demonstrated by cases involving Pennsylvania’s most recent “bad apple.” The bill does, however, provide common sense safeguards. Passage in 2018 would enable courts and state officials to approach selection, training, and oversight of guardians with state-wide standards firmly in place. Senate Bill 884 as it stands now provides a significantly more modern framework for oversight.

Proposed amendments to S.B. 884 are also under consideration and would directly address the issues raised recently in Eastern Pennsylvania, adding additional safeguards. For example, Senator Art Haywood has offered a widely circulated amendment of Senate Bill 884, which appears to be acceptable to both parties. With this amendment, “certification” as directed by the Pennsylvania Department of Human Services would be required for all “professional guardians,” defined as anyone appointed to assist three or more incapacitated persons. Further, the proposed amendment requires all prospective guardians to obtain criminal history reports from the Pennsylvania State Police and to submit such reports to the court. A criminal history of conviction for certain offenses (abuse, neglect, fraud, misappropriate, theft, or conversion) would disqualify the candidate to serve as a guardian, regardless of whether that individual is a family member or “professional guardian,” unless the court made a specific finding after careful review of the record and history, that appointment of that person (most likely a family member) is in the best interest of the alleged incapacitated person. Such additional provisions represent a delicate balancing of concerns about family dynamics with efforts to respect the preferences of the alleged incapacitated person, while also setting higher standards, especially for “professionals” handling multiple accounts.

Efforts to provide relevant training and education for current and prospective guardians are also underway. Faculty at Penn State’s Dickinson Law, in partnership with faculty at several other relevant units of the University (including the Colleges of Nursing and Medicine, and the School of Behavioral Sciences) and the Administrative Office of the Pennsylvania Courts, have proposed creation of online educational modules for guardians and similar fiduciaries to assist Pennsylvania in the process of training and overseeing prospective and current guardians. We have applied for a Pennsylvania Strategic Initiative Seed Grant to fund development of high quality materials for the task we are calling the Pennsylvania Adult-Fiduciary Education Project.⁷ If funded, the 18-month work-plan will begin in January 2019.

⁶ *Estate of Margareta & Edmund Berg*, Court of Common Pleas, Philadelphia, Opinion filed May 10, 2018 by Judge John W. Herron.

⁷ I am the principal on the grant application for the Pennsylvania Adult-Fiduciary Education Project. We have put together a team of five core collaborators from the University, along with a host of additional team members,

Development of the educational materials is not dependent on passage of Senate Bill 884. Certainly, however, it will be far more cost effective and efficient to have key guardianship reforms, such as those covered by Senate Bill 884, already in place as the team begins work on a comprehensive education plan for guardians and similar fiduciaries serving in Pennsylvania. Senate Bill 884 (Printer's No. 1147) imposes a stronger framework, with modern safeguards, that would apply when any court in Pennsylvania finds it necessary and appropriate to appoint guardians for incapacitated persons. Additional proposed amendments, responding appropriately to the latest scandal, would make the framework even stronger.

In short, time is of the essence for guardianship reform in Pennsylvania. Passage of Senate Bill 884 is the next important step.

including representatives of the Courts, the Bar, and organizations who serve the public interest on guardian and fiduciary service.