

Guidelines for Guardians

A Guide to Responsibilities and Procedures

Prepared as a Public Service by the
NYSBA Elder Law Section

(Edited to conform to the procedures of this Part)

**Westchester County Guardianship Part
9th Judicial District Guardianship Accounting Part
111 Dr. Martin Luther King Jr. Blvd, 14th Floor
White Plains, New York 10601
(914) 824-5372/ 5377
fax: (914) 995-4396**

**Hon. J. Emmett Murphy, J.S.C.
Law Secretary: Anne Minihan, Esquire
Court Attorney Referee: Lisa Citarella, Esquire
Court Attorney Referee: Edward Borrelli, Esquire
Associate Court Clerk: Mary Haran**

TABLE OF CONTENTS

- I. INTRODUCTION**
- II. QUALIFYING AS A GUARDIAN**
 - A. After the Hearing
 - B. Consent and Designation
 - C. Bond
 - D. Commission
- III. THE FIRST NINETY DAYS**
 - A. Training Course
 - B. Marshal Assets
 - 1. Title of Accounts
 - a. Guardianship Assets
 - b. Supplemental Needs Trust Assets
 - 2. Types of Accounts
 - a. Checking Account
 - b. Securities, Annuities, Insurance Policies
 - c. Certificates of Deposit / Savings Accounts
 - 3. Examining Transactions Occurring Prior to Your Appointment
 - 4. Personal Property
 - 5. Joint Accounts
 - 6. Last Will and Testament
 - C. Real Property
 - 1. Real Property Filing
 - 2. Appraisal
 - 3. Insurance
 - D. Inventory Safe Deposit Box
 - E. Assess Needs
 - F. Court Examiner
 - G. Initial Report
 - H. Investment of Assets
- IV. POWERS OF THE GUARDIAN FOR PROPERTY MANAGEMENT AND PERSONAL NEEDS**
 - A. Introduction
 - B. Powers of the Guardian for Property Management
 - 1. Marshaling Assets and Establishing an Accurate Inventory
 - 2. Developing and Submitting a Budget for the Needs of the Incapacitated Person and, when applicable, for Dependents of Incapacitated Persons
 - 3. Determining Eligibility for Government and Private Benefits

- a. Private Benefits
 - 1. Pensions
 - 2. Insurance
 - 3. Annuities
 - 4. Disability Benefits
- b. Government Entitlements
 - 1. Social Security Retirement Benefits
 - 2. Social Security Disability
 - 3. Supplemental Security Income (SSI)
 - 4. Medicare
 - 5. Medicaid
- c. Supplemental Needs Trust Funds
- 4. Ensuring Receipt Court Approval for Any Unusual Expenditures
- 5. Entering Into Contracts
- 6. Authorizing Access to, or Release of, Confidential Records
- 7. Conditioning All Contracts for Sale and Purchase of Property upon 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.
- 9. Requesting Court Approval for Retaining Attorneys and Accountants
- 10. Upon the Death of the incapacitated person
- 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
 - 2. Apply for Government and Private Benefits
 - 3. Having the Authority to Make Residential Placement
 - 4. Having Authority to Make Medical Decisions

V. ANNUAL REPORTS

VI. FINAL REPORT - TERMINATION OF GUARDIANSHIP

VII. CONCLUSION

VIII. SAMPLE ACCOUNTING FORMS

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 if ordered. 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.

THE JUDGMENT IN THE CASE IS VERY USEFUL AND HELPFUL TO THE GUARDIAN BECAUSE IT STATES THE OFFICIAL DUTIES AND RESPONSIBILITIES OF THE GUARDIAN. READ AND REFER TO THE JUDGMENT AND KEEP IT IN A SAFE PLACE.

II. QUALIFYING AS A GUARDIAN (Guardian must obtain the official Guardian's commission from the County Clerk within 30 days of the signing of the Judgment)

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 Guardian.

After the hearing, your attorney will order from the Court Reporter a copy of the Findings the Judge made in court and prepare an *Order and Judgment* appointing you as Guardian. Your attorney will submit this Judgment to the Court and will also send a copy to all persons who appeared at the hearing. The Judge then will sign the Judgment after all parties have had a chance to review the Judgment.

Your attorney will send to you a copy of this Judgment. This Judgment 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 County Clerk as well. Your attorney or the attorney for the Petitioner if you do not have an attorney, should help you with all of the necessary papers and the filings with the County Clerk.

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 the estate's 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 the original bond to the Guardianship Accounting Part, submit a copy to the Court Examiner and maintain a copy for your own records.

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.

However, you must obtain your commission from the County Clerk within 30 days of the date of the Judgment.(If a guardian is required to attend the training course, you may receive your commission before you attend the course.) A guardian is not authorized to act, including marshaling of assets and collecting income, until the guardian receives the official commission signed by the County Clerk. **Upon receipt of the commission, the Guardian must file a copy of the commission with the Court Examiner and with the Guardianship court..**

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. Information about the Guardianship Educational Training Course may be found on line at “www.nycourts.gov/ip/gfs”. Also, you may be able to obtain audio or video tapes of the training course from the New York State Bar Association . Please call telephone number 1-800-582-2452—ask for CLE and tell the person that you are interested in the training materials for the Article 81 Guardianship Course.

B. Marshal Assets

1. Title of Accounts

a. Guardianship Assets

If you are the Guardian of the Property, you must gather all of the assets of the Incapacitated Person and establish accounts titled: “*Guardianship Account for [name of incapacitated person] by Guardian of the Property, [Guardian’s name]*”. As you are not the owner of the 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. If a Court Evaluator is appointed, he / she 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. All guardianship accounts shall be solely for the benefit of the incapacitated person and no ‘joint’ accounts shall be allowed.

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 he / she may continue to receive government benefits such as 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 the accounts titled: (Your Name) *as Trustee of the Supplemental Needs Trust for _____, an Incapacitated Person*”. This trust will have its own *Employer 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 Trustee of the Supplemental Needs Trust Fund. The Trustee(s) shall account to the Court regarding all trust activity in the same manner as a Guardianship of the Property - i.e. Initial Report within 90 days; and an Annual Accounting (for the previous calendar year) on or before May 15th of every year. The Court Examiner must be served with all accountings. Additionally, the Trustee(s) must serve all interested parties as listed near the end of the Judgment. Any objections to the accountings shall be served on the Court Examiner within 45 days of service, or such objection are considered waived. No professional fees or commissions shall be paid without prior Court approval.

2. Types of Accounts

a. Checking Account

It is important for you to open a checking account in your name, titled: “*Guardianship Account of [name of incapacitated person] by Guardian of the Property, [Guardian’s name]*”, 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. DO NOT pay anyone in cash.

b. Securities, Annuities, Insurance Policies

Securities, likewise will be in your name as “*Guardianship Account of [name of incapacitated person] by Guardian of the Property,[Guardian’s name]*.”. 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 “*Guardianship of [name of incapacitated person] by Guardian of the Property,[Guardian’s name]*”. 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 precludes a bank from charging a penalty to this transaction so long as the term of a Certificate of Deposit will remain the same.

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. Assets may have another's name for convenience only, for example, and they really belong to the Incapacitated Person. Those assets belonging to the Incapacitated Person are those that you will marshal in accounts titled:

“Guardianship of [incapacitated person’s name] by Guardian of the Property, [Guardian’s name].”

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. **The Guardian must file a copy of the will with the Court Examiner assigned to the matter.**

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 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

An existing safe deposit box must be opened in the presence of a bank officer and the contents written down and secured.

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 as alternatives to living alone may be sought if appropriate and if authorized in the Order and Judgment.

F. Court Examiner (The name and address of the Court Examiner assigned to the case is found in the Judgment)

The court will appoint a *Court Examiner* who will examine your initial report and annual and final accountings. The Court Examiner can be of much assistance to the Guardian regarding the accountings. This person is different from the *Court Evaluator* who may have been present at the hearing that determined that the Incapacitated Person was in need of a Guardian and that you would be suitable to serve.

G. Initial Report

An Initial Report is due within 90 days after the issuance to you of your commission as Guardian. You should file the original Initial Report in the County Clerk's Office in the county in which the Guardianship was filed, and a copy is sent to the assigned *Court Examiner*. You must include the following:

1. A copy of the Certificate of Attendance stating that you have attended a Guardianship class. If you have not been able to attend such a class, you must explain why and what plans you have made to enroll in a class.

2. A list of all the assets of the Incapacitated Person and proof that they are now titled: “*Guardianship of [incapacitated person ‘s name] by Guardian of the Property [Guardian’s name]*”.
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.

H. Investment of Assets

Pursuant to the *prudent investment standard*, the Guardian should invest and reinvest the funds according to Estate 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 will not 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

(See Section III)

2. Developing and Submitting a Budget for the Needs of the Incapacitated Person and, when applicable, for Dependents of the Incapacitated Person

The Petition to Appoint a 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. Any large expenditures not previously authorized must receive prior approval of the court.

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 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*. A fiduciary has 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 he / she is entitled to receive either private or government benefits.

a. Private Benefits

1. Pensions

An Incapacitated Person may have a work history which entitles him / her to pension benefits for which she 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 not change beneficiaries of any insurance policies without prior court approval.

3. Annuities

Annuities may be in pay or lump sum status. You may determine whether or not an annuity should be annuitized, thereby giving an income stream to the Incapacitated Person. If the Incapacitated Person is the beneficiary of an annuity, and if a showing is made that the Incapacitated Person cannot reasonably be expected to need the annuity benefit, you may seek, or may have sought in the Petition Appointing Guardian, the authority to remove the Incapacitated Person as the beneficiary.

4. Disability Benefits

If the Incapacitated Person is a disabled person he / she 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:

The Social Security Act has different programs which provide cash payments to recipients as well as two 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. Children disabled prior to age 22 whose parents are retired, deceased or disabled may also receive Social Security Disability.

3. 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 \$599 per month in New York State in 2000 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 per month. These figures change annually with a cost of living adjustment.

4. 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 stay. Under *Part B*, physicians' charges are covered, again with a co-insurance. *Medicare Supplemental Policies, A-J*, will supplement these benefits.

5. 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 \$13,800 (as of 2009) in available resources. This figure changes annually. Some resources, such as a car worth \$4,500, a house in which the Medicaid recipient resides, 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

Any items not approved in a budget and which are not clearly for the Incapacitated Person must have prior court approval.

5. Entering Into Contract

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 the court must approve any contracts prior to sale.

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 Property Upon Court Approval

You must comply with Article 17 of the Real Property Actions and Proceedings Law (RPAPL 17) to sell real property owned by the Incapacitated Person or to purchase real property. You bring such a proceeding by filing a *Petition*, by way of an Order To Show Cause, 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 the 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. You will receive an order from the court permitting the sale or purchase of real property—always bring a copy of this order to the closing.

8. Exercising rights to Elect Options and Change Beneficiaries Under Insurance and Annuity Policies and to Surrender 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. *However, you must obtain a court order approving any specific changes of beneficiaries or surrender.*

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 lawsuit or civil proceeding and to settle and/or compromise all matters related to such proceedings, all such legal actions are subject to the approval of the court. While the Order and Judgment may authorize you to retain an attorney or accountant, **no fees from the assets of the Incapacitated Person may be paid to the attorney or accountant without a prior Order of the Court.** The attorney must make a detailed application to the Court for the approval of attorney's fees. *After* the Guardian receives the order from the court approving the legal fee, the Guardian may then pay the approved amount to the attorney.

Guardians are NOT required to be personally responsible for legal fees for the benefit of the incapacitated person, nor is the Guardian required to sign any retainer agreements that would require them to be personally responsible for legal fees for services to the Guardianship.

10. Upon the Death of the Incapacitated Person

Upon the death of the incapacitated person, the Guardian is authorized to pay the funeral expenses of the incapacitated person and, in the absence of a duly appointed personal representative of the estate, pay estimated estate and income tax charges, as well as other charges of an emergent nature.

Within 20 days of the death of the incapacitated person, the guardian shall:

1. Serve a *Statement of Death*¹ [the Court recommends also attaching a copy of the *Death Certificate* to the Statement of Death]

¹ A *Statement of Death* is a written notarized statement containing the caption and index number of the Guardianship; name and last address of the incapacitated person; date and place of death; names and last known addresses of all persons entitled to notice of further Guardianship proceedings (Mental Hygiene Law §81.16(c)), including the nominated and/or appointed personal representative, if any, of the deceased incapacitated person's estate.

a. Serve the original *Statement of Death* upon the Guardianship Court, and a copy of the *Statement of Death* upon the Court Examiner, the duly appointed representative of the decedent's estate, or, if no personal representative has been appointed, then upon the personal representative named in the decedent's will or any trust instrument, if known, and upon the Public Administrator; and file proof of service of the *Statement of Death* with the Court.

Within 150 days of the death of the incapacitated person , the guardian shall:

1. Serve upon the personal representative of the decedent's estate, or where there is no personal representative of the decedent's estate, upon the Public Administrator, a ***Statement of Assets and Notice of Claim***² , and except for property retained to secure any known claim, lien or administrative costs of the guardianship(attorney's fees, commissions, Court Examiner fees)³, deliver all guardianship property to:

1. The duly appointed personal representative of the deceased incapacitated person's estate, or

2. The Public Administrator given a copy of the *Statement of Death* , where there is no personal representative;

3. Any dispute as to the size of the property retained shall be determined by the Surrogate's Court having jurisdiction of the estate.

Within 150 days of the death of the incapacitated person , the Guardian shall:

1. Serve a copy of the ***Notice of Final Accounting*** along with the ***Final Accounting*** on all interested persons; and file the original ***Notice*** and ***Final Accounting*** with the County Clerk and file a copy of the ***Notice*** and ***Final Accounting*** with the Court Examiner.

2. There shall be no extensions of the time to file a Final Accounting, except by Court order.

Upon the failure of the Guardian to comply with the above, any person entitled to notice of this proceeding may file a petition to compel the Guardian to account, to suspend and/or remove the Guardian, and to take and state the Guardian's account.

²A Statement of Assets and Notice of Claim is a written statement under oath containing the caption and index number of the guardianship proceeding; the name and address of the incapacitated person at the time of death; a description of the nature and approximate value of the guardianship property at the time of the incapacitated person's death, with the approximate amount of any claims, debts or liens against the guardianship property including , but not limited to medicaid liens, tax liens and administrative costs, with an itemization and approximate amount of such costs, claims or liens.

³The Guardian shall retain assets necessary to cover the costs of the guardianship, known claims or liens.

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 duty to safeguard the Incapacitated Person by scheduling necessary medical and dental appointments and arranging for the Incapacitated Person to attend these appointments.

2. Applying for Government and Private Benefits

(See Section IV,B,3,b above.)

3. Having the Authority to Make Residential Placement

A Guardian may have received the authority from the Court to place the Incapacitated Person in a skilled nursing facility, assisted living facility, or an adult home. If such admission was contemplated at the time of the 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.

However, if an incapacitated person is living in their home, oftentimes having an aide assisting the person in their home will alleviate the need for outside placement.

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. Nursing homes do vary in quality and the better nursing homes are not necessarily more expensive. Please note, as long as it is reasonable and safe under the circumstances to maintain the Incapacitated Person in the community, residential placement cannot occur without the consent of the Incapacitated Person.

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 or other assisted living facilities, and

care 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 \$9,000 per month, the Medicaid program will pay fully for the services. Medicaid will make payment only if the applicant has been approved to receive Medicaid and if any waiting penalty 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. Assisted living facilities, if appropriate for the incapacitated person, are usually preferable to a nursing home as it allows for more independence for the person and are markedly cheaper than the cost of a nursing home. Almost all assisted living facilities require private payment. No Guardian may consent to the voluntary admission of the incapacitated person to a mental hygiene facility or psychiatric hospital or to an alcoholism facility.

4. Having Authority to Make Medical Decisions

You are usually given the authority to consent to or refuse generally accepted routine or major medical or dental treatment. 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.

You may not revoke *advance directives* such as Do Not Resuscitate Orders, Health Care Proxies and Living Wills. If the provisions of these documents conflict, a court may remove the agent on the Health Care Proxy in a special proceeding which you have brought.

You do not have the inherent power to give consent to withhold or withdraw *life sustaining treatment*, including artificial nutrition and hydration. Life sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, the Incapacitated Person will die within a relatively short time period. You may bring a special court proceeding for that purpose if the situation dictates it.

V. ANNUAL ACCOUNTINGS/ REPORTS

Every year on or before May 15th the both the Guardian of the Person and the Guardian of the Property must file an Annual Accounting. The original Annual Accounting is filed with the County Clerk and a copy must be filed with the Court Examiner. All questions as to the accountings should be directed to the Court Examiner.

In the *Guardian of the Property's* accounting, such Guardian must account 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. Each account should detail the starting balance of estate assets, the income earned 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. For example, health care may subcategorize aides, prescriptions, room and board at a facility, and physician bills. Clothing, rent, Guardianship expenses, taxes are all possible categories that may have subcategories and which shall be itemized per month and then annually per year.

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

The *Guardian of the Person* must also submit a report as to the condition of the incapacitated person, where the person is living and with whom, list doctors and dentists visits during the year, medications, health insurance, government benefits, if any, if the person's needs are being met, and how often the Guardian has visited the incapacitated person.

You will file the original report with the County Clerk's Office and a copy with the assigned Court Examiner. If the incapacitated person is receiving benefits from the Veterans Administration, you must file a copy of all reports and accountings with the Veterans Administration.⁴ 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 not take any compensation (*commission*) for your services as Guardian without prior Order of the Court fixing this compensation (*commission*). The method of compensation will be fixed in the Order and Judgment Appointing Guardian.

The Court Examiner will review the report and submit recommendations to the Court for approval. The Court Order will generally include the approval of the annual account, the fixing

⁴The address for filing of reports and accountings with the VA is : New York Veterans Administration Regional Office, Attn.: Field and Fiduciary Service Unit, 245 West Houston Street, New York, New York 10014. The VA requires that all accountings be court certified by the County Clerk. Also, the VA requires the Guardian obtain an official **certification** from the bank or other entity which holds the veteran's funds as to the exact amount of funds held at the end of the accounting period.

of compensation (*commission*) for the guardian and approval of compensation of the Court Examiner. Professional fees may also be set in this Order. **Note: No commissions or fees for professionals, such as attorneys or accountants, may be paid from estate assets before the Court issues a written order approving such fees.**

VI. FINAL ACCOUNTING - TERMINATION OF GUARDIANSHIP

Upon the death of the incapacitated person, the Guardian of the Person and the Guardian of the Property must submit an original Death Certificate to the Court and a copy of the Death Certificate to the Court Examiner, and file a Final Accounting and Notice of Final Accounting (form attached). The Guardian files the original accounting with the County Clerk and sends a copy to the Court Examiner with a copy of the Death Certificate. Also, the Guardian must send a copy of the Final Accounting to all persons listed in the Judgment entitled to notice of any further proceedings and to all interested persons (close relatives, distributees, etc.). Interested persons have 45 days to file any formal objection(s) to the Final Accounting. For further instructions, see pages 16 and 17, subdivision 10.

The Court Examiner shall review the Final Accounting following the 45 day period for objections and submit a report to the Court. Upon review the Court shall issue a Decision and Order approving the Final Accounting, fixing any compensation due the Guardian, Counsel and the Court Examiner, and give the Guardians directions on how to disburse any remaining assets. Once the Guardian has complied with these directives, the Guardian shall submit an Ex Parte Order of Discharge of Guardian and Surety (if any), which shall also discharge the bonding 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.

By following the Order and Judgment which appointed you as Guardian and by consulting with both your own attorney and the Court Examiner who will be overseeing your case, you should meet with success in assisting an Incapacitated Person.

**ATTACHED TO THESE GUIDELINES ARE COPIES OF ACCOUNTING FORMS
ALWAYS CONTACT YOUR COURT EXAMINER WITH ANY ACCOUNTING QUESTIONS**

