

**SUPREME COURT OF PENNSYLVANIA  
ORPHANS' COURT PROCEDURAL RULES COMMITTEE**

**NOTICE OF PROPOSED RULEMAKING**

**Proposed Amendment of Pa.R.O.C.P. 5.5 and 14.4**

The Orphans' Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Rules 5.5 and 14.4 of the Pennsylvania Rules of Orphans' Court Procedure for the reasons set forth in the accompanying Publication Report. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **July 23, 2026**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Orphans' Court  
Procedural Rules Committee,

Hon. John J. McNally  
Chair

**Rule 5.5. Appointment of [a] Guardian *ad Litem* or [a] Trustee *ad Litem*.**

- (a) On petition of the accountant or any interested party, or upon its own motion, the court may appoint one or both of the following if the court considers that the interests of the non-*sui juris* individuals are not adequately represented:
- (1) a guardian *ad litem* to represent a minor or a person believed to be incapacitated under the provisions of Chapter 55 of Title 20, but for whom no guardian of the estate is known to have been appointed by a Pennsylvania court or by the court of any other jurisdiction; and
  - (2) a trustee *ad litem* to represent an absentee, a presumed decedent, or unborn or unascertained persons not already represented by a fiduciary.
- (b) The same person may be appointed as guardian *ad litem* and trustee *ad litem* and may be appointed for more than one non-*sui juris* individual when the interests to be represented are not conflicting.
- (c) **Contents of Petition.** The request for the appointment of guardian *ad litem* and trustee *ad litem* may be made in one petition. In addition to the requirements provided by the **[Rules] rules** in Chapter III, the petition shall set forth the following:
- (1) the name, age, and address of the minor or person believed to be incapacitated under the provisions of Chapter 55 of Title 20, but for whom no guardian of the estate is known to have been appointed;
  - (2) the relationship, if any, of such non-*sui juris* individual to any interested party and to the decedent or settlor;
  - (3) the interest of such non-*sui juris* individual in the property or in the matter at issue;
  - (4) the provisions of any instrument creating such interests;
  - (5) the necessity for such interests to be represented by a guardian *ad litem* or a trustee *ad litem*; and
  - (6) the proceeding in which such non-*sui juris* individual is to be represented.

- (d) A decree appointing a guardian *ad litem* or trustee *ad litem* shall specify the period or proceeding during which the guardian *ad litem* or trustee *ad litem* shall act as such.

**[Note: Rule 5.5] Comment: Pa.R.O.C.P. 5.5** is based upon former **[Rule 12.4] Pa.R.O.C.P. 12.4**, with some modifications to provide for a person believed to be incapacitated under the provisions of Chapter 55 of Title 20, but not yet adjudicated as such or for whom no guardian is known to have been appointed.

**This rule does not apply to the appointment of a guardian *ad litem* initiated pursuant to Pa.R.O.C.P. 14.4(e).**

## **Rule 14.4. Counsel.**

### **(a) Retention of Counsel.**

- (1) Except as provided in subdivision (a)(3) and if not set forth in the petition filed pursuant to Pa.R.O.C.P. 14.2 or 14.9(c), the petitioner shall file a written notice with the court containing the name and contact information of retained counsel as soon as the petitioner becomes aware that the alleged incapacitated person has retained counsel.
- (2) The notice shall include the name and contact information of retained counsel.
- (3) If retained counsel has filed an entry of appearance pursuant to Pa.R.O.C.P. 1.7(a), the petitioner is not required to file the notice in subdivision (a)(1).

**(b) Private Counsel.** If the alleged incapacitated person has retained private counsel, counsel shall prepare a comprehensive engagement letter for the alleged incapacitated person to sign, setting forth when and how counsel was retained, the scope of counsel's services, whether those services include pursuing any appeal, if necessary, how counsel will bill for legal services and costs and the hourly rate, if applicable, who will be the party considered responsible for payment, whether any retainer is required, and if so, the amount of the retainer. Counsel shall provide a copy of the signed engagement letter to the court upon request.

### **(c) Appointed Counsel.**

- (1) **Generally.** If the alleged incapacitated person has not retained counsel, the court shall appoint counsel to represent the alleged incapacitated person in any matter initiated by a petition filed pursuant to Pa.R.O.C.P. 14.2 and in any proceeding to review, modify, or terminate a guardianship. The appointment required by this subdivision shall be made without regard to the ability of the alleged incapacitated person to pay.
- (2) **Qualifications of Appointed Counsel.** Prior to appointing counsel to represent an alleged incapacitated person, the court shall inquire as to the experience and training of counsel to ensure adequate representation of the alleged incapacitated person.

(3) **Initial Meeting; Certification by Counsel.**

- (i) Appointed counsel shall meet with the alleged incapacitated person as soon as reasonably possible after the appointment.
  - (ii) Within five days of the initial meeting between appointed counsel and the alleged incapacitated person, appointed counsel shall file a certification with the court setting forth the time and place of the meeting.
- (d) **Other Counsel.** Counsel for any other party shall enter an appearance in accordance with Pa.R.O.C.P. 1.7(a).
- (e) **Guardian ad Litem.** If the court finds it necessary due to a conflict between the legal interests and best interests of the alleged incapacitated person, the court shall appoint a guardian ad litem to represent the alleged incapacitated person's best interests.

**Comment: If the alleged incapacitated person is unable to pay counsel fees, then the court shall order counsel fees to be paid by the county. See 20 Pa.C.S. § 5511(c); see also Pa.R.O.C.P. 1.40 (“Application to Waive Fees and Costs (*In Forma Pauperis*)). Any fee dispute should be resolved in a timely and efficient manner to preserve resources in order to maintain the best possible quality of life for the incapacitated person.**

**An order adjudicating incapacity and appointing a guardian shall identify the scope of representation of court-appointed counsel. See Pa.R.O.C.P. 14.7(a)(1)(v).**

**Retained or appointed counsel for the alleged incapacitated person is obligated to ensure there is no conflict between the alleged incapacitated person's legal and best interests. See Pa.R.P.C. 1.14 (responsibilities of counsel to a client with diminished capacity). “Legal interests” reflect the alleged incapacitated person's wishes, regardless of whether counsel agrees with them, while “best interests” reflect what will meet the alleged incapacitated person's needs, including, but not limited to, ensuring physical health and safety, protection of rights, managing financial resources, and developing or regaining abilities to the maximum extent possible. See *In re T.S.*, 192 A.3d 1080, 1082 n. 2 (Pa. 2018)(citing Pa.R.J.C.P. 1154, cmt.)(discussing competing interests in the context of an involuntary termination of parental rights proceeding); see also 20 Pa.C.S. § 5502 (characterizing the purpose of guardianship statutes). Retained or appointed counsel is required to represent the alleged incapacitated person's legal interests, i.e., to “advocate for the client's expressed wishes and consistent with the client's**

instructions, to the extent the client is able to express wishes and provide instruction.” See 20 Pa.C.S. § 5511(a.1)(3).

In contrast, the guardian and, by extension, a guardian *ad litem* is to “assert the rights and best interests of the [alleged] incapacitated person. Expressed wishes and preferences of the [alleged] incapacitated person shall be respected to the greatest possible extent.” See 20 Pa.C.S. § 5521(a); see also 20 Pa.C.S. § 5502. If retained or appointed counsel cannot represent the alleged incapacitated person’s legal and best interests without conflict, then the court shall make a separate appointment of a guardian *ad litem*. See 20 Pa.C.S. § 5511(a.1)(3).

The court may appoint a guardian *ad litem* upon its own motion or upon the motion of an interested party or counsel. Pa.R.O.C.P. 5.5 (Appointment of Guardian *ad Litem* or Trustee *ad Litem*) does not apply to the appointment of a guardian *ad litem* initiated pursuant to subdivision (e).

#### Historical Commentary

The following commentary is historical in nature and represents statements of the Committee at the time of rulemaking:

**Explanatory Comment:** Reasonable counsel fees, when appropriate, should be paid from the estate of the alleged incapacitated person whenever possible. If the alleged incapacitated person is unable to pay for counsel, then the court may order counsel fees and costs to be paid by the county. See 20 Pa.C.S. § 5511(c). Any fee dispute should be resolved in a timely and efficient manner to preserve resources in order to maintain the best possible quality of life for the incapacitated person.

An order adjudicating incapacity and appointing a guardian will identify the scope of representation of court-appointed counsel. See Pa.R.O.C.P. 14.7(a)(1)(v).

See Pa.R.P.C. 1.14 pertaining to the responsibilities of counsel to a client with diminished capacity.

**SUPREME COURT OF PENNSYLVANIA  
ORPHANS' COURT PROCEDURAL RULES COMMITTEE**

**PUBLICATION REPORT**

**Proposed Amendment of Pa.R.O.C.P. 5.5 and 14.4**

The Orphans' Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Rules 5.5 and 14.4 of the Pennsylvania Rules of Orphans' Court Procedure. This proposal is intended to provide for the appointment of a guardian *ad litem* for an alleged incapacitated person if the court finds it necessary due to a conflict between the legal and best interests of the alleged incapacitated person.

**Background**

The Act of December 14, 2023, P.L. 446, No. 61 ("Act 61") included guardianship reforms in the areas of mandatory appointment of counsel, certification of guardians, consideration of less restrictive alternatives before appointing a guardian, and scheduling review hearings within one year when there may be a change in capacity. In the context of appointment of counsel, Act 61 made appointment of counsel mandatory in all circumstances when the alleged incapacitated person has not retained counsel. See 20 Pa.C.S. § 5511(a.1)(2). Moreover, the appointment is to be made without regard to the alleged incapacitated person's ability to pay. *Id.*

Among other provisions related to appointment of counsel for the alleged incapacitated person, Act 61 provides that "[r]etained or appointed counsel may not act as guardian *ad litem* for the alleged incapacitated person." See 20 Pa.C.S. § 5511(a.1)(3). The Committee incorporated this provision in Rule 14.4 in its Notice of Proposed Rulemaking. See 54 Pa.B. 1654 (March 30, 2024). However, as explained in the Committee's Adoption Report published when the Court adopted the Act 61-related rule amendments: "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." See 55 Pa.B. 7 (January 4, 2025). The Committee's review of the prohibition focused on two areas: (1) whether the prohibition infringes on the Court's exclusive authority to govern the practice of law; or (2) whether the same concepts of legal and best interests set forth in the context of juvenile or adoption proceedings also apply in the context of capacity proceedings.

**Discussion**

Concerning the infringement areas, the Court's authority to regulate 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).

Under § 5511(a.1)(3), counsel is categorically barred from serving in that role solely because he or she represents the alleged incapacitated person, regardless of whether an actual conflict exists. The Committee believes that the statutory prohibition may be in tension with this constitutional authority by preventing retained or appointed counsel from also serving as guardian *ad litem*.

A guardian *ad litem* is court-appointed fiduciary who represents someone under a legal disability. See Pa.R.O.C.P. 1.3 (definition of "guardian *ad litem*"). "Fiduciary" is broadly defined and includes, among others, an agent under a power of attorney, custodian, personal representative, guardian, trustee, guardian *ad litem*, or trustee *ad litem*. *Id.* Thus, while a guardian *ad litem* is not required to be an attorney, § 5511(a.1)(3) purports to limit retained or appointed counsel from serving in that capacity.

Concerning the concepts of legal interest and best interest, the Court has prescribed counsel's duties when a conflict arises between the client's legal and best interests. If counsel reasonably believes that a client has diminished capacity, is at risk of substantial harm without intervention, and cannot adequately act in their own interest, counsel is permitted to take protective action. See Pa.R.P.C. 1.14 (regarding representation of a client with diminished capacity). This may include consulting with individuals or entities able to protect the client and, when appropriate, seeking the appointment of a guardian *ad litem*, conservator, or guardian. In this regard, the Court already provides comprehensive supervisory guidance for attorneys confronted with conflicts of interest in their representation of persons who may be incapacitated.

The Committee also examined whether the concepts of legal and best interests, as developed in juvenile and adoption proceedings, should inform incapacity proceedings. An alleged incapacitated person, of course, differs from a child because "a person is presumed to be mentally competent, and the burden is on the petitioner to prove incapacity by clear and convincing evidence." *In re Hyman*, 811 A.2d 605, 608 (Pa. Super. 2002). Nevertheless, as noted above, Pa.R.P.C. 1.14(b) already recognizes tensions when counsel "reasonably believes that the client has diminished capacity," acknowledging that a divergence may arise between the client's legal interests, *i.e.*, how the client wants to proceed, and the client's best interests, *i.e.*, what is necessary to protect the client from harm.

While Pa.R.P.C. 1.14 offers guidance to counsel, there is scant case law that thoroughly analyzes these competing considerations within guardianship proceedings.

Accordingly, the Committee looked to analogous areas of law, such as juvenile and adoption proceedings, for additional guidance.

In dependency matters, the commentary to Pa.R.J.C.P. 1154 (“Duties of Guardian *ad Litem*”) explains the distinction between “legal interests” and “best interests”:

“Legal interests” denotes that an attorney is to express the child's wishes to the court regardless of whether the attorney agrees with the child's recommendation. “Best interests” denotes that a guardian *ad litem* is to express what the guardian *ad litem* believes is best for the child's care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.

See Pa.R.J.C.P. 1154, cmt. Similarly, “if a child has legal counsel and a guardian *ad litem*, counsel shall represent the legal interests of the child and the guardian *ad litem* shall represent the best interests of the child.” See Pa.R.J.C.P. 1151(c) (“Assignment of Guardian *ad Litem* and Counsel”).

The Court has also identified the legal interests and best interests of a child in involuntary termination of parental rights cases. See *In re T.S.*, 192 A.3d 1080, 1082 n. 2 (Pa. 2018)(citing Pa.R.J.C.P. 1154, cmt.). Similarly, “an attorney appointed as counsel to represent a child's legal interests may also serve as the child's guardian *ad litem* (“GAL”), responsible for asserting the child's best interests, so long as the child's legal interests do not conflict with the attorney's view of the child's best interests.” *In re Adoption of K.M.G.*, 240 A.3d 1218, 1224 (Pa. 2020) (citing *In re T.S.*, 192 A.3d at 1082 in an involuntary termination of parental rights case).

Notably, the orphans’ court is required to make a record finding that no conflict exists between the child’s best interests and legal interests before appointing a single attorney to represent the child in both capacities during an involuntary termination of parental rights proceeding. See *id.* at 1236; see also Pa.R.O.C.P. 15.10(d)(1). In contrast, in dependency matters, counsel who identifies a conflict between the roles may move the court for separate counsel. “If there is a conflict of interest between the duties of the guardian *ad litem* pursuant to paragraphs (7) and (9), the guardian *ad litem* for the child may move the court for appointment as legal counsel and assignment of a separate guardian *ad litem* when, for example, the information that the guardian *ad litem* possesses gives rise to the conflict and can be used to the detriment of the child.” See Pa.R.J.C.P. 1154, cmt.

After considering these examples, the Committee was not inclined to require a record determination regarding a conflict before permitting dual representation of the interests, as in the involuntary termination of parental rights scenario. First, the subject of the proceeding has not yet been adjudicated to lack capacity and has either retained

counsel or has been appointed counsel. Second, the Committee does not wish to recommend a separate hearing, with a possible accompanying delay, in every case solely to establish the absence of a conflict. While the Committee recognizes that guardianship matters implicate vital personal interests, it believes that the existing guidance in the Rules of Professional Conduct sufficiently addresses counsel's obligations in navigating any tension between best interests and expressed legal interests. Third, the alleged incapacitated person will be present at the hearing to determine incapacity, unless such attendance is determined to be harmful. Thus, the court will have the opportunity to explore any competing interests at the hearing if necessary. The Committee especially welcomes comments on this point.

### **Proposed Rules Changes**

While discussing appointment of a guardian *ad litem*, the Committee observed that Pa.R.O.C.P. 5.5 addresses the appointment of a guardian *ad litem* or a trustee *ad litem*. It provides: "The court may appoint ... (1) a guardian *ad litem* to represent a minor or a person believed to be incapacitated under the provisions of Chapter 55 of Title 20, but for whom no guardian of the estate is known to have been appointed by a Pennsylvania court or by the court of any other jurisdiction." The Committee believes it would be helpful to clarify that this provision is limited to accounting and trust proceedings and is not to be used in guardianship matters. The proposed commentary to Rule 5.5 reflects that the rule does not apply to the appointment of a guardian *ad litem* initiated pursuant to Pa.R.O.C.P. 14.4(e).

Pa.R.O.C.P. 14.4 is proposed to be amended by the addition of a new subdivision (e) pertaining to the appointment of a guardian *ad litem*: "If the court finds it necessary due to a conflict between the legal interests and best interests of the alleged incapacitated person, the court shall appoint a guardian *ad litem* to represent the alleged incapacitated person's best interests."

Commentary was added to Rule 14.4 to explain the meanings of best interests and legal interests. The commentary also notes that the appointment of a guardian *ad litem* may be initiated by appointed or retained counsel or by the court *sua sponte*.

The Committee also proposes deleting the first sentence of the commentary relating to payment of reasonable counsel fees by the estate of the alleged incapacitated person whenever possible. That sentence is reflected in the Historical Commentary. First, the statement may be gratuitous, given that counsel will be appointed for an unrepresented alleged incapacitated person "without regard to the ability of the alleged incapacitated person to pay." See Pa.R.O.C.P. 14.4(c)(1). Second, there was concern among the Committee that the commentary could suggest that the fees of a guardian *ad litem* for an alleged incapacitated person without financial resources are payable in the same manner as appointed counsel. Thus, the commentary is proposed to be deleted.

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The Committee welcomes all comments, concerns, and suggestions regarding this proposal