



**Testimony of Pamela Walz, Esq. on behalf of the Pennsylvania Bar Association  
Joint Public Hearing on Strengthening Guardianship Laws and Preventing Elder Abuse  
Pennsylvania Senate Judiciary Committee and Senate Aging and Youth Committee  
March 14, 2023**

Good morning, Chairpersons Baker, Santarsiero, Ward and Collett, and all the members of the Senate Judiciary and Aging and Youth Committees. Thank you for taking up the critically important issues surrounding guardianship and for the opportunity to offer testimony today. I have the honor this year of serving as the Chair of the Pennsylvania Bar Association's Elder Law Section. I am testifying today on behalf of the Pennsylvania Bar Association, which has 20,000 members and represents attorneys from all over the Commonwealth.

The PBA strongly supports SB 506, and we thank Chairwoman Baker for introducing it. In the spring of 2022, the PBA adopted a position in support of the provisions of SB 506. The important reforms embodied in the bill – ensuring that individuals facing guardianship proceedings have legal counsel, requiring the certification of professional guardians and providing for a more thorough consideration of less restrictive alternatives to guardianship – align with the PBA's goal of promoting equal administration of justice for all and ensuring that no one on account of poverty is denied their legal rights.

The consequences of an adjudication of incapacity and appointment of a guardian are profound – the individual is stripped of their rights to decide where to live, to make health care decisions and to handle their finances. A guardian may decide to sell their home and to place them in a nursing facility against their will. Where such fundamental liberty and property interests are at stake, constitutional due process requires the appointment of counsel.

Pennsylvania is in a small minority of states in not making appointment of counsel mandatory in guardianship proceedings where counsel has not been otherwise retained: [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/chartrepresentationandinvestigation.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartrepresentationandinvestigation.pdf). Instead, Pennsylvania leaves it to the court's discretion to appoint counsel in cases where it is deemed appropriate. In practice, the result is that many – perhaps most, although we don't have clear data on this – people face guardianship proceedings without a lawyer in Pennsylvania. The likelihood of counsel being appointed varies widely by county, with some courts in some counties deeming it appropriate to appoint counsel in all cases and others doing so far less frequently. By contrast, there are more than a dozen other types of civil proceedings in Pennsylvania where appointment of counsel is required, in recognition that access to counsel is constitutionally mandated where an individual is at risk of losing any of their constitutional rights. To give a few examples, appointment of counsel is required for unrepresented litigants in cases involving child dependency, termination of parental rights, involuntary commitment under the Mental Health Procedures Act, imposition of involuntary protective services, truancy, civil contempt in Family Court, non-payment of court fees and fines, and involuntary outpatient treatment. In guardianship proceedings, the rights at stake are at



least as important as those implicated in these cases: the person is at risk of losing **all** of their fundamental constitutional rights to autonomy and to make decisions about their lives.

Representation by counsel in guardianship proceedings serves a number of critical purposes. Without an attorney, the individual is left to navigate court and evidentiary rules, determine what is relevant to argue, and obtain supportive medical evidence on their own, without an understanding of the legal standards for guardianship in Pennsylvania. Having an attorney can make a real difference in the outcome of a case and the protection of an alleged incapacitated person's rights. In addition to contesting whether the client is incapacitated, counsel can advocate for a limited guardianship tailored to the individual's specific needs, rather than a plenary guardianship in which the individual loses all of their rights.

An attorney can also advocate for a less restrictive alternative such as the use of power of attorney, applying for a representative payee to handle Social Security benefits or joint titling on bank accounts for financial matters. For health care decision-making, in addition to a health care power of attorney, family members and others can act as health care representative. 20 Pa. Cons. Stat. Ann. §5461. In addition, Supported Decision Making is a rapidly growing alternative to guardianship, in which a circle of support persons assists the individual in making decisions. An attorney can also advocate on their client's behalf concerning the choice of guardian and promote a care plan that aligns with the client's values and preferences. Representation by an attorney also serves the very important purpose of ensuring that the voice of the alleged incapacitated person – their wishes, values, concerns and expressed needs – are heard in the proceedings.

We are very pleased that SB 506 also provides for the appointment of counsel in subsequent proceedings to modify or terminate a guardianship. Once an individual has been adjudicated incapacitated, it becomes even more difficult for them to pursue such actions without the appointment of counsel. They are likely to have difficulty finding an attorney to engage due to their status, and since they have lost their rights to medical decision-making, they are hampered in getting medical evidence to support a petition. I have represented clients who had an acute incapacitating condition at the time the guardian was appointed but later regained capacity. Although the guardian is supposed to notify the court that guardianship is no longer needed in such situations, this often does not happen, leaving the burden on the protected person to raise and pursue it in court.

We also strongly support the bill's definition of the role of counsel as an advocate for the client's expressed wishes and consistent with the client's instructions, wherever the client is able to express wishes and provide instructions. The role of an attorney is to be a zealous advocate for the expressed wishes of their client. People facing guardianship proceedings - in which their most fundamental rights are at stake - are also entitled to have their attorney play this role on their behalf. This is in accordance with Rule 1.14 of the Pennsylvania Rules of Professional Conduct, which provides that where a client's capacity to make adequately considered decisions



in connection with a representation is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

We also strongly support the bill's provisions to require that guardians of three or more individuals obtain certification. This will ensure that professional guardians receive the training and demonstrate the ability to meet professional standards of guardianship practice. While there are many excellent, dedicated and hard-working professional guardians in Pennsylvania, there have also been serious incidents of neglect, abuse and financial exploitation by professional guardians in the Commonwealth and elsewhere in the nation. A 2017 New Yorker article brought to national attention the case of a professional guardian who obtained guardianship of more than 150 older adults in Nevada through proceedings that lacked due process protections and then institutionalized them and stole their assets. "How the Elderly Lose Their Rights", Rachel Aviv, 10/2/17, <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>. Closer to home, between 2019 and 2021, a professional guardian was charged in two Pennsylvania counties as well as federally for stealing more than a million dollars from more than 100 victims in six Pennsylvania counties. <https://www.justice.gov/usao-edpa/pr/court-appointed-pennsylvania-guardian-and-virginia-co-conspirators-indicted-stealing>. By requiring passage of a certification exam and background check, the certification process will help to ensure that professional guardians understand their fiduciary and professional responsibilities and possess the skills to carry them out.

The bill's amendments to sections 5511 (e) and 5512.1 direct courts to prefer less restrictive alternatives to guardianship, where available and sufficient, and require pleading and specific findings of fact concerning less restrictive alternatives to guardianship. These provisions codify and will promote compliance with existing case law, including *In re Peery*, 727 A.2d 539 (Pa. 1999). In that case, the Pennsylvania Supreme Court held that a guardian shall not be appointed where an individual's impairments are counterbalanced by the support of family, friends or other supports which meet their essential needs. The current statutory language requires petitioners to plead the steps taken to find less restrictive alternatives and also requires courts to make findings concerning the need for guardianship services in light of the existence of advance directives and the availability of family, friends and other supports to assist the individual in making decisions. In practice, however, petitions and court findings have frequently limited this step to consideration of whether a power of attorney exists or could be executed. The proposed language will make clear that the less restrictive alternatives which should be considered encompass a much wider array of supportive arrangements, including health care representatives pursuant to 20 Pa.C.S. § 5461, the appointment of a representative payee for individuals receiving Social Security benefits, mental health advance directives or supported decision-making in the form of assistance from family, friends or other supports.

Thank you for the opportunity to testify today, and I'd be happy to answer any questions.