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***UNDERSTANDING YOUR  
DUTIES AND  
RESPONSIBILITIES AS A  
GUARDIAN***

***By Ethan J. Ordog, Esquire***

As the probate judge renders his or her decision regarding a finding of incapacity and the appointment of an appropriate guardian, many individuals, specifically those who have been entrusted with such an appointment, begin to contemplate the responsibility which is being conferred upon them. Typically, a determination to pursue guardianship is prompted by a realization, usually by one's spouse, children or next of kin, that a protective arrangement is necessary as an individual has lost the capacity and no one can lawfully act for him or her duty absence of a living will and power of attorney. Most frequently, guardianships are established on behalf of older adults who have lost mental capacity due to senile dementia, major stroke, severe mental illness, among other conditions which render them unable to manage their affairs.

In order to become a guardian of the person and/or estate of an alleged incapacitated individual, a petition must be filed with the Superior Court, which is located in the county where the mentally incapacitated person is domiciled. The pleadings do so if a guardianship were filed with the Surrogate's office and thereafter heard before the Judge who presides over the probate part. Specifically, the petitioner must file an Order for hearing, verified complaint and affidavit as to the alleged incapacitated person's estate. The complaint itself must contain a variety of information including the health and limitations of the alleged incapacitated individual, as well as an overview of the circumstances which require the establishment of a guardianship.

Additionally, such a filing requires the inclusion of two certifications from physicians have examined the alleged incapacitated individual, no longer than 30 days prior to the filing of a complaint. Moreover, the petitioner is also required to submit an affidavit as to the estate of the alleged incapacitated individual, thereby detailing the income, assets and liabilities.

Upon receipt of such documentation, the judge responsible for hearing such matters shall establish a hearing date and appoint an independent attorney to represent the interests of the alleged incapacitated individual. The Court-appointed attorney visits with the legitimate individual to determine whether or not he or she is indeed incapacitated and to determine any reasonable wishes that his or her client would like to be articulated with respect to the guardianship. Typically, prior to the filing of a report by the court-appointed attorney, he or she shall meet with other family members and interested parties. Furthermore, ultimately a hearing, which may or may not require the appearances of counsel and/or the proposed guardian(s), is held with a corresponding judgment executed by the local probate judge. After a Guardianship has been granted, the proposed guardian is required to execute qualification documentation with the surrogates office, with letters of guardianship then issued to the guardian. In most cases the guardian will need to acquire a surety bond which insures against potential mismanagement or abuse of the incapacitated person's assets.

In fulfilling the duties of a guardian, it must be

recognized that the guardian function is in the best interests of the ward. Following such appointment, a guardian is typically required to file an inventory of the incapacitated person's assets, as well as an annual report, submitted yearly on the anniversary of the establishment of such guardianship, with the Surrogate's office. As guardian of the person, the essential responsibilities include determining where the incapacitated individual shall reside and how personal and medical care, meals, transportation, socialization and recreation shall be provided. As guardian of the property, which shall typically entail both real and personal property, it is the responsibility of the guardian to determine the extent of such assets and take control. Fundamentally, consistent with those assets attributable to the incapacitated person, as well as monthly income, by way of social security, pension and/or other monthly distributions, it is necessary to establish a budget and ensure that bills and other related expenses are paid.

While it is often the intention for an incapacitated individual to remain in their residence as long as they are physically able, a guardian must consider and determine the feasibility of the living arrangement, based upon physical, mental or financial considerations. In determining an appropriate alternative, it is essential for the guardian to determine what benefits or possible assistance is available to help cover the costs of such placement, if necessary. Moreover, especially following the placement of an incapacitated person in a long-term-care facility, it remains the guardian's

responsibility to insure that the incapacitated person's needs are met in that he or she is receiving the appropriate care. Systemically, as guardian, authority has been conferred to make decisions concerning the incapacitated person's medical treatment, although some simple decisions may be made by the incapacitated person. It is important to make decisions upon consideration of medical device as well as previously stated wishes of the incapacitated person, specifically pertaining to end of life decision-making. Additionally, it is important to ensure the health care providers are provided with health insurance information including but not limited to Medicare, Medicaid, long-term care insurance and other private policy coverage.

In serving as guardian of the incapacitated person's property, both real and personal, the guardian must identify such assets which may include bank accounts, stocks, bonds, life insurance policies, real estate, business interests, vehicles, as well as monthly income and/or payments from the government, pension plans, insurance companies and other sources. Typically, it is necessary to open a guardianship account for the deposit of such funds, as well as take control and be added to existing accounts. Additionally, it is imperative to maintain records of expenditures, with a corresponding description, so that you will have such information to prepare any accountings which might be required. Further, the law requires that those assets attributable to the incapacitated person remain separate from those of the guardian. If the incapacitated person

still owns the vehicle the guardian should obtain the certificate of ownership to ensure that no unauthorized person attempts to use the vehicle. Regardless, while remains an asset, it is important to ensure that the registration, inspection and auto insurance are current. If the vehicle is no longer necessary, the guardian may consider selling it, rather than continuing to expend those funds necessary for maintaining such possession. A guardian should be aware that if the incapacitated person becomes eligible for such programs as Medicaid, SSI or municipal welfare, a review we may determine that all assets were expended for the benefit of the incapacitated person. Therefore it is important to maintain accurate and up-to-date records, including receipts, on the expenditure of such funds and/or the disposition of any assets.

As a guardian of an incapacitated person's property, such individual is entitled to commissions on income, pursuant to N.J.S.A. 3B: 18-24, and on corpus, pursuant to N.J.S.A. 3B: 18-25. Such compensation is taxable income to you as received. Additionally, a guardian may be reimbursed for any other reasonable expenditure made on behalf of the incapacitated person, assuming assets are available. You should always use reasonable judgment as a guardian and seek to ensure the ongoing financial and physical threat well-being of the incapacitated person.

Should you or a family member require assistance with respect to obtaining guardianship of an individual, please contact Begley, Begley & Bookbinder at 800-533-7227.

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