The State of Guardianship in Pennsylvania

CENTER FOR ADVOCACY FOR THE RIGHTS AND INTERESTS OF THE ELDERLY (CARIE)

STUDY TEAM

CO-PRINCIPAL INVESTIGATORS

DIANE A. MENIO, MS
ALISSA HALPERIN, ESQ.

JENNIFER CAMPBELL, PHD
KAREN REEVER, MSG, MPA
We are dedicated to improving the quality of life for vulnerable older adults

The Center for Advocacy for the Rights and Interests of the Elderly (CARIE) is a non-profit organization, based in Philadelphia, that has been dedicated to improving the quality of life for vulnerable older people for more than 35 years. CARIE fulfills its core mission to improve the well being, rights and autonomy of older persons through advocacy, education, and action through a "case to cause" model of advocacy that serves to promote equal access to justice and addresses problems and issues on both the individual and the systemic levels.
In 2011, the Pa. Department of Aging (PDA) selected CARIE to conduct an in-depth study of guardianship processes and practices in Pa.

PDA requested specific attention be paid to the role of the aging service system with regard to guardianship.

The goal of the study was to make policy recommendations that would improve Pennsylvania’s guardianship process as it affects the rights of Pennsylvania’s older adults.
Four Key Research Questions Guided the Study

- What is the current practice of guardianship in Pennsylvania today?
- What are the significant differences between counties regarding guardianship practices?
- What are established national best practices in guardianship?
- What are the recommendations for improving Pennsylvania’s guardianship practices?
Methodology

- Review of the literature
- Review of historical efforts to understand guardianship – state and national
- Surveys
  - Attorneys
  - AAA/OAPS staff
- Key Informant Interviews
  - Attorneys, Orphans’ Court judges, protective services supervisors, guardians, guardian support agency directors, law professors, and national experts on guardianship and the elderly
- Focus Groups
  - OAPS workers
  - Ombudsman staff
Pennsylvania’s current guardianship statute was drafted in 1992 – an amendment to a 1975 statute
  - Added a legal preference for limiting guardianships to only as much as was necessary to address individual circumstances
  - Changed terminology referring to an “incapacitated person” rather than “incompetent person” and revised who can be subjected to guardianship

PA legislature revisited adopted Act 108 of 2012 to improve the transferability of guardianship orders between jurisdictions and states
National Guardianship Law and Practice Studies

- Collaboration and Education Around Guardianship
- ABA and APA Collaborative Work on Assessing Capacity
- The National Guardianship Association
- The Center for Guardianship Certification
- The ABA Commission on Law and Aging Clearinghouse
Promising National Practices in Guardianship through State and Local Programming

- Court Monitoring of Guardians
- Aging Network Collaboration with Courts
- Guardianship Agencies
Literature Review (3)

- State Guardianship Law and Practice Studies
  - Research Studies and Surveys
    - The Pennsylvania Guardianship Services Study – 2000
    - P4A Protective Service/Guardianship Work Group Informal Survey – 2004
    - P4A 2009 Informal Guardianship Survey
### Comparison of Pennsylvania Studies 2000-2009

<table>
<thead>
<tr>
<th>Year</th>
<th>AAAs</th>
<th>Methodology</th>
<th>Guardianship Details</th>
<th>Cost of Guardianship</th>
<th>Issues/Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>34 AAAs 23 court judges 15 guardianship agencies 13 attorneys 3 MDs 5 other</td>
<td>AOPC data Focus groups (2) Mailed Survey</td>
<td>1999 AOPC data 1,375 petitions filed for 60+ 75% of total 42% non-relative guardians.</td>
<td>Estimated based on survey data: $100/hr. x 3.5 hr./mo. x 12 mo. = $4,200/yr. per agency case</td>
<td>1. Government funding for indigent. 2. Coordinate hearing process among courts, agencies, and medical institutions. 3. Set standards and monitoring for guardians. 4. Create public guardian to: focus solely on guardianship include money mgt., case mgt. and 24 hr. services serve 18+</td>
</tr>
<tr>
<td>2004</td>
<td>48 AAAs</td>
<td>Mailed survey</td>
<td>30 serve as guardian 21 only for PS 820 cases 460 by AAA 360 subcontract 17 are POA for 321</td>
<td>No data</td>
<td>1. No guidance on AAA as public guardian so decided at county level. 2. AAAs need consultation and training by experts with legal and practical experience.</td>
</tr>
<tr>
<td>2007</td>
<td>44 AAAs</td>
<td>Mailed survey</td>
<td>33 AAAs serve as guardian or contract 721 cases 394 by 23 AAAs, 327 contracted by 8 AAAs 17 serve as POA</td>
<td>FY06 $2,752,240 spent by AAAs</td>
<td>1. AAAs need funding to provide/assist with guardianship. 2. Need more &amp; better guardians. 3. Educate public about alternatives. 4. Establish joint dept. of DPW/PDA to oversee See statutory recommendations in text.</td>
</tr>
<tr>
<td>2009</td>
<td>46 AAAs</td>
<td>Mailed survey</td>
<td>27 are guardians 24 only as last resort 1030 cases 562 managed by AAA 468 contracted to 9 agencies</td>
<td>No data</td>
<td>AAAs need funding to provide/assist with guardianship. Many requests from hospitals &amp; nursing homes tax AAA funding.</td>
</tr>
</tbody>
</table>
Findings include information obtained through:
- Survey of 144 attorneys who practice guardianship in PA
- Survey of all 52 directors of PA AAAs
- 4 focus groups with 45 OAPS workers
- 4 focus groups with 36 LTC ombudsmen
- Interviews with 47 key informants
- Review and analysis of state data on guardianship
Promising Practices in Guardianship in PA

- Volunteer Guardianship Monitoring Programs in several PA Counties
- Pennsylvania Protective Services Institute
- Pennsylvania Area Agency on Aging Association (P4A)
- PA Elder Abuse Task Forces
AAA Involvement in Guardianship

- Survey results were analyzed in conjunction with state data on total guardianships.
- AAAs report filing 575 guardianship petitions in FY 2011.
- When AAA survey data is analyzed in conjunction with the annual Act 24/AOPC data for 2011, AAAs filed 30% (575) of all petitions for people 60+.
- In 2011, 1,917 guardianship petitions were filed in PA for individuals age 60 and older.
The 144 attorneys who responded to the survey indicated that had filed 1,407 petitions for persons age 60 and older during 2011.

The attorneys who responded to the survey filed about 73% of all guardianship petitions filed in 2011.

Including outliers the survey had a response rate that included 87% of all lawyers filing petitions in 2011.
2011 PA Guardianship Petitions (AOPC Data)

- Petitions filed by AAA in FY ending 6/11/2011: 1,917
- Cases by attorneys in 2011 involving guardianship: 1,407
- 575
How many are impacted by Guardianship in PA? (AOPC data)

<table>
<thead>
<tr>
<th>Year</th>
<th>Emergency Petitions</th>
<th>Regular Petitions</th>
<th>Statewide Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Filed</td>
<td>Approved</td>
<td>Approval Rate</td>
</tr>
<tr>
<td>2009</td>
<td>503</td>
<td>413</td>
<td>82.1%</td>
</tr>
<tr>
<td>2010</td>
<td>588</td>
<td>519</td>
<td>88.3%</td>
</tr>
<tr>
<td>2011</td>
<td>486</td>
<td>399</td>
<td>82.1%</td>
</tr>
</tbody>
</table>
Is an older adult more or less likely to be found incapacitated than a younger person? (AOPC Data)

### Guardianship Cases in Pennsylvania 60 Years of Age and Older

<table>
<thead>
<tr>
<th>Year</th>
<th>Filed</th>
<th>Estimated Approved</th>
<th>Approval Rate %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>1,821</td>
<td>1,649</td>
<td>90.6</td>
</tr>
<tr>
<td>2010</td>
<td>1,910</td>
<td>1,635</td>
<td>85.6</td>
</tr>
<tr>
<td>2011</td>
<td>1,917</td>
<td>1,642</td>
<td>85.6</td>
</tr>
<tr>
<td><strong>TOTAL 2009-2011</strong></td>
<td><strong>5,648</strong></td>
<td><strong>4,926</strong></td>
<td><strong>87.2</strong></td>
</tr>
<tr>
<td><strong>FY 2011 AAA Cases</strong></td>
<td><strong>575</strong></td>
<td><strong>568</strong></td>
<td><strong>98.8</strong></td>
</tr>
</tbody>
</table>
What is the role of AAAs in Guardianship?

24. Counties with an AAA currently accepting new appointments to serve as guardian (coded in orange)
Is there a conflict of interest with AAAs Role and Guardianship?

- AAAs are not consistently staffed to handle many broad responsibilities
- AAA staff may hold more than one position within the AAA
  - i.e. one full-time staff person who is both an OAPS worker who serves as guardian and an ombudsman who visits the facility where the ward resides
- Some focus group participants and key informants indicated there are no standards for preventing against conflicts
- Focus group participants noted that there is little guidance provided by the state office about the AAAs role in guardianship and protecting against conflicts of interest
When do AAAs become involved in Guardianship?

- Breakdown of a caregiving support system that puts an older adult at risk
- An older adult who has no responsible caregiver and is unable to manage
- A caregiver who is neglectful or exploitive
- Caregiver has Power of Attorney, but is not currently acting in best interest of the older adult
When do Ombudsman get involved in Guardianship?

- When a family cannot afford the costs of applying for guardianship
- Family members are fighting over control of the older adult’s care or resources
- A ward asks to have a guardian removed
- When a family member objects to a third party guardian or learns of a guardianship after a petition has been granted
- Facilities need payment from a resident who appears to lack capacity
- Facilities want guidance on a resident who is incapacitated and does not have a caregiver
- Protective Service workers refer to Ombudsman when a report of need is unsubstantiated for an older resident of a facility
What influences an AAA to petition for Guardianship?

- There is no singular set of circumstances that appear to prompt guardianship
  - 24 (46%) said they would if the client came in through Protective Services
  - 15 (29%) indicated that they would only petition if there was no family who could
  - 13 (25%) indicated that they do not petition
  - 8 (28%) indicated they would consider petitioning for another person to be appointed as guardian
  - 5 (17%) indicated that they only petitioned as a last resort
Most agree that there are differences in guardianship practices from county to county

- Petitioning/who testifies as to capacity
- Judges' willingness to hear cases/appoint guardians
- Reviewing/monitoring reports
- Open court vs. closed court
- AIP represented, in court, at AIP location, etc.
- Degree to which the judges follow the law etc.
How are experts used to formally evaluate capacity?
Alternatives to Guardianship

- Power of Attorney 19% (18),
- Family-facilitated involvement 15% (14),
- Representative Payee 14% (13),
- Placement in a NH 5% (5), and
- Provision of in-home services 5% (4).
How is Incapacity Proven?

- Written Deposition Forms 50% (61)
- Live Expert Testimony 34% (42)
- Transcript from Live Deposition 16% (19)
- Of those that responded “other” for the way they most frequently demonstrate incapacity
  - 44% indicated they used phone testimony
  - 33% indicated they used a written report or affidavit
Does the AIP get counsel?

- According to the lawyers surveyed, AIPs did not have legal representation in 25% (341) of the guardianship cases (1,388) that were attended by attorney respondents.
- 1% (11) of AIPs in those cases were represented by counsel, but the counsel was not present at the hearing.
Does AIP attend the hearing?

- Of the 1,388 cases handled in 2011 by the attorneys:
  - In 1% of the cases (12) the hearings were held at the AIPs location
  - In 31% of the cases (434) the AIPs were present at their hearing
- According to focus group participants participation varies from county to county, however, many reported rarely seeing an AIP in court
What Role Does the AAA Have Post Appointment?

- 46% (24) closed the case upon appointment of guardian
- 25% (13) had no standard policy regarding closing cases when a guardian is involved
- 12% (6) closed the case 30 days after guardian is appointed
- 10% (5) closed when ward is placed in a facility
- 8% (4) closed the case on the day of the hearing
- 8% (4) closed the case when the guardian developed a care plan
- 2% (1) closed the case 90 days after appointment of guardian
What role does the Ombudsman have?

- Advocate for the point of view of the ward/resident to be heard
- Mediate or facilitate collaboration between the guardian and resident
- Educate guardians, facility staff, the ward, and the ward’s family about the rights of the resident
- They help families and the older resident access support for the guardianship process from service agencies, legal counsel, specialists, or orphans court
What do AAAs do to monitor Guardians?

- 14% (7) are monitored by AAA Protective Services staff
- 8% (4) are monitored by AAA care management staff
- 6% (3) are monitored by a separate guardianship unit within the AAA
- 63% (31) are monitored by someone other than an OAPS worker, Care Manager, or Guardianship Unit within the AAA
What do the Courts do to monitor Guardians?

- No uniform monitoring system or consistent monitoring practices across PA courts
- Some judges who do not have monitoring programs in their courts, report having paid staff who review reports and flag problems for the court
- Key informants who are guardians in counties that have volunteer monitoring programs are pleased to have these programs operate in their counties and see them as contributing to the quality of the guardianship profession
How often do Guardians visit Wards?

[Bar chart showing the number of visits for persons and estates]
What happens after Guardian is appointed?

Of the guardianship cases you handled in 2011, how many AIP(s) at the time of the hearing, and Ward(s) 90 days later, were at these locations?

<table>
<thead>
<tr>
<th>Location</th>
<th>Lawyer - At time of hearing</th>
<th>Lawyer - 90 days after hearing</th>
<th>AAA - At time of hearing</th>
<th>AAA - 90 days after hearing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nursing Home</td>
<td>45%</td>
<td>22%</td>
<td>27%</td>
<td>18%</td>
</tr>
<tr>
<td>Other non-NH Facility</td>
<td>33%</td>
<td>22%</td>
<td>14%</td>
<td>13%</td>
</tr>
<tr>
<td>Home/Community</td>
<td>38%</td>
<td>40%</td>
<td>58%</td>
<td>69%</td>
</tr>
</tbody>
</table>

L38-39, A45-46
Recommendations for Change

- Systems Change Recommendations (4)
- Pre-hearing Recommendations (25)
- Hearing Recommendations (13)
- Post-appointment Recommendations (18)
Development of standardized training (procedures & policies)

Strengthen existing relationships and build new ones
- Judicial system
- Administrative Offices of Pennsylvania Courts (AOPC)
- PA Supreme Court
- County Orphan’s Courts
- National Guardianship Association
- Advocacy and guardianship organizations
Long-Term Recommendations

- Further analysis and synthesis of data
- Legislative Advocacy
  - Review of current laws
  - Oversight and monitoring of guardians
- Centralized agency to oversee guardianship, specifically, monitoring of wards and guardianship proceedings
- Additional supports for guardians
  - Example: ethics board to assist ethical dilemmas
Office of Guardianship Support

- A centralized conflict-free Office of Guardianship Support should be established in Pennsylvania responsible to:
  - Train guardians
  - Oversee a guardian registry
  - Monitor guardian compliance with reporting requirements
  - Develop and implement a statewide guardianship certification system and requirements
  - Conduct education and develop training materials
  - Provide education and support about resources and alternatives to guardianship
  - Support judges in their work and their understanding about alternatives through publications of desk reference materials on available alternatives.
Standards for Guardians’ Performance

- Develop and implement written standards or rules of practice and procedure for guardians to:
  - Include ethical obligations applicable to all professional and lay guardians; and
  - Specify that a guardian should “exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs.”

- Additionally:
  - A guardian should become and/or remain personally acquainted with the ward;
  - Maintain sufficient contact with the ward to know of the ward’s capacities, limitations, needs, opportunities, desires, personal values, and physical and mental health; and
  - The guardian should be required to consider the expressed desires and personal values of the ward to the extent known to the guardian and to, at all time, act in the ward’s best interest and exercise reasonable care, diligence, and prudence.
Conclusion

- We are hopeful that this study will provide a framework for future decision-making regarding guardianship practice and reform
- The study can help decision-makers by providing information to help design programs and establish funding to ensure that the system works for all but especially for vulnerable older adults
- It is time to take the weight of study and move it to action
An appropriate guardianship system must ensure that guardianship is never imposed unless the requisite time, attention, due process, alternative consideration, and judicial scrutiny have been allocated to:

- Evaluation of the AIP’s capacity
- Need for guardianship over alternatives
- Qualifications of the proposed guardian

We believe that implementation of the recommendations of our study has the power to significantly improve PA’s guardianship system and protect the rights of its most vulnerable citizens.
Contact

Center for Advocacy for the Rights and Interests of the Elderly (CARIE)

100 South Broad Street
1500 Land Title Building
Philadelphia, PA 19110-1088

www.carie.org
Direct #: 267-546-3434
Main #: 215-545-5728
E-mail: menio@carie.org