

NEW YORK STATE BAR ASSOCIATION

# *LEGALEase*

## Guidelines for Guardians

A Guide to Responsibilities  
and Procedures



*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 and Special Needs Section.*

# GUIDELINES FOR GUARDIANS A GUIDE TO RESPONSIBILITIES AND PROCEDURES

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## I. INTRODUCTION

You have been appointed as Guardian of an Incapacitated Person (IP), or of a Person in Need of a Guardian (PING) under the Mental Hygiene Law. This booklet is intended to familiarize you with your duties and to guide you. This booklet is not intended to answer every question that you may have concerning your duties. You are required to take a Guardianship course where your duties will be further explained. Your Attorney, the Court, and the Court Examiner can address specific questions and issues which may 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 is incapacitated, or is a person in need of a Guardian, and has designated 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 had an opportunity to be reviewed by all parties. In many counties, prior to the Judge signing the Order, the transcript of the hearing must be secured, and all parties must have at least 10 days' notice to object, comment, or voice concerns regarding the proposed Order.

Your attorney will send you a copy of the signed Order, which s/he will serve on all parties entitled to notice. This Order will set forth what powers you, as the Guardian, have, as explained more fully below.

The signed Order itself does not authorize you to act as Guardian. To act as a Guardian, you must receive a *Commission to Guardian*. To obtain your Commission, you must fill out and sign a Consent and a Designation and file these with the County Clerk. If you have been appointed as the Guardian of the Property, in most instances, you will be required to obtain and file a Bond with the County 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 probably set an amount of a *Surety Bond* to be issued, insuring the Incapacitated Person's funds from misuse. This is based upon your ward's income and assets. Prior to issuing a bond, the surety company will require that you complete an application in which you list your own assets and liabilities so that the company can assess your credibility for bonding and decide whether to issue this bond. If you are approved, the bond will be issued and you must sign the bond before a Notary Public and submit the bond for approval to the Court. If you do not qualify for a bond, the Court may devise an alternative such as appointment of an attorney as co-Guardian. The bond premium will be paid from your ward's assets.



## D. Commission

The *Commission* is issued by the County Clerk and states that you are qualified to serve as Guardian by reason of having filed your Consent, Designation and Bond. This Commission will, depending on the county, 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 the Order lists marshaling all assets as a power. 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 personal needs 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 several counties, a compliance conference is held a few months after the Guardianship hearing to ensure that the training course has been completed and the Oath, Consent and Designation, and Bond have been filed. The conference may be waived if all of this material is submitted prior to the conference date.

## **B. Marshal Assets**

### **1. Titling 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 \_\_\_\_." As you are not the owner of these accounts, the Social Security number of the Incapacitated Person will be used in establishing these accounts.

The Petition seeking the appointment of a Guardian will list the known 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 and may list additional assets if known. This is an excellent starting point for you as Guardian.

Full investigation into all of the person's assets should be made. Obtaining tax transcripts from the IRS, speaking with your ward's accountant, and gathering current and past mail may provide additional information.

**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, or place the Incapacitated Person's assets into your own accounts. The assets of your ward must remain separate from all other accounts without exception.**

## **b. Supplemental Needs Trusts**

The Order and Judgment may have authorized you, as Guardian, to establish a Special Needs or Supplemental Needs Trust for the benefit of the Incapacitated Person so that s/he may continue to receive means-tested government benefits such as Supplemental Security Income (SSI) and Medicaid, without having his/her own assets disqualify him/her from eligibility. Your attorney will help you to establish this trust, on notice to the appropriate parties and governmental agencies whose benefits you wish to preserve.

The trust assets must be titled into accounts: "YOUR NAME as Trustee of the *Supplemental Needs Trust* for \_\_\_\_." This trust will have its own *Tax Identification Number* issued by the Internal Revenue Service, upon application. 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. Either you or your attorney must present the Order authorizing the Supplemental Needs Trust and 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 \_\_\_\_\_, 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. Retaining financial records is critical because, without them, filing an annual report would be difficult, if not impossible. By paying all expenditures by check, you will have proper and accurate records for the reports described below. Keep notes and careful records of each and every transaction you make as Guardian. Have receipts, bank statements, and cancelled checks to back up all expenditures.

**b. Securities, Annuities, Insurance Policies**

Securities, likewise, will be titled in your name as Guardian of \_\_\_\_\_. 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. Verify that the account statements are correct, and retain all 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 \_\_\_\_\_. 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. Verify that there is no charge assessed by the bank. Any new accounts or Certificates of Deposit opened should be titled as Your Name as Guardian of \_\_\_\_\_.

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

When marshaling your ward's assets, 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 as Guardian may highlight unauthorized transactions and may give you a clear mandate to reclaim particular assets wrongfully transferred from the Incapacitated Person or to pursue a turnover proceeding to have them returned.

Authority to hire counsel and to pursue these claims should be sought from the Court if not contained in the Order appointing you.

#### **4. Personal Property**

Personal property must be inventoried. Valuables should be appraised, insured, and safeguarded.

#### **5. Joint Accounts**

When assets have been jointly held between the Incapacitated Person and another, the Order and Judgment most likely directed the respective percentages owned by the Incapacitated Person and the other individual(s). For example, assets may have another's name for convenience only, and they belong to your ward in full. Those assets belonging to your ward are those that you will marshal in accounts titled: Your Name as Guardian of \_\_\_\_.

If any account(s) you are marshaling has a beneficiary, carry the beneficiary designation into the guardianship account so that at death, the anticipated beneficiary will inherit. Advise the Court in your Initial Report and thereafter in your Annual Reports of the beneficiary designation pre- and post-guardianship. Do not substitute a different beneficiary designation other than the one that preceded the guardianship and do not name a beneficiary if none existed prior to the guardianship. If a named beneficiary is deceased, consider bringing an application to the Court to name an alternate beneficiary in line with your ward's known wishes.

#### **6. Last Will and Testament**

If the Incapacitated Person has executed a *Last Will and Testament*, 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, which you should retain along with your other documents.

## **C. Real Property**

### **1. Introduction**

If your ward owns real property, the property must be secured, insured, and protected whether or not it is occupied. Consider obtaining an appraisal if needed.

### **2. Lis Pendens (Notice of Pendency) Filing**

If the Incapacitated Person owns an interest in real property, you must file a form called a Lis Pendens or Notice of Pendency with the County Clerk in the county in which the property is located, stating that a person under guardianship owns an interest in this property. This protects the real property from being conveyed without the approval and protection 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. Note this in your Initial and Annual Reports.

### **3. 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 and in obtaining adequate insurance.

### **4. Insurance**

Ascertain that all property is adequately insured and that all insurance premiums are up to date. If there has been a lapse in fire, theft, or liability coverage, have the policies reinstated if possible, or purchase new insurance.

## **D. Inventory Safe Deposit Box**

If your ward has a safe deposit box, it must be opened in the presence of a bank officer and a representative of the surety unless it is waived

in writing for an inventory to be obtained. This inventory should be filed with the Court and listed in your Initial and Annual Reports. The contents of the safe deposit box and key should be secured.

#### **E. Assessing Personal Needs**

The Order and Judgment may set forth a plan that you will undertake in the best interest of your ward. If the Guardian for Personal Needs is different from the Guardian for Property Management, the two Guardians must coordinate efforts to provide for your ward's needs.

The Guardian for Personal Needs must determine if there are any unmet medical, personal care, social, therapeutic, or housing needs. If your ward has been living alone, assess whether home care services are required. Assure that sufficient care is in place to provide for the safety and needs of your ward.

You may also have the authority to choose the place of abode subject to prior Court approval if a move from the community or current living situation is anticipated. Assisted living facilities and skilled nursing facilities are alternatives to living alone in the community, and may be sought if appropriate and required. Prior Court approval is required before your ward can be placed in a long-term health care facility.

Every effort to maintain your ward at home, if this is your ward's desire, and if it can be done safely, should be made. Your convenience as the Guardian should not be a factor when considering what is best for your ward. Preserving your ward's quality of life and independence, and providing the mandated least restrictive environment, must be paramount. The greatest independence and self-determination should be provided to your ward.

#### **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 Order and Judgment appointing Guardian, Consent and Designation, Bond, and Commission and, if applicable, Supplemental Needs Trust. The Court Examiner will also be served with all future reports, motions, requests, and proceedings.

## **G. Initial Report**

An *initial report* is due 90 days after the issuance of your Commission as Guardian. File the original initial report with the Court, and send a copy to your ward and the Court Examiner. The report 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 \_\_\_\_.
3. An explanation as to why any known assets have not yet been titled in your name as Guardian.
4. A list of the Real Property owned by your ward with proof of a Lis Pendens filed with the County Clerk.
5. A medical report stating your ward's mental and physical condition, medications and treatments.
6. Disbursements/expenditures you have made on behalf of your ward.
7. If you have located a Last Will and Testament for your ward, proof of filing with the Surrogate's Court, if applicable.

## **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. The greatest independence and self-determination should be provided to your ward. Preserving your ward's quality of life and independence, and providing the mandated least restrictive environment, must be paramount.

## **B. Powers of the Guardian for Property Management**

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.

1. Marshal the Assets and Establish an Accurate Inventory
2. Develop a Budget for the Needs of Your Ward and, if applicable, for Your Ward's Dependents

The 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 of either the Court or the Court Examiner.

Courts differ on what constitutes a large expenditure for which specific Court approval must be sought. In certain counties, individual expenditures above \$5,000.00 must have Court approval if not included in a budget or in the type of expenditures for which you are given discretion to make as Guardian.

For example, in some counties, a Guardian may present a short form Order to the Court,

or to the Court Examiner assigned to the case, detailing 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 expenditure or request additional information. 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. Know the rules of your county and the assigning judge. If you were represented by an attorney in the Guardianship proceeding, your counsel can advise you as to the ongoing reporting responsibilities and need for approval for large purchases.

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 when your ward was using his/her own judgment. In preparing a budget, assess the ongoing needs of your ward, the assets available to provide for your ward's needs now and in the future, your ward's expressed desires, and the cost of maintaining your ward for the remainder of his/her life.

Any previous pattern of gifting may also be continued, subject to the Court's prior approval, and dependent on the available assets for your ward's lifetime use. In assessing whether 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. On rare occasions, with the Court's approval, the Guardian will be authorized to 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. Investing Assets**

Pursuant to the *prudent investor standard*, the Guardian should invest and reinvest the funds according to Estates Powers & Trusts Law 11-2.3. 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.

#### **4. Determining Eligibility for Government and Private Benefits**

Examine your ward's finances and entitlements to means-tested and non-means-tested public (governmental) and private benefits. 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, examine whether your ward is entitled to receive private benefits and/or governmental benefits.

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

##### **a. Private Benefits**

###### **1. Pensions**

Your ward, or his/her spouse, may have a work history which entitles him/her to a pension benefit which may be actively in place or should be applied for. Contact the plan and/or employer to ascertain whether your ward is entitled to monthly or lump sum benefits, if not already in place. In addition, if there is a death benefit and 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 may be an employment related benefit or privately obtained. Investigate if your ward has any life insurance policies and if so, evaluate the cost of retaining these policies and effect it may have on current and future means-tested benefits. Arrange to pay any required premiums if retaining the insurance is in the best

interest of the Incapacitated Person. If the designated beneficiary on the life insurance policy is deceased, you may make an application to the Court to name a beneficiary either consistent with the Incapacitated Person's current wishes or with his/her past wishes.

### **3. Annuities**

Annuities may be in payout status or may consist of a lump sum accruing interest which will make distributions in the future. Determine whether an annuity should be annuitized, thereby giving an income stream to your ward. Evaluation must be made on any payout option so as not to jeopardize your ward's current or future eligibility for means-tested benefits (i.e. SSI and/or Medicaid).

Not all annuities are equal. Non-qualified annuities outside of a qualified retirement account purchased prior to the Deficit Reduction Act require that Medicaid be made the secondary beneficiary for payback of services provided. The rules are technical and should be evaluated carefully.

### **4. Disability Benefits**

If the Incapacitated Person is a disabled person s/he may have worked and be eligible for private or public disability insurance payments. Investigate if any disability benefit is due to your ward and if so, file to obtain this benefit.

### **5. Long Term Care Insurance**

Determine if your ward has a long term care insurance policy. If so, file for the appropriate benefit when your ward meets the requirements for obtaining the coverage. Long term care insurance policies have specific requirements when benefits are sought (i.e. assistance with two or more activities of daily living). Evaluate the policy's requirements carefully and submit supporting medical and other

required documentation when filing your claim for benefits on behalf of your ward.

**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 either financial payments to recipients or health care coverage. The following is a brief overview of the programs for which your ward may be eligible:

**1. Social Security Retirement Benefits**

For workers age 62 and older who have paid into the Social Security System and are now retired, Social Security provides monthly payments based on the earnings and number of quarters worked. Benefits may also be available for the worker's spouse.

**2. Social Security Disability Benefits (SSD)**

Workers who have paid into the Social Security system and are no longer able to engage in substantial gainful employment within the national economy because of a total disability may be eligible to receive Social Security Disability payments. Depending on the worker's age, a minimum amount of quarters must have been worked to obtain this benefit.

**3. Disabled Adult Child Benefits**

Children disabled prior to age 22 whose parents are retired, deceased or disabled may receive the Disabled Adult Child benefit as a dependent based upon the parent's earnings. Proof of disability before age 22 is required.

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

This is a means-tested benefit which provides financial assistance to the aged (over 65), blind or disabled (unable to engage in gainful

employment in the national economy) who have not worked the requisite number of quarters or who have never worked and/or paid into the Social Security system. The 2017 SSI maximum federal benefit provides income up to \$735/month plus a New York State supplement of \$87 per month for persons residing in their own households.

This benefit considers all other sources of income, and will add only what is necessary to bring the aged, blind or disabled person up to these income levels. For those in congregate care facilities such as adult homes and community residences, in 2017, SSI will pay more than \$1,001.48/ month, up to \$1,429.00/month, depending on the level of services. 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 or older, the Medicare program provides limited coverage for hospitals, skilled nursing care, physicians' services, and prescription drugs.

Under *Part A*, for hospital stays, the first 60 days are covered after an initial deductible, while days 60-150 have a copay. For nursing or rehabilitative home stays, the coverage is 100% for days 1-20, providing the patient is receiving skilled care and enters the skilled care facility within 30 days of a three-day minimum hospital stay, not on observation status. After the initial 20 days, if additional skilled care is required, Medicare will pay for up to an additional 80 days, less a deductible of \$160.50 per day in 2017.

Under *Part B*, physicians' charges are covered, less a 20% copay and a deductible. The Part B premium is based in part on income.

Under *Part D*, Medicare covers a portion of prescription drug costs with co-pays and deductibles. Various prescription drug plans cover different medications. Ask your ward's pharmacist if the plan enrolled in is suitable for your ward, given his/her prescription drug needs/formulary.

*Medicare Supplemental Policies, A-J*, offer a supplement to these benefits.

Beware of the penalties assessed against your ward if, once eligible for Medicare A, B and D, your ward fails to enroll, unless creditable coverage is in place and provided, with proof provided to Medicare. The penalty is 10% per annum for each year of non-coverage.

## **6. Medicaid**

Medicaid is a means-tested health benefit program under the Social Security Act that provides wide-ranging health care coverage, skilled nursing and rehabilitative care, and custodial care, both at home and in a nursing facility. Asset and income limits apply. In 2017, the applicant/recipient may have no more than \$14,850 in available, countable resources. Exempt resources, such as a car, a house in which the Medicaid recipient resides with a 2017 home equity limit of \$840,000.00, an irrevocable prepaid funeral contract, and qualified retirement accounts in payout status are not countable resources when computing Medicaid eligibility. In 2017, the applicant/recipient may have an income of no more than \$825 per month plus a \$20 per month disregard in certain counties.

## **7. Veterans' Benefits**

Inquire with the Veterans' Administration whether your ward is eligible for Veterans' Benefits if your ward performed active military service.

Veterans of any age may be eligible for benefits and services. Veterans' dependents and survivors may also qualify. If benefits are based on disability, the Veterans' Administration must make the disability determination. Available benefits vary based on income, resources, number of dependents, and disability.

Disability compensation is provided to veterans with service-related disabilities or conditions.

Pension benefits are available to veterans and surviving relatives depending on income and resources.

Medical benefits may include care at VA hospitals, outpatient services, skilled nursing facilities, and at-home care.

#### **c. Supplemental Needs Trusts**

You may be serving both as a Guardian for Property Management and as Trustee of your ward's Supplemental Needs Trust. Supplemental Needs Trusts have strict requirements which must be followed carefully to avoid disqualifying your ward from governmental means-tested benefits.

The trust document will detail the rules concerning disbursements from the trust. All trust funds must be expended solely on your ward. Cash and gifts of any type are not allowed. 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.

#### **5. 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.



## **6. Contracts to Sell Real Property**

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.

Prior Court approval is required before entering into any contract to buy or sell real property. The Court will generally require an appraisal and may appoint its own Part 36 appraiser. Any contract to sell must be conditioned upon the Court approving the sale.

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. Your attorney will also advise whether or not you may utilize the Incapacitated Person's funds as a down payment prior to Court approval.

## **7. Authorizing Access to or Release of Confidential Records**

Determine who should receive and review medical and other confidential records of your ward. You may execute authorizations for the release of records as necessary.

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

The Order and Judgment appointing you the Guardian may direct you to manage the insurance assets and annuity policies of your ward. Options may need to be elected for payout. Surrendering a policy with a cash surrender value which would otherwise render your ward ineligible for means-tested benefits may be required. Beneficiaries may need to be changed if a stated beneficiary is deceased or is him/herself a recipient of means-tested public benefits. Seek Court approval before changing any beneficiary designation or taking other action which might need specific authorization.

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

While the Order and Judgment may authorize you to represent your ward's interests in any state of the United States and New York State, and while the Order and Judgment may authorize you to retain an attorney or accountant, in down- state 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 provide for reasonable accountant's or attorney's fees for the filing of annual tax returns and/or preparation of the annual accounts, requiring no additional Court order provided the fees do not exceed the limit set by the Order. If a provision for attorney's or accountant's fees is not stated in the Order appointing Guardian, separate Court approval must be sought.

### **C. Powers of the Guardian for Personal Needs**

The Petition for the Appointment of a Guardian may have sought the Court's approval of a plan for you to provide for your ward's needs. Any plan must provide the least restrictive environment for your ward, respecting any wishes which your ward may communicate or are known, and which leave him/her with the greatest autonomy and independence possible.

Keeping your ward safely in the community should be given the greatest preference when considering placement options. You have the authority and the duty to provide for your ward's needs, including his/her safety, health, social, environmental, and living conditions.

#### **1. Medical, Dental, and Mental Health Services for Your Ward**

Schedule necessary medical, dental, and mental health appointments for your ward as is prudent, necessary and required. Familiarize yourself with your ward's health care providers and continue using these providers unless a change is warranted. Make sure your ward's medications are properly managed and that you are aware

of all of his/her diagnoses and treatment plans and preferences. Arrange for your ward to have an annual physical, as well as to be followed as required by all specialists. If practical, attend appointments with your ward to familiarize yourself with his/her medical providers.

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

Work together with the Property Guardian to evaluate and obtain government and private medical benefits. See duties of the Guardian for Property Management, above.

## **3. Authority to Make Residential Placement**

As Guardian, you will need Court approval before placing your ward in a skilled nursing facility or an adult home. If such admission was contemplated at the time of the Petition to Appoint a Guardian, the Court may have already consented to the plan and have authorized you to choose a more restrictive environment for your ward than the one in which your ward was residing prior to your appointment.

Before seeking to place your ward in a long term care facility, consider 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 anyone your ward resides with. 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 placement in a residential facility, analyze the cost, resources, and benefits available to pay for this placement. If your ward has unlimited resources, the payment source is not a problem. However, this is generally not the case, and careful evaluation as to ongoing payment source or available benefit must be made. In certain adult home and congregate care living arrangements, the SSI program covers room and board provided the resident's income is less than the applicable SSI rate for that type

of home. The Medicaid program may not cover room and board at an adult home, for example, but it may cover the care at certain other assisted living facilities, while others are paid for only privately. Analysis as to the ongoing ability to pay or have coverage for the stay at these facilities must be made.

In a skilled nursing facility, the Medicaid program will pay for room, board, therapeutic, skilled care and medical treatment for eligible applicants. For private pay residents, costs vary depending on the county and the facility, from \$6,000.00 to \$20,000.00 per month. The Medicaid program will pay fully for the services if a resident is eligible at the Medicaid rate.

Medicaid will make payment in a nursing home only if the applicant has no more than \$14,850 in available assets (in 2017), and if any waiting period caused by any transfer of assets for less than fair market value has passed. Your attorney can assist you in determining when and if it is proper for you to apply for Medicaid on behalf of your ward. You should not submit a Medicaid application for long term care in a nursing facility if any transfers were made for less than fair market value within the prior five-year lookback period. Seek legal counsel if questions arise.

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.

#### **4. Authority to Make Medical Decisions**

Guardians are generally 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 your ward'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 been granted the specific power to consent to withhold or withdraw *life-sustaining treatment*, including artificial nutrition and hydration. If the issue arises, and the power is not specifically granted in the Order appointing you, you should consult your attorney.

## **V. ANNUAL ACCOUNTS AND REPORTS (ACCOUNT)**

Keeping accurate financial records that reflect all income and expenditures is essential and required.

Each year, on or before May 31, you must file your prior calendar year's Annual Account and Report with the Court. Details as to what is required in the Annual Account and Report are provided in the Guardianship training course, and sample forms may be obtained from the County Clerk, depending on the county.

The Annual Account should detail the assets marshaled, income received and all expenditures by category made by you on behalf of your ward during the prior calendar year.

You must keep detailed and accurate records and have bills, receipts, statements and cancelled checks to back up expenditures. Your account should detail

the starting balance, the income earned from each account, income from all other sources (pension, SSI, SSD, retirement benefits, annuities, etc.).

Your disbursements should be categorized by the type of expenditure. Typical categories include health care aides, prescriptions, room and board at a facility, physicians' bills, clothing, rent, utilities, food, insurance, maintenance and repairs, guardianship expenses, prepaid funeral and burial, taxes, etc., with a line total for each category. Backup documentation should be available and complete. 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. You may be asked for this documentation years after filing your account. Some counties require you to keep all documentation, even for approved accountings, through the time of the approval of the Final Account at the termination of the guardianship, which may be years or even decades after the Annual Account was filed.

The beginning balance, plus the income received, less the disbursements, should equal the balance on hand retained at the end of the year (12/31/20\_\_).

File the original account with the Court.

A copy should be sent to the Incapacitated Person, the surety bond company, and the Court Examiner. If the Incapacitated Person resides in a facility, a copy of the report should be sent to the Chief Executive Officer of the facility. If the facility is a skilled nursing facility, the Court may require you to send a copy to the Mental Hygiene Legal Service of the judicial department where your ward resides or where the guardianship is established. If your ward is on Medicaid, you should also send a copy of the accounting to the Commissioner of the Department of Social Services where your ward resides and receives benefits.

You may not take any commissions for your services as Guardian without the Court setting your compensation in the Order approving your Annual Account. 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 on an hourly basis. 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 resulting 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. UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT**

New York State has formally adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), which acknowledges the mobile nature of society and of legal problems that can arise when incapacitated adults move from one state to another.

On April 21, 2014, the UAGPPJA went into effect as Article 83 of the Mental Hygiene Law of the State of New York.

The UAGPPJA essentially creates a mechanism for resolving multi-jurisdictional disputes by helping accomplish the following three goals:

- Identifying one singular state court to adjudicate first-time guardianship petitions;
- Establishing a system of transferring existing guardianship appointments from one state to the other; and
- Establishing a system for recognizing and enforcing guardianship orders of one state in another.

If multistate guardianship issues arise you may need the assistance of counsel to navigate these issues.

## **VII. TERMINATION OF GUARDIANSHIP**

The process to conclude the Guardianship, if your ward dies or termination is otherwise required, requires the filing of a Statement of Death upon all interested parties by certified mail, return receipt requested, within 20 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 required to deliver the remaining assets to the Court-appointed estate representative or public administrator if no representative was

appointed. You may retain assets for outstanding administrative costs as permitted by the Court.

The process is a little different if the Incapacitated Person's assets are depleted during his/her 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 60 days to file this accounting with the County Clerk's Office and to move for the account's settlement. This Order will also direct service.

Once the Court has approved your Final Accounting, your attorney will submit an Order Settling the Final Account, which will fix commissions and 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.

## VIII. CONCLUSION

While the opportunities for caring for your ward's present and future needs are great, be careful to adhere to the powers the Court has granted. If additional powers are needed as your ward's situation changes, you must seek the Court's approval for expanded intervention, which often decreases your ward's own decision-making authority. Seek legal counsel and Court approval as needed. Keep careful records. Be transparent in your actions and always keep your ward's best interests at the forefront.

**Every effort to maintain your ward at home, if this is your ward's desire, and if it can be done safely, should be made.** Your convenience as the Guardian should not be a factor when considering what is best for your ward. Preserving your ward's quality of life and independence, and providing the mandated least restrictive environment, must be paramount. **The greatest independence and self-determination should be provided to your ward.**



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