

## **ORPHANS' COURT PROCEDURAL RULES COMMITTEE ADOPTION REPORT**

### **Amendment of Pa.R.O.C.P. 1.8, 2.4, 14.2, 14.3, 14.4, 14.6, 14.7, 14.8, 14.9, and 14.14; Rescission and Replacement of Form G-01; Rescission of Forms G-02, G-03, and G-05; and Amendment of the Index to the Appendix of Orphans' Court Forms**

On December 18, 2024, the Supreme Court of Pennsylvania: (1) amended Pa.R.O.C.P. 1.8, 2.4, 14.2, 14.3, 14.4, 14.6, 14.7, 14.8, 14.9, and 14.14; (2) rescinded and replaced Form G-01; (3) rescinded Forms G-02, G-03, and G-05; and (4) amended the Index to the Appendix of Orphans' Court Forms. These changes update procedural rules and forms in guardianship matters pursuant to the Act of December 14, 2023, P.L. 446, No. 61 ("Act 61"). The Orphans' Court Procedural Rules Committee has prepared this Adoption Report describing the rulemaking process. An Adoption Report should not be confused with Comments to the rules. See Pa.R.J.A. 103, cmt. The statements contained herein are those of the Committee, not the Court.

By way of background, Act 61 included guardianship reforms in the areas of certification of guardians, mandatory appointment of counsel, consideration of less restrictive alternatives before appointing a guardian, and scheduling review hearings within one year if there may be a change in capacity. While Act 61 largely contained substantive matters that were self-executing, amendment of the procedural rules governing guardianship proceedings was deemed necessary. The Committee published for public comment a proposal intended to address the requirements of Act 61. See 54 Pa.B. 1654 (March 30, 2024).

#### **Certification of Guardians**

Act 61 added a new certification requirement for "individuals" proposed as guardians prior to appointment to a third active guardianship. See 20 Pa.C.S. § 5511(f)(2). Use solely of the term "individual" in § 5511(f)(2) is in contrast with the more fulsome list of potential appointees referenced in § 5511(f)(1), which includes "individuals," as well as a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support), or a county agency. *Id.* § 5511(f)(1). A threshold question for the Committee was determining who is required to obtain a certification prior to appointment as a guardian given the statutory language found in § 5511(f)(1) and (f)(2). The Committee relied on the plain language of § 5511(f)(2) to recommend that the certification requirement for an "individual" was clear and unambiguous.

Per Act 61, the certification must require, at a minimum, submission of education and employment history, submission of federal and state criminal history information, and

passage of a certification exam administered by a national nonprofit guardianship certification organization. See 20 Pa.C.S. § 5511(f)(2)(ii)(B). The “national nonprofit guardianship certification organization” must provide a “comprehensive certification program for guardians, including supervising a national certification process, developing certification exam content and maintaining a decertification process.” *Id.* At this time, the Center for Guardianship Certification (“CGC”) appears to meet the statutory requirement for a national nonprofit guardianship certification organization. It is unknown to the Committee whether there are other organizations that satisfy the requirements of § 5511(f)(2)(ii)(B) or whether such other organization may be formed in the future.

Act 61 also permits the court to waive the certification requirement upon a petition “demonstrating that a proposed guardian has such equivalent licenses or certifications as are necessary” to ensure the guardian is capable of performing the obligations of a guardian. See 20 Pa.C.S. § 5511(f)(3). Notably, a law license alone is not an equivalent license or certification for purposes of waiver. *Id.*

### **Rule Changes Pertaining to Certification**

The Act 61 certification requirements necessitated changes to the guardianship petition. Averments were added to the petition to advise the court whether the proposed guardian is required to be certified. Pa.R.O.C.P. 14.2(b)(6) requires an averment whether the proposed guardian is, was, or is seeking to be a guardian in any other matters, as well as the number of active guardianships. Similarly, the required averment in subdivision (b)(7) is intended to inform the court how the proposed guardian will satisfy the certification requirement, if required. Current subdivision (b) relates to any completed guardianship training and certifications that the proposed guardian holds. See Pa.R.O.C.P. 14.2(b)(4)–(b)(5). With respect to petition exhibits, Pa.R.O.C.P. 14.2(c)(5) requires attachment of proof of a guardianship certification or a copy of a concurrently filed petition for waiver of the certification. See Pa.R.O.C.P. 14.2(c)(5).

Pa.R.O.C.P. 14.6 generally addresses appointment preferences and eligibility to serve as a guardian. It was amended to reflect the certification requirement for an individual seeking appointment as a guardian prior to a third active guardianship. See Pa.R.O.C.P. 14.6(c)(1).

Pa.R.O.C.P. 14.6(c)(2) addresses certification by a national organization and tracks the express language of § 5511(f)(2). A guardian required to be certified has a continuing duty to maintain the certification in good standing, to file with the court proof of recertification prior to the expiration of the current certification, and to file with the court of any negative actions against the certification within seven days of such action. See Pa.R.O.C.P. 14.6(c)(2)(ii).

Act 61 permits waiver of the certification requirement upon a petition demonstrating that a proposed guardian has “such equivalent licenses or certifications as are necessary” to ensure the suitability of the proposed guardian. 20 Pa.C.S. § 5511(f)(3). The procedure for waiver of the certification is incorporated in Pa.R.O.C.P. 14.6(c)(3)(i). The equivalent licenses or certifications must be relevant to the type of guardianship that is established. See *id.* Examples of relevant equivalencies are included in the commentary to Pa.R.O.C.P. 14.6. As provided in § 5511(f)(3), Pa.R.O.C.P. 14.6(c)(3)(iii) reflects that a law license is not an equivalent license or certification for waiver purposes. See *id.*

Post-publication, Pa.R.O.C.P. 14.2(b)(6), pertaining to petition averments for the nomination of the guardian, was further revised to require identification of all judicial districts where the proposed guardian is actively serving in other guardianships. The change is intended to assist the jurist in assessing the scope of the proposed guardian’s experience and existing obligations.

The Committee also deleted a proposed requirement in Pa.R.O.C.P. 14.6(c)(2) that a national certification entity provide guardianship training. Subdivision (c)(2) now tracks the statute more closely and does not impose certification requirements beyond those set forth in Act 61.

### **Mandatory Appointment of Counsel**

Prior to the enactment of Act 61, appointment of counsel in a guardianship case was at the discretion of the court. See 20 Pa.C.S. § 5511(a) (effective through June 10, 2024). Act 61 eliminated the court’s discretionary appointment power and made appointment of counsel mandatory in all circumstances when the alleged incapacitated person has not retained counsel. “[T]he court shall appoint counsel to represent the alleged incapacitated person in any matter for which counsel has not been retained by the alleged incapacitated person, including in [a guardianship proceeding] and in any subsequent proceedings to consider, modify or terminate a guardianship.” 20 Pa.C.S. § 5511(a.1)(2) (effective June 11, 2024). The appointment is to be made without regard to the alleged incapacitated person’s ability to pay. See *id.* New § 5511(a.1)(2) also provides that “[a]ppointed counsel shall be qualified by experience or training and shall act without delay under the circumstances.” *Id.*

In order to facilitate appointment of counsel, the petitioner is required to notify the court if he or she knows that the alleged incapacitated person is represented by counsel. See 20 Pa.C.S. § 5511(a.1)(1). The petitioner must include an averment in the petition or file notice with the court as soon as possible if the petitioner becomes aware of the representation. See *id.*

Section 5511(a.1) also contains statutory directives pertaining to the relationship between appointed counsel and the alleged incapacitated person. Appointed counsel for

the alleged incapacitated person is required to “maintain a normal client-attorney relationship with the client,” “advocate for the client’s expressed wishes and consistent with the client’s instructions” to the extent possible, and “comply with the Rules of Professional Conduct governing the attorney-client relationship.” 20 Pa.C.S. § 5511(a.1)(3). New § 5511(a.1)(3) also requires appointed counsel to “meet with the incapacitated person as soon as reasonably possible after the appointment” and to file a certification of the meeting with the court within five days. *Id.*

## **Rule Changes Pertaining to Appointment of Counsel**

Incorporating the mandatory appointment requirements necessitated amendments to Pa.R.O.C.P. 14.2, 14.3, 14.4, and 14.7. A new petition averment will enable the petitioner to notify the court if the alleged incapacitated person is represented by counsel and counsel’s name and address if known. See Pa.R.O.C.P. 14.2(a)(9). If counsel for the alleged incapacitated person is identified in the petition, Pa.R.O.C.P. 14.2(f)(2)(iii) requires the petitioner to serve the petition on retained counsel identified in Pa.R.O.C.P. 14.2(a)(9).

Pa.R.O.C.P. 14.3 relates to proof of incapacity and the use of expert reports. Subdivision (b)(1) was amended to delete a reference to an alleged incapacitated person “unrepresented by counsel,” insofar as all incapacitated persons will now be represented by retained or appointed counsel pursuant to § 5511(a.1)(2). Post-publication, a similar change was made to Pa.R.O.C.P. 14.3(c)(1).

Pa.R.O.C.P. 14.4 governs retention and appointment of counsel. Pa.R.O.C.P. 14.4(a)(1) requires the petitioner to file notice with the court as soon as the petitioner becomes aware that counsel has been retained if not indicated in the petition at the time of filing. The Committee considered timing issues relating to appointment of counsel. The Committee anticipates that many courts will appoint counsel at the time the petition is filed if retained counsel has not been identified. On the other hand, there may be overlap between appointed and retained counsel if the alleged incapacitated person retains counsel upon or following receipt of the petition for adjudication but before the appointment of counsel. The Committee foresees that courts will navigate these timing issues as they arise.

Pa.R.O.C.P. 14.4(c) sets forth the new requirements for appointed counsel. Subdivision (c)(1) addresses the general requirement that the court shall appoint counsel to represent the alleged incapacitated person in any matter for which counsel has not been retained. To the extent the statute limits court-appointed counsel to the alleged incapacitated person, subdivision (c)(1) will eliminate any ambiguity as to whether counsel can be appointed for the petitioner.

Pa.R.O.C.P. 14.4(c)(2) addresses qualifications of appointed counsel. As previously discussed, appointed counsel is required to be “qualified by experience or training.” 20 Pa.C.S. § 5511(a.1)(2). The Committee believes the judge making the appointment is best suited to ensure qualified representation of an alleged incapacitated person.

Pa.R.O.C.P. 14.4(c)(3) addresses the new statutory requirement that appointed counsel meet with the alleged incapacitated person “as soon as reasonably possible” after the appointment and file a certification with the court relaying the time and place the meeting occurred within five days of the meeting. See 20 Pa.C.S. § 5511(a.1)(3).

The commentary to Pa.R.O.C.P. 14.4 was revised to cross-reference Pa.R.O.C.P. 14.7(a)(1)(v), concerning a requirement that the guardianship order identify the scope of representation of court-appointed counsel in order to eliminate uncertainty and the need for counsel to file a withdrawal petition if scope is not defined at the commencement of representation.

Pa.R.O.C.P. 14.7(a)(1)(v) requires the order adjudicating incapacity and appointing a guardian to address the scope of representation of court-appointed counsel. This should provide the court with flexibility to determine whether the incapacitated person requires ongoing representation or if representation may be terminated until the commencement of a future proceeding. Similarly, post-publication changes were made to the notice to the incapacitated person set forth in Pa.R.O.C.P. 14.7(a)(2).

Post-publication, changes were made to the proposal concerning the attorney-client relationship. The authority of the Court to regulate the conduct comprising the practice of law is well established. “There can be no question the authority to supervise the practice of law in this Commonwealth lies in this Court's constitutional province, and we affirm the command in Article V, Section 10(c) that ‘all laws shall be suspended to the extent’ they are inconsistent with our Rules.” *Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 247 (Pa. 2017). With regard to the new statutory provisions relating to the relationship between appointed counsel and an alleged incapacitated person, the Committee observes that all counsel are bound by the Pennsylvania Rules of Professional Conduct, including Pa.R.P.C. 1.14 (responsibilities of counsel to a client with diminished capacity). Therefore, the proposed cross-reference to § 5511(a.1)(3), pertaining to the attorney-client relationship, in the commentary to Pa.R.O.C.P. 14.4 was deleted. A cross-reference to Pa.R.P.C. 1.14, concerning the conduct of counsel representing a client with diminished capacity, was retained in the commentary to Pa.R.O.C.P. 14.4.

Similarly, Act 61 provides that “[r]etained or appointed counsel may not act as guardian *ad litem* for the alleged incapacitated person.” 20 Pa.C.S. § 5511(a.1)(3). Post-publication, a proposed cross-reference pertaining to the prohibition on appointed counsel

serving as guardian *ad litem*, was deleted from the commentary to Pa.R.O.C.P. 14.4 and is undergoing further review by the Committee.

### **Less Restrictive Alternatives**

Act 61 added a requirement to § 5512.1(a) that the court consider and make findings of fact regarding less restrictive alternatives to a guardianship prior to appointing a guardian. These less restrictive alternatives include, but are not limited to, advance directives, living wills, powers of attorney, trusts, health care representatives, and representative payees for social security benefits. 20 Pa.C.S. § 5512.1(a)(3). Likewise, § 5511(e), pertaining to the petition, was amended to require specific factual averments in the petition “demonstrating that less restrictive alternatives were considered or tried and why the alternatives are unavailable or insufficient.” 20 Pa.C.S. §5511(e).

A new requirement concerning identification of less restrictive alternatives in an order denying a petition for guardianship in whole or in part was also added to § 5512.1(a). If the court enters such an order, the court must identify “the less restrictive alternatives that are available and sufficient to enable the alleged incapacitated person to manage personal financial resources or to meet essential requirements of personal physical health and safety.” 20 Pa.C.S. § 5512.1(a)(6)(iv). It appears that including the less restrictive alternatives in a partial order was intended to “assist the respondent and any supportive and substitute decision makers involved to effectuate the respondent’s decisions with third parties.” *Id.*

### **Rule Changes Pertaining to Less Restrictive Alternatives**

Pa.R.O.C.P. 14.2(a)(14) was amended to include the statutory requirement that the petition identify what less restrictive alternatives to a guardianship were considered or tried, and why the alternatives are unavailable or insufficient. See 20 Pa.C.S. § 5511(e). Because Pa.R.O.C.P. 14.6(a), pertaining to the procedure for determining incapacity and appointing a guardian, already cross-references § 5512.1, it was not necessary to incorporate detailed language regarding consideration of less restrictive alternatives to guardianship in the rule text. Instead, the commentary to Pa.R.O.C.P. 14.6 provides more detailed information regarding less restrictive alternatives and a cross-reference to § 5512.1(a)(3).

Post-publication, the Committee considered efforts by petitioner’s counsel to pursue less restrictive alternatives to guardianship with the alleged incapacitated person, e.g., drafting pre-need documents. To the extent that such efforts could implicate ethical considerations relating to confidentiality and conflicts, cross-references to Pa.R.P.C. 1.6, 1.7, and 1.14 were added to the commentary to Pa.R.O.C.P. 14.2.

## **Scheduled Review Hearing**

Section 5512.2(a) adds new requirements relating to review hearings. It introduced a new concept, “automatic review hearings.” Specifically, “if the evidence presented during the guardianship proceeding indicates that the circumstances of the person’s incapacity may change, the court shall hold a review hearing to determine whether the guardianship continues to be necessary.” 20 Pa.C.S. § 5512.2(a). The court is required to set a hearing date in the order to be held no later than one year from the date of the order. *Id.*

## **Rule Changes Pertaining to Scheduled Review Hearing**

Pa.R.O.C.P. 14.9 was amended to incorporate these new review hearings. However, the hearings are “scheduled” rather than “automatic,” insofar as they are scheduled as the result of judicial action. Pa.R.O.C.P. 14.7(a)(3) requires the court to include in the adjudication order a date for a scheduled review hearing, if warranted. Additional provisions relating to scheduled review hearings were added to Pa.R.O.C.P. 14.9(c). Persons to be served notice of the review hearing are the same persons entitled to notice of the petition filing, *i.e.*, Pa.R.O.C.P. 14.2(f)(2).

Post-publication, further revisions were made to Pa.R.O.C.P. 14.9(b) to require the appointment of counsel for a review hearing if the person is unrepresented. Additionally, Pa.R.O.C.P. 14.9(b) was revised to require that an order ruling on the merits of a review hearing shall address the continued scope of representation of court-appointed counsel. This is similar to the requirement in Pa.R.O.C.P. 14.7(a)(1)(v), which requires an order adjudicating incapacity and appointing a guardian to set forth the continued scope of representation of court-appointed counsel. Pa.R.O.C.P. 14.9(c)(1)(viii) was also revised post-publication to delete the prior petition averments and instead require averments setting forth the need for termination or modification of the guardianship as well as averments relating to the findings required by § 5512.1(a)(1)–(a)(4).

## **Form G-01 (Citation and Notice)**

The Committee received a comment in response to the Notice of Proposed Rulemaking suggesting the deletion of a provision in Form G-01 concerning an alleged incapacitated person’s right to request that the court appoint counsel to represent them. Because all alleged incapacitated persons are now entitled to representation, the provision is obsolete. The form has been rescinded and replaced with corrective language.

## **Guardianship Tracking System Reporting Forms**

Post-publication, the Committee recommended that the Court rescind the three Guardianship Tracking System (“GTS”) reporting forms, G-02 (Report of Guardian of the Estate), G-03 (Report of Guardian of the Person), and G-05 (Guardian’s Inventory for an Incapacitated Person), from the Appendix to the rules. In lieu of maintaining the reporting forms in the rules, the Committee recommended relocating the forms to the GTS and the Unified Judicial System website in the manner of numerous other forms used by participants. The Committee believes this change will enable the Advisory Council on Elder Justice in the Courts, the Administrative Office of Pennsylvania Courts (“AOPC”), and the Committee to revise the reporting forms more timely outside of the rulemaking process. The Committee further believes that this change will give AOPC greater flexibility in coordinating changes to the GTS and its reporting forms.

Rescinding the GTS reporting forms from the Appendix to the rules required further amendments to Pa.R.O.C.P. 1.8, 2.4, 14.8, and 14.14 and the Index to the Appendix of Orphans’ Court Forms. Pa.R.O.C.P. 1.8 was revised to add a new provision relating to the reporting forms required by Pa.R.O.C.P. 14.8 and an updated website address. Second, the Committee revised Pa.R.O.C.P. 14.8 to provide that the Court Administrator of Pennsylvania, in consultation with the Committee and Advisory Council, shall prescribe the forms necessary for filing reports. The phrasing is intended to reflect that the forms are not adopted by the Court but required by the rules. See, e.g., Pa.R.Civ.P.M.D.J. 350(c)(1) and 1002. Third, the Committee revised Pa.R.O.C.P. 14.14 to rescind Forms G-02, G-03, and G-05 from the Appendix. The commentary to Rule 14.14 was amended to explain this change and provide an updated website address. Fourth, the Committee revised the Index to the Appendix of Orphans’ Court Forms to the rules to reflect the rescission of the referenced forms. Finally, corollary revisions were made to the Comment to Pa.R.O.C.P. 2.4 to reflect the renumbering of Pa.R.O.C.P. 1.8.

## **Other Rule Changes**

In addition to the previously discussed rule changes, the proposal was modified in a number of areas both within and beyond the scope of Act 61. Some of the changes were the result of public comments received in response to the Notice of Proposed Rulemaking, while others were made in the interest of avoiding serial recommendations to the guardianship rules.

Pa.R.O.C.P. 14.2(a)(16) and its commentary reference the United States Veterans’ Administration and the United States Veterans’ Bureau, respectively. These references are made in the context of fulfilling 20 Pa.C.S. § 8411, which requires notice to the United States Veterans’ Bureau or its successor when a petition for a guardian is filed with respect to veterans or their dependents who receive veterans’ benefits. The rule and its commentary were revised to reflect the successor entity of the United States



Veterans' Administration and the United States Veterans' Bureau, the Department of Veterans Affairs.

Former Pa.R.O.C.P. 14.6(b)(1)(x) and (b)(2) referenced a "professional guardian" as being eligible to serve as the guardian of an incapacitated person. Post-publication, those references to a "professional guardian" were deleted to reflect that neither Title 20, Chapter 55, nor the rules address or define "professional guardians." A cross-reference to § 5511(f)(1), which, among other things, identifies those entities eligible to serve as a guardian, was substituted for the deleted term.

The Committee also published proposed revisions relating to the pre-existing "Certificate of Guardianship of the Estate" ("Certificate") in the Notice of Proposed Rulemaking. Prior to the adoption of Act 61, the Committee received a request to review Pa.R.O.C.P. 14.7(c). It was suggested that the rule requires the clerk to certify that the guardian is still serving before issuing a Certificate to that effect, noting that the clerk's office should not issue the Certificate if the guardian has been removed or resigned. The Committee generally agreed with this suggestion and proposed amending the Certificate to: (1) have the clerk certify that no record of modification of the appointment order was on the docket at the time of the certification; and (2) deleting the statement that the appointment was made by the court "in full consideration of Chapter 55 of the PEF Code" insofar as the clerk would have no factual basis to make that statement.

While preparing the proposal for publication, it became apparent there was a need to distinguish between a plenary and limited guardian of the estate because a limited guardian would not have unlimited access to all of the incapacitated person's accounts. Therefore, the Committee proposed new subdivision (c)(2) relating to a certification for a limited guardian. However, it was suggested that the Committee should further revise Pa.R.O.C.P. 14.7(b), pertaining to the order adjudicating incapacity and appointing guardian of the estate to distinguish between orders appointing a plenary or limited guardian. Post-publication, new subdivisions (b)(2)(i) and (b)(2)(ii) were added to address the authority of a plenary or limited guardian, respectively.

Stylistic changes were made throughout the rulemaking.

These rule changes are immediately effective.