

Guardianship and Orphans' Court

Changes in Place and on the Horizon

Counsel for the alleged incapacitated persons (AIP)

1. At the most basic level, the entry of an appearance by counsel in any OC case is covered by Pa. R.O.C.P. 1.7(a).

2. The Court may also appoint counsel pursuant to statutory authority, such as Section 5511(a)(2) of the Guardianship Act (20 Pa.C.S. § 5511(a)(2)).

3. Both Section 5511(a)(2) and Pa. R.O.C.P. 14.4b) recognize the possibility of both court-appointed counsel and privately retained counsel serving the same AIP.

4. At this point, it is imperative that we recognize the presumption of capacity that all *Alleged* Incapacitated Persons enjoy.

5. If you're privately retained counsel, be sure you have a written fee agreement that covers the scope of work you're going to do, your rate of pay, **who is responsible for paying you**, and whether your retention will extend to any appeal, and *it must be signed by the AIP*. There is an opportunity to really dig into who you're actually working for at this point, particularly in regard to who is paying your bill, and to recognize that the Court is going to look at that issue, as well.

6. Privately retained counsel must provide a written fee agreement to court *upon the court's request*. Nothing provides for disclosure of fee agreement to opposing counsel, or to the other attorney for the AIP.

7. Both privately retained counsel (by written agreement) and court-appointed counsel (by the terms of the appointment order) must have a defined scope of work and whether appellate work is included. Pa. R.O.C.P. 14.4(c).

8. Whichever position you occupy, private or court-appointed, be sure to coordinate with co-counsel to present a united front. If you're sharing work for the same client, the client's position should be advocated by both of her attorneys.

9. Both attorneys should cooperate on a response to the petition, whether it's preliminary objections or an answer and new matter. This is particularly important with the adoption in 2016 of Pa. R.O.C.P. 3.10(b). Failure to comply with that rule could result in a successful motion for judgment on the pleadings or nonsuit.

10. Once more, the presumption of capacity applies to all AIPs. The fact that someone is alleged to be totally incapacitated does not mean they can't choose their own counsel.

11. It is not a violation of the Rules of Professional Conduct to meet with and be privately retained by an AIP who is already represented by court-appointed counsel, even if you and the AIP know of the existing representation. Be sure to employ all of the regular safeguards when you meet with the AIP – Sufficient time, certainty of privacy of the discussion, clarity and simplicity in explanation of the nature of the action, copious notes to support your conclusion that you are able to take the case, and a written agreement that complies with Pa. R.O.C.P. 14.4(b).

Pa. Rules of Orphans' Court Procedure – Small Estate Petitions

1. Small estate petitions – Amendment of the form and exhibits required for a small estate petition are proposed to Pa. R.O.C.P. 5.50 to eliminate the requirement that only the Pa. Rev. notice of appraisal is sufficient, among other changes.

See: : <https://www.pacourts.us/courts/supreme-court/committees/rules-committees/orphans-court-procedural-rules-committee/>

2. Comment period ends July 15, 2022. Speaking from experience, the comments from actual practitioners are always very helpful, particularly when they're county specific. Even though local rules may not conflict with Supreme Court OC Rules, there are distinctions that can make a difference.

3. Amendments expand the options for providing proof of inheritance tax compliance.

4. Also, expands requirements for proof of will provisions, including attaching copies of a will if the original can't be found.

5. Clearly defines the contents of the small estate petition and all required exhibits.

6. Amendments should restore small estate petitions as a practical alternative to probate.

7. See proposed amendments for comment, attached.

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

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.O.C.P. 5.50

The Orphans' Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.O.C.P. 5.50 governing petitions for small estates for the reasons set forth in the accompanying explanatory 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 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 15, 2022**. 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. Emil A. Giordano (ret.)
Chair

Rule 5.50. Settlement of Small Estates by Petition.

- (a) **Applicability.** This Rule applies to all petitions filed pursuant to 20 Pa.C.S. § 3102, pertaining to settlement of small estates by petition.
- (b) **Contents.** In addition to the requirements provided by the Rules in Chapter III, a petition shall set forth the following:
 - (1) **Estate.**
 - (i) the name and address of each petitioner and the petitioner's relationship to the decedent;
 - (ii) the decedent's name, date of death, and domicile at the time of death;
 - (iii) a statement whether the decedent died testate or intestate and, if testate[,];
 - (A)** that the original will **[is attached] has been lodged or probated with the register[.];** or
 - (B)** that the original will cannot be produced, the reason it cannot be produced, **and that the register issued a decree accepting the photocopy as an original [and that a photocopy of the original will is attached];**
 - (iv) the name and address of each testate or intestate beneficiary, and if any such beneficiary is a minor or otherwise incapacitated, the name and address of such beneficiary's legal representative, as applicable; and
 - (v) whether a claim for family exemption is included, and if the claimant is not the surviving spouse, the relationship of the claimant to the decedent, and a statement that the claimant resided with the decedent at the date of death and if the claimant is the surviving spouse, that he or she has not forfeited the right to claim the family exemption.
 - (2) **Assets.** All assets of decedent's estate, other than real estate and property distributable under 20 Pa.C.S. § 3101, and the value of each asset.

(3) **Liabilities.**

- (i) **[the] The** names and addresses of all known creditors, total amounts claimed by each, whether the debts have been satisfied, and an itemized list of all debts, including whether or not admitted, a description of the property claimed and the gross value thereof, and whether there is any objection to the debt, and if so, by whom;
- (ii) an itemized list of unpaid administrative expenses, unpaid taxes, all other unpaid debts, and, if insolvent, as prioritized under 20 Pa.C.S. § 3392; and
- (iii) if the decedent was 55 years of age or older at the time of death, whether a request for a statement of claim was sent to the Department of Human Services in accordance with 62 P.S. § 1412, the date the request was made, and the response received from the Department.

(4) **Distribution.**

- (i) **[the] The** name of any distributee paid prior to the filing of the petition, including the nature and amount of each payment;
- (ii) the name of each proposed distributee and respective proposed distribution;
- (iii) the name of each interested person who has consented to or joined in the petition; and
- (iv) the names of each testate or intestate beneficiary, as applicable, who has not consented to or joined in the petition.

- (5) **Taxes.** A statement that a Pennsylvania inheritance tax return has been filed, that all taxes due on the assets listed on the petition have been paid in full, and that proof of such payment is attached to the petition, or the reason why **the filing has not been made or** payment has not occurred.

(c) **Exhibits.** The following items shall be attached as exhibits to the petition in the following order:

- (1) an original death certificate;

- (2) **[the decedent's will, if any] a photocopy of the decedent's will along with either:**
 - (i) **proof the original will was lodged or probated with the register; or**
 - (ii) **a decree of the register accepting a photocopy as the original.**
 - (3) **[Pennsylvania Department of Revenue Notice of Appraisalment and Assessment of Tax] documentation supporting the statement required by subdivision (b)(5), if any;**
 - (4) original consents, joinders, and statements of no objection signed by interested parties; and
 - (5) a copy of any correspondence received from the Department of Human Services in response to the statement of claim referenced in **[subparagraph] subdivision (b)(3)(iii).**
- (d) **Notice.** The petitioner shall serve written notice on interested parties in compliance with **[Chapter III] Rule 3.5(b).**

[Explanatory] Comment: The original will is to be lodged or probated with the register to ensure it can be located at a later time, if necessary. If the petitioner does not have the original will, he or she must petition the register for a decree accepting a photocopy of the will as the original. The decree by the register establishes the validity of the will. The register's decree is not intended to initiate probate, but rather ensure that the appropriate entity is determining the validity of the will.

20 Pa.C.S. § 3101, referenced in **[paragraph] subdivision (b)(2)**, sets forth certain allowable payments to the decedent's family members, and to a licensed funeral director for the decedent's burial expenses. Property payable under 20 Pa.C.S. § 3101 shall not be included when determining whether the decedent's personal property exceeds a gross value **of** \$50,000.

In **[paragraph] subdivision (b)(3)**, the term "creditors" includes creditors of the decedent on the date of death, providers of funeral services, and providers of goods and services to the petitioner arising from settlement of the estate.

The Medical Assistance Estate Recovery Program, established by federal law, requires the Commonwealth to recover the Medical Assistance costs from decedents' estates. See 42 U.S.C. § 1396p; 62 P.S. § 1412.

Examples of documentation required by subdivision (c)(3) include, but are not limited to, a copy of the Pennsylvania Department of Revenue Notice of Appraisalment and Assessment of Tax, the filed inheritance tax return, proof of payment of the inheritance tax, or a statement from the Department of Revenue or its agent that no tax is due.

The filings required by this rule are subject to the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*. See [Rule] **Pa.R.O.C.P.** 1.99.

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

PUBLICATION REPORT

Proposed Amendment of Rule 5.50 of the Pennsylvania Orphans' Court Rules

In 2020, the Supreme Court of Pennsylvania adopted new Pa.R.O.C.P. 5.50, providing for the contents of small estate petitions. See Order of August 18, 2020, No. 847, Supreme Court Rules Docket. Subsequently, the Committee received correspondence expressing concern about certain provisions in the rule. One concern related to the requirement in subdivision (c)(3) that the Department of Revenue Notice of Appraisal and Assessment of Tax ("Notice") be attached as an exhibit to the petition. Another concern related to service on interested persons in compliance with Chapter III.

Regarding the attachment of the Notice, commenters reported delays in the issuance of these notices – sometimes six months or more. In some cases, this delay could outweigh the benefit of filing a small estate petition. Thus, the Committee reconsidered the need to require attachment of the Notice and contemplated other means by which payment of tax (or the waiver of same) could be demonstrated. The Committee also noted the limited exposure of an underpayment, given the estate cap for small estate eligibility. Therefore, the Committee is considering proposing amendments to Rule 5.50(c)(3) permitting alternative documents to demonstrate the status of tax payments. Instead of limiting the required exhibit to the Notice, other documentation would be acceptable including, but not limited to, the Notice, the filed inheritance tax return, proof of payment of the inheritance tax, or a statement from the Department of Revenue or its agent that no tax is due.

Current Rule 5.50(d), pertaining to service of the petition, provides that "[t]he petitioner shall serve written notice on interested parties in compliance with Chapter III." Commenters expressed concern that failure to designate the precise service procedure leaves practitioners electing the issuance of a preliminary decree and citation for all parties in interest not already subject to the court's jurisdiction – an expensive proposition for a small estate. While the Committee had initially thought it better to leave the service determination to practitioners, it is sensitive to the cost issues raised and acknowledges the small estate statute does not direct the method of service of the petition, merely stating "with such notice as the court shall direct." See 20 Pa.C.S. § 3102. Therefore, the Committee is considering proposing amendments to Rule 5.50(d) narrowing the service requirement of the small estate petition to Rule 3.5(b) (service by notice).

Finally, while considering these two issues, the Committee identified a need to refine provisions for attaching the original or a photocopy of the decedent's will (if the original will cannot be produced) as an exhibit to the petition as required by current Rule

5.50(c)(2). First, the Committee observed that permitting the attachment of a photocopy of a will to the petition had the potential to lead to an incorrect distribution. In the absence of the original will, questions of validity and revocation must be determined, which falls within the jurisdiction of a register of wills. Thus, the Committee considered whether a petitioner who does not have the original will should petition the register and obtain a decree as to the photocopy's validity. The register's decree accepting the photocopy would establish proof of the validity of the will and enable the court to order distribution in accordance with the will. The petition to accept the photocopy would not necessarily initiate probate, although the decree could be used to do so or to file the small estate petition. The Committee observes that adding this practice to Rule 5.50 could disincentivize petitioners who do not have an original will from electing a small estate petition over probate when the photocopy is of questionable validity. However, it seems a necessary change to ensure the integrity and validity of the document in question.

Concurrently, the Committee reconsidered whether an original will should be filed with the petition. The register is the office for the lodging and probating of wills and maintains filing and cataloging systems for such responsibilities. In contrast, an original will filed as an exhibit to a petition may be difficult to locate in the future and not easily discoverable. Therefore, the Committee is considering proposing that an original be lodged or probated with the register before filing of the small estate petition. Rather than attaching the original will, the petitioner would attach a photocopy demonstrating proof of lodging with the register or the decree of the register accepting a photocopy of the original.

The Committee invites all comments, concerns, and suggestions.