NEW YORK STATE BAR ASSOCIATION

LEGALEase

Guidelines for Guardians

A Guide to Responsibilities and Procedures

NYSBA

This pamphlet, which is based on New York law, is intended to inform, not to advise. No one should attempt to interpret or apply any law without the aid of an attorney. Produced by the New York State Bar Association Elder Law Section.

GUIDELINES FOR GUARDIANS
A GUIDE TO RESPONSIBILITIES AND PROCEDURES

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I. INTRODUCTION

Congratulations on your appointment as Guardian of a person determined to be incapacitated under the Mental Hygiene Law. This booklet is intended to guide you through your duties and is a written embodiment of the information you have obtained or will obtain in the Guardianship course that you must complete. However, this booklet is not intended to answer every question that you may have concerning your duties. Your Attorney and the Court Examiner are the individuals who can answer specific questions as they might arise in your particular situation.

II. QUALIFYING AS A GUARDIAN

A. After the Hearing

This booklet assumes that a hearing has been held and that the judge has issued a decision declaring the Alleged Incapacitated Person to be incapacitated and designating you as Guardian. You may be the *Guardian of the Person*, meaning you have the authority to make personal decisions on behalf of the Incapacitated Person, and/or you may be the *Guardian of the Property*, meaning that you have the authority to manage the finances of the Incapacitated Person.

After the hearing, your attorney will prepare an *Order and Judgment* appointing you as Guardian. S/he will submit this Order to the Court and will also send a copy to all persons who appeared at the hearing. The Judge then will sign the Order after it has been reviewed by all parties. In many counties, prior to the Judge's signing the Order, the transcript of the hearing must be secured, and all parties must have at least 10 days' notice. In those counties it may take a month or so after the hearing to receive a signed Order.

Your attorney will send you a copy of this Order. This Order sets forth your powers, as explained more fully below.

It does not, however, authorize you to act as Guardian. To act as a Guardian, you must receive a *Commission to Guardian*. The Commission is issued when you have signed a Consent and a Designation and filed it with the County Clerk and, for most Guardians of the Property, when you have filed a Bond with the Clerk as well.

B. Consent and Designation

A *Consent to Act* states that you agree to act as the Guardian of the Incapacitated Person. Although you have most likely already declared in court that you wish to act, you must sign this statement before a Notary Public, confirming your intent to act.

A *Designation* states that you will faithfully discharge your duties as Guardian. Moreover, if any issue arises concerning your duties such that you must be served legal papers and if you cannot be found, you agree that the County Clerk may be served these papers instead of you. That means that if you are no longer in the jurisdiction of New York, for the purposes of any action concerning your role as Guardian, legal action can continue as if you were in New York.

C. Bond

If you have been appointed as a *Guardian of the Property*, the Order and Judgment appointing you has fixed an amount of a *Surety Bond* to be issued, insuring the Incapacitated Person's funds from misuse. Prior to issuing a bond, the surety company may want you to complete an application form in which you list your assets and liabilities so that the company can assess whether or not to issue this bond. Once the bond has been issued, you must sign it before a Notary Public and then submit this bond either for approval by the judge who appointed you or directly for filing with the County Clerk of the county in which the proceeding took place.

D. Commission

The *Commission* is issued by the County Clerk and states that you have qualified to serve as Guardian by reason of having filed

your Consent and Designation and Bond. This Commission will, in many instances, list your duties and powers as delineated in the Order and Judgment appointing you as Guardian. The Commission is signed by the County Clerk and authorizes you to gather all the assets of the Incapacitated Person. If you are a Guardian of the Property, by presenting this Commission, all persons having assets of the Incapacitated Person must deliver these assets to you. If you are Guardian of the Person, by showing this Commission, you may make decisions concerning the personal needs of the Incapacitated Person within the parameters of the powers granted in the Order and Judgment. As the Incapacitated Person may have assets in several different financial institutions, you may wish to obtain several Commissions certified by the County Clerk to be true copies of the original. In some counties, the Commission is a one page document that is annexed to the Order and Judgment which delineates your duties and authority as Guardian.

III. THE FIRST NINETY DAYS

A. Training Course

All persons appointed Guardians are required to attend a training course for Guardians approved by the Office of Court Administration unless this course has been waived pursuant to the Order and Judgment appointing you. Such courses are offered on a rotating basis by the local bar associations in the county in and near which you reside and by other organizations, such as law schools or providers of legal seminars approved to offer such courses. By law, you are required to attend this training course within 90 days of the date of your Commission. You will receive a *Certificate of Attendance* stating that you have attended this Guardianship class. This Certificate is an important document and should be retained with the other documents concerning this Guardianship, such as the Order and Judgment and a certified copy of the Commission. In a few counties a compliance conference is held a few months

after the Guardianship hearing to insure that the training course has been completed and the Oath, Consent and Designation and Bond have been filed. The conference is sometimes waived if all of this material is submitted prior to the conference date.

B. Marshal Assets

1. Title of Accounts

a. Guardianship Assets

As a Guardian, you must gather all of the assets of the Incapacitated Person and establish accounts titled: "YOUR NAME as Guardian of _____ an Incapacitated Person." As you are not the owner of these accounts, the Social Security number of the Incapacitated Person will be used in establishing these accounts. Prior to your appointment, the Petition seeking the appointment of a Guardian will have listed the assets of the Incapacitated Person. The Court Evaluator will have investigated to ascertain that the assets listed in the Petition are all of the assets that belong to the Incapacitated Person. You must keep the Incapacitated Person's funds separate from yours and never commingle, or place your own assets into the Incapacitated person's account, nor the Incapacitated Person's assets into your own personal accounts.

b. Supplemental Needs Trust Assets

As a Guardian, the Order and Judgment may have authorized you to establish a trust fund for the benefit of the Incapacitated Person so that s/he may continue to receive government benefits such as Supplemental Security Income (SSI) and Medicaid, without having his/her own assets disqualify him/her from eligibility.

If so, and if you are the *Trustee* of this trust, then you should gather all of the assets of the Incapacitated Person and establish accounts titled: "YOUR NAME as Trustee of the *Supplemental Needs Trust* for _____ an Incapaci-

tated Person". This trust will have its own *Tax Identification Number* issued by the Internal Revenue Service. Use this number, rather than the Incapacitated Person's own Social Security Number, in opening these accounts. This number will be used in filing income tax returns for the trust. If your attorney has not already obtained this number for you, then you may request a form, called an *SS4*, from the Internal Revenue Service. It will then issue the identification number to you. If there is a structured settlement, or future periodic payments, the Commission and the Order and Judgment should direct that the insurance company make future payments to you as the Trustee of the Supplemental Needs Trust Fund. Either you or your attorney must present that Order and the Commission to the insurance company that owns the annuity to arrange for proper payments. This information may be contained in a Court Order authorizing a lawsuit recovery for the Incapacitated Person.

2. Types of Accounts

a. Checking Account

It is important for you to open a checking account in your name as Guardian of _____ an Incapacitated Person, so that you may make the expenditures authorized in the Order and Judgment and/or which are reasonable and necessary to provide for his/her needs. By making all expenditures by check, you will have proper and accurate records for the reports described below.

b. Securities, Annuities, Insurance Policies

Securities, likewise, will be titled in your name as Guardian of _____ an Incapacitated Person. When stocks and bonds are held by a brokerage company or investment house or other

financial institution, the brokerage statement will be issued monthly or quarterly. You must verify that the account statements are correct, and must retain these monthly or quarterly statements in preparation for your initial and annual reports.

c. **Certificates of Deposit/Savings Accounts**

If you wish to retain these accounts, once again you must change the title of these accounts to Your Name as Guardian of an Incapacitated Person. Even if a Certificate of Deposit has not yet come due, you must change the title. When done pursuant to a court order, New York Banking Law §§ 9-I(2) and 238 preclude a bank from charging a penalty to this transaction.

3. **Examining Transactions Occurring Prior to Your Appointment**

When marshaling the above assets, you must verify that any recent use of the funds was authorized. If you believe that the Incapacitated Person unknowingly transferred assets or that anyone acting on behalf of the Incapacitated Person made unauthorized use of his/her funds, you may demand their return. The Order and Judgment appointing you Guardian may have highlighted some unauthorized transactions and hence may give you a clear mandate to gather particular assets no longer belonging to the Incapacitated Person or to pursue a procedure to have them found and returned.

4. **Personal Property**

Personal property must be inventoried. If this property is unattended, such as in a vacant home of the Incapacitated Person, you should secure it. Valuables should be appraised.

5. **Joint Accounts**

When assets have been jointly held between the Incapacitated Person and

another, the Order and Judgment most likely determined what percentage was owned by the Incapacitated Person and what percentage belongs to the other individual. For example, assets may have another's name for convenience only, and they really belong to the Incapacitated Person. Those assets belonging to the Incapacitated Person are those that you will marshal in accounts titled: Your Name as Guardian of _____ an Incapacitated Person.

6. **Last Will and Testament**

   If the Incapacitated Person has executed a *Last Will and Testament*, you must locate the original Will. In some counties the Will must be filed with the Surrogate's Court in the county in which the Incapacitated Person resides, while in other counties the original Will is kept with the attorney who drafted the Will. If you file the Will with the Surrogate's Court, you will get a receipt for this filing, and should retain this along with your other documents.

C. Real Property

1. **Real Property Filing**

   If the Incapacitated Person owns an interest in real property, you must file a form with the County Clerk in the county in which the property is located, identifying that an Incapacitated Person owns an interest in this property. In this manner, the real property is protected and cannot be conveyed without the approval of the court. This form is filed with the section, lot and block of the property and is signed by you before a Notary Public.

2. **Appraisal**

   Securing a written appraisal of real property owned by the Incapacitated Person assists you in determining whether retaining this real property is in the best interest of the Incapacitated Person.

3. **Insurance**

   You must ascertain that all insurance premiums have been paid. If there has been a lapse in fire and theft coverage, this must be reinstated or new insurance purchased.

D. Inventory Safe Deposit Box

A safe deposit box must be opened in the presence of a bank officer and a representative of the surety unless it is waived in writing. The contents must be inventoried. This list should be filed with the Court. The contents of the safe deposit box should be secured and included in your Initial Report.

E. Assess Needs

The Order and Judgment sets forth a plan that you will undertake in the best interest of the Incapacitated Person. If the Guardian for Personal Needs is different from the Guardian for Property Management, the two Guardians must coordinate efforts to effectuate the proposed plan for the Incapacitated Person. The Guardian for Personal Needs must determine if there are any unmet medical, personal care, or housing needs. If the Incapacitated Person has been living alone, you may need to arrange home care services for him/her. You must assure that sufficient care is provided for the needs of the Incapacitated Person. You may also have the authority to choose the place of abode. Assisted living facilities or even entry to a skilled nursing facility as alternatives to living alone may be sought if appropriate and if authorized in the Order and Judgment.

F. Court Examiner

The court will appoint a *Court Examiner* who will examine your initial and annual reports. This person is different from the *Court Evaluator* who was present at the hearing that determined that the Incapacitated Person was in need of a Guardian and that you would be suitable to serve. The name, address and telephone number of the *Court Examiner* will be included in the Order and Judgment. You should forward to him/her a copy of your Consent and Designation, bond, and

Commission and, if applicable, Supplemental Needs Trust.

G. Initial Report

An *initial report* is due 90 days after the issuance to you of your commission as Guardian. You should send the original initial report to the court, and a copy to the Court Examiner. You must include the following:

1. a copy of the Certificate of Attendance stating that you have attended a Guardianship class as part of this initial report. If you have not been able to attend such a class, you must explain why and what plans you have made to enroll in the class.
2. a list of all the assets of the Incapacitated Person and proof that they are now titled in your name, as Guardian of _____ an Incapacitated Person.
3. an explanation as to why any assets have not yet been titled in your name as Guardian.
4. a copy of the Real Property filing with the County Clerk for any real property owned by the Incapacitated Person.
5. a medical report on his/her mental and physical condition, together with a statement of medications and treatments.
6. expenditures you have made on behalf of the Incapacitated Person. These are called *disbursements*.
7. a receipt showing that you have filed the Last Will and Testament with the Surrogate's Court, if applicable.

H. Investment of Assets

Pursuant to the *prudent investor standard*, the Guardian should invest and reinvest the funds according to Estates Powers & Trusts Law § 11-2.3. You have a duty to maximize returns but not risk loss on the overall investments. For accounts retained in banks, you must be careful not to retain more than $250,000 in any single bank, as the accounts may not otherwise be insured by FDIC.

IV. POWERS OF THE GUARDIAN FOR PROPERTY MANAGEMENT AND PERSONAL NEEDS

A. Introduction

Article 81 of the Mental Hygiene Law affords incapacitated persons the opportunity for their previous wishes to be honored and, in the absence of a prior expression of their desires, the wishes of a reasonable person in their circumstance are applied to the incapacitated person's situation. Because the law leaves as much discretion and autonomy with the Incapacitated Person as possible, you have only those powers authorized by the court. In providing for the property management and personal needs of an Incapacitated Person, you must exercise your judgment within the parameters of the court order to provide for the best interests of the Incapacitated Person.

B. Powers of the Guardian for Property Management

1. Marshaling Assets and Establishing an Accurate Inventory

2. Developing a Budget for the Needs of Incapacitated Person and, When Applicable, for Dependents of Incapacitated Person

   The Petition to Appoint Guardian and Order and Judgment may have already approved expenditures to be made from the funds of the Incapacitated Person. All expenditures must be for the benefit of the Incapacitated Person, directly or indirectly. In many counties, any large expenditures not previously authorized should receive prior approval either of the court or of the Court Examiner.

   The individual courts differ on what constitutes a large expenditure for which specific approval is sought. In certain counties, individual expenditures above $1,000 should have specific approval if not included in a budget or in the type of expenditures for which you are given discretion to make as Guardian. In Queens County, for example, a Guardian may

present a short form Order to the Court Examiner assigned to the case in which the Guardian will detail the expenditures sought. The Court Examiner will then review the proposed expenditure and make a recommendation to the Court, which will then either approve or disapprove the expenditures or call for additional information concerning the need for the expenditures. In some counties a letter written to the Court Examiner will suffice, while other counties do not require court oversight and prior approval for large expenditures. If you were represented by an attorney in the Guardianship proceeding, your counsel can advise you as to the ongoing reporting responsibilities.

Keeping in mind that the Court's primary concern is preserving the assets of an Incapacitated Person for his/her own needs, you should review previous patterns of spending made by the Incapacitated Person when the Incapacitated Person was using his/her own judgment. In preparing a budget, you must assess the needs of the Incapacitated Person, the assets available to provide for the needs, and the desires expressed by the Incapacitated Person.

Any previous pattern of gifting may also be continued, subject to the Court's prior approval. In assessing whether or not to gift assets, the tax and government entitlement consequences of the proposed gifting must be analyzed and presented to the Court for the Court's consideration. Absent Court approval, you may not use the assets of the Incapacitated Person for anyone other than the Incapacitated Person. With the Court's approval, the Guardian may provide for the support of those dependent upon the Incapacitated Person, even if the Incapacitated Person is not legally liable for the support of those dependents.

3. Determining Eligibility for Government and Private Benefits

As a Guardian, you are a *Fiduciary*. As a fiduciary, you have a duty to act in the

best interest of the Incapacitated Person and not to benefit personally from the decisions that you make for his/her benefit. Consistent with your fiduciary duty to preserve assets of the Incapacitated Person and consistent with your authority to qualify the Incapacitated Person for government and private benefits, you may examine the situation of the Incapacitated Person to determine whether or not s/he is entitled to receive either private benefits or government benefits.

The following is a brief overview of the government entitlements and private benefits to which an Incapacitated Person may be eligible and the requirements for those entitlements.

a. Private Benefits

1. Pensions

An Incapacitated Person may have a work history which entitles him/her to pension benefits for which s/he may never have applied. You should contact the employer and ascertain whether the Incapacitated Person is entitled to monthly or lump sum benefits. In addition, if no beneficiary has been designated, or if the beneficiary designated is deceased, you may make an application to the Court for the authority to name a beneficiary either consistent with the Incapacitated Person's current wishes or with his/her past wishes.

2. Insurance

Insurance is often an employment-related benefit. You must investigate life insurance plans and arrange to pay any premiums required, if retaining the insurance is in the best interest of the Incapacitated Person. You may have been given the authority to change beneficiaries of the insurance policies in the Order and Judgment Appointing Guardian.

3. **Annuities**

   Annuities may be in pay status or consist of a lump sum accruing interest and which will make distributions in the future. The Incapacitated Person may be the owner of the annuity meaning that s/he may activate payments or designate beneficiaries, and/or the annuitant meaning that payments will be made during his/her lifetime. You may determine whether or not an annuity should be annuitized, thereby giving an income stream to the Incapacitated Person.

4. **Disability Benefits**

   If the Incapacitated Person is a disabled person s/he may have worked and be eligible for private disability insurance payments. You must investigate this benefit and also determine whether any denial of private insurance benefits should be appealed.

b. **Government Entitlements: Social Security Retirement, SSI, Social Security Disability, Disabled Adult Child Benefits, Medicare, Medicaid**

   The Social Security Act has different programs which provide cash payments to recipients and programs that provide health care coverage. The following is a brief summary of the programs for which an Incapacitated Person may be eligible:

1. **Social Security Retirement Benefits**

   For workers age 62 and older who have paid into the Social Security System and who now have retired, Social Security provides monthly payments.

2. **Social Security Disability**

   Workers who have worked and paid into the Social Security system and now are unable to engage in substantial gainful activity within the national economy because of

a total disability are eligible to receive Social Security Disability payments

3. **Disabled Adult Child Benefits**

   Children disabled prior to age 22 whose parents are retired, deceased or disabled may also receive Disabled Adult Child benefits as a dependent based upon the parent's earnings.

4. **Supplemental Security Income (SSI)**

   For the aged (over 65), blind or disabled (unable to engage in competitive employment in the national economy) who have not worked the requisite number of quarters in the past years or who have never worked and/or paid into the Social Security system, SSI will pay a maximum of $785/month in New York State in 2012 to persons residing in their own households. For those in congregate care facilities such as adult homes and community residents, SSI will pay more than $900/month. These figures change annually with a cost of living adjustment.

5. **Medicare**

   For those who have paid into the Social Security System and are 65 years of age, the Medicare program provides coverage for hospitals and for nursing home care under *Part A*. For hospital stays, the first 60 days are covered after an initial deductible, while days 60-150 have a co-insurance. For nursing home stays, the coverage is 100% for days 1-20, so long as the patient is receiving skilled care and is entering the facility within 30 days of a three-day minimum hospital stay. Thereafter if additional skilled care is required, Medicare will pay for up to an ad-

ditional 80 days, less a deductible. Under *Part B*, physicians' charges are covered, again with a co-insurance. *Medicare Supplemental Policies, A-J*, will supplement these benefits. Under *Part D*, Medicare will cover prescription drugs. Various prescription drug plans cover different medications. As Guardian, you should investigate whether the Incapacitated person is enrolled in a Prescription Drug Plan, and, if so, whether the Plan chosen by the Incapacitated Person is the best for him/her.

6. **Medicaid**

   Medicaid is a health benefits program under the Social Security Act that provides wide-ranging health care coverage, both custodial and skilled, both at home and in a nursing facility, so long as the applicant/recipient has no more than $14,250 in available resources in 2012. This figure changes annually. Some resources, such as a car, a house in which the Medicaid recipient resides depending upon its value, and a prepaid funeral are not countable resources when computing Medicaid eligibility.

c. **Supplemental Needs Trust Funds**

You may be serving both as a Guardian for Property Management and as a Trustee of a Supplemental Needs Trust for the benefit of a disabled individual under the age of 65. The trust document will detail special rules concerning disbursements from the trust. You must give advance notice to the local Department of Social Services prior to making certain disbursements from the Supplemental Needs Trust. Your attorney will explain the special rules that apply when you are the Trustee as well as the Guardian.

4. **Ensuring Receipt of Court Approval for Any Unusual Expenditures**

   In many counties, any items not approved in a budget and which are not clearly for the Incapacitated Person must have prior court approval.

5. **Entering Into Contracts**

   Contracts may be needed to provide for the needs of the Incapacitated Person. Prior to executing any contracts to buy or sell real property, however, it is necessary to consult with your attorney, as explained more fully in Number 7, below.

6. **Authorizing Access to or Release of Confidential Records**

   You determine who receives and reviews medical and other kinds of confidential records of the Incapacitated Person.

7. **Conditioning All Contracts for Sale and Purchase of Real Property Upon Court Approval**

   The procedure for selling and purchasing real property varies from county to county. Consult your attorney as to the process in the county where the Guardianship exists. For those counties following Article 17 of the Real Property Actions and Proceedings Law (RPAPL § 17), you bring a proceeding by filing a Petition stating why you believe purchasing or selling real property is in the best interest of the Incapacitated Person. Your attorney will assist you in bringing a Petition seeking the court's approval for your anticipated purchase or sale. The contract for purchase or sale must be conditioned on court approval so as not to risk the Incapacitated Person's funds. Your attorney will also advise whether or not you may utilize the Incapacitated Person's funds as a down payment prior to court approval.

8. **Exercising Rights to Elect Options and Change Beneficiaries Under Insurance and Annuity Policies and to Surrender the Policies for Their Cash Value**

   Following either the Incapacitated Person's own wishes or determining what a

reasonable person would do in comparable circumstances, you may manage the insurance assets of the Incapacitated Person, as consistent with the Order and Judgment appointing you Guardian.

9. **Requesting Court Approval for Retaining Attorneys and Accountants**

   While the Order and Judgment may authorize you to represent the Incapacitated Person's interests in any statute of the United States and New York State, and while the Order and Judgment may authorize you to retain an attorney or accountant, in downstate counties, no fees from the Incapacitated Person may be paid to the attorney or accountant without prior Order of the Court. These fees may be authorized in the annual accounting or the attorney may make an application to the Court for the approval of attorney's fees. In some counties, the Order and Judgment will have approved reasonable accountant's fees for the filing of annual tax returns and/or in preparation of your annual accounts. If so, then no additional court order may be required so long as the fees do not exceed the limit set by the Order.

C. Powers of the Guardian for Personal Needs

1. **Devising a Plan and Supervising Medical, Dental, Mental Health or Related Services for the Incapacitated Person**

   Decision making is a fundamental part of your role. The Petition for the Appointment of a Guardian may have sought the Court's approval of a plan for you to provide for the Incapacitated Person's needs. This plan must provide the least restrictive environment for the Incapacitated Person, respecting any wishes which the Incapacitated Person may communicate and leaving him / her with the greatest autonomy possible.

   When the Incapacitated Person will remain in the community, care must be given for his/her safety and the provision of his/her needs. In particular, you now have the authority and the duty to safeguard the Incapacitated Person by scheduling neces-

sary medical and dental appointments and arranging for the Incapacitated Person to attend these appointments.

2. **Applying for Government and Private Benefits**

   See duties of the Guardian for Property Management, above.

3. **Having the Authority to Make Residential Placement**

   No Guardian may consent to the voluntary formal or informal admission of the Incapacitated Person to a mental hygiene facility such as a psychiatric hospital or to an alcoholism facility. These admissions are procedurally directed in other parts of the Mental Hygiene Law.

   A Guardian may, however, seek the Court's permission to arrange for the admission of the Incapacitated Person to a skilled nursing facility or to an adult home. If such admission was contemplated at the time of the Petition to Appoint Guardian, the Court may have already consented to the plan and have authorized you to choose a more restrictive environment for the Incapacitated Person than the one in which the Incapacitated Person was residing prior to your appointment.

   In seeking the placement of an Incapacitated Person in a nursing facility, you should be guided by the existence and availability of family, friends and community services, the care, comfort and maintenance and rehabilitation of the Incapacitated Person and the needs of those with whom the Incapacitated Person resides. As long as it is reasonable under the circumstances to maintain the Incapacitated Person in the community, residential placement cannot occur without the consent of the Incapacitated Person and/or of the court.

   When assessing the placement of an Incapacitated Person in a residential facility, you must be aware of the cost and methods of payment available for these facilities. When the Incapacitated Person has unlimited resources, of course, the

payment source is not a problem. However, in an adult home, the SSI program covers the room and board at certain adult homes, so long as the Social Security payments are less than the SSI rate at a congregate care facility. The Medicaid program does not cover room and board at an adult home but may cover the care at certain other assisted living facilities, while others are paid for only privately, must be taken that there will be sufficient assets to pay for the stay at these facilities.

In a skilled nursing facility, the Medicaid program will pay for room and board and medical treatment. While the private rate may exceed approximately $10,000 per month, the Medicaid program will pay fully for the services. Medicaid will make payment only if the applicant has no more than $14,250 in available assets (in 2012) and if any waiting period caused by the transfer of assets has passed. Your attorney can assist you in determining when it is proper for you to apply for the Medicaid program on behalf of your ward.

4. Having Authority to Make Medical Decisions

Guardians are usually given the authority to consent to or refuse generally accepted routine or major medical or dental treatment. If you have this power, you must make treatment decisions in accordance with the patient's wishes, including his/her religious and moral beliefs, or, if these wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the Incapacitated Person's best interests.

The *best interests standard* would include a consideration of the dignity and uniqueness of the Incapacitated Person, the possibility and extent of preserving the Incapacitated Person's life, the preservation, improvement or restoration of the Incapacitated Person's health or functioning, the relief of the Incapacitated Person's suffering, the adverse side effects associated with the treatment, the consideration of any less intrusive alternative treatments, and

other concerns and values that a reasonable person in the Incapacitated Person's circumstances would wish to consider.

The Court may have revoked *advance directives* such as Do Not Resuscitate Orders, Health Care Proxies and Living Wills, if they conflict with the powers given to the Guardian and/or if the person who had been appointed was not fulfilling his duty to the Incapacitated Person.

Depending on how the Order and Judgment is drafted, you may have the inherent power to give consent to withhold or withdraw *life sustaining treatment*, including artificial nutrition and hydration. If this issue arises, you should consult your attorney.

V. ANNUAL REPORTS

Keeping accurate financial records that reflect all income and expenditures

Each year, in the month of May, you must account to the Court and to the Court Examiner as to the assets and income received by you on behalf of the Incapacitated Person and to the expenditures made. You must keep accurate records and have bills and receipts to back up expenditures when the nature of the expenditure may not be clear. Each account should detail the starting balance upon marshaling, the income earned from the account each month, and the annual income earned. When totaled, the income and principal recorded should balance the total receipts at the end of the year.

For disbursements, you should categorize the type of expenditures. Typical categories include, health care aides, prescriptions, room and board at a facility, physician bills, clothing, rent, Guardianship expenses, and taxes.

The beginning balance, plus the income received, less the disbursements should equal the balance retained at the end of the year.

You will send the original report to the Court. A copy of the report will be sent to the Incapacitated Person, to your surety bond company, and to the Court Examiner. Some Court Examiners will want copies of all bank statements, canceled

checks, bills to substantiate checks written, proof of income and income tax returns. Others will want this underlying documentation only upon request. If the Incapacitated Person resides in a facility, a copy of this report should be sent to the Chief Executive Officer of the facility. If this facility is a skilled nursing facility, then the Court may wish you to send a copy to the Mental Hygiene Legal Service of the judicial department in which the Incapacitated Person resides. If the Incapacitated Person is a Medicaid recipient, the Court may also request that a copy of this accounting be sent to the Commissioner of the Department of Social Services of the county in which the Incapacitated Person resides.

You may not take any compensation for your services as Guardian without prior order of the Court fixing this compensation. In some courts, your compensation will be based upon a percentage of funds received and paid out, while other courts will fix compensation based upon a percentage of the principal. In other counties, the time that you spend will be compensated. You should include form U.C.S. 875 for the recording of Court Ordered compensation.

In many counties, the Court Examiner will review the report and submit recommendations to the assigned Justice for approval. The Court Order will generally include the approval of the annual account, the fixing of compensation for the guardian and approval of compensation of the Court Examiner. Accountant fees and/or counsel fees may also be set in this Order.

VI. TERMINATION OF GUARDIANSHIP

The process to conclude the Guardianship, if the Incapacitated Person dies, requires the filing of a Statement of Death upon all interested parties by certified mail, return receipt requested, within 30 days of the Incapacitated Person's death.

Within 150 days of the Incapacitated Person's death you must make a motion to Judicially Settle the Final Accounting. The Final Accounting and Statement of Assets and Notice of Claims must be part of this motion. You are further required to deliver the remaining assets to either the Court appointed estate representative or the

public administrator. You are permitted to retain some assets for outstanding administrative costs (i.e. statutory commissions, legal fees, etc.).

The process is a little different if the Incapacitated Person's assets are depleted during their lifetime. In some counties you can make a motion to settle your final account. In other counties you must make a request for permission to file a Final Accounting. The Court will usually issue an Order for Leave to File a Final Account, and move for its settlement usually giving you 60 days to file this accounting with the County Clerk's Office and move for the account's settlement. This Order will also tell you who must receive a copy of this Final Accounting.

Once the Court has approved your Final Accounting, your attorney will submit an Order Settling the Final Account which will fix compensation due to you and to give instructions on how to disburse assets remaining in the Guardianship. Once you have complied with these directives, your attorney will submit an Order Discharging you as Guardian and also discharging the surety bond company. This last order officially terminates the Guardianship.

VII. CONCLUSION

While the opportunities for planning for an Incapacitated Person's present and future needs are great, you must be careful to adhere to the powers the Court has granted. If additional powers are needed as the Incapacitated Person's situation changes, you must seek the court's approval for expanded intervention which decreases the Incapacitated Person's own decision-making authority.

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