

# DUTIES OF THE GUARDIAN OF AN INCAPACITATED PERSON

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## Introduction

Thank you for becoming the Guardian of a friend, family member, neighbor or other resident of Montgomery County who now needs your help. The goal of this Guardian's Manual is to assist the Court-appointed Guardian of the Person, Guardian of the Estate or Guardian of both the Person and Estate of an Incapacitated Person to exercise these Guardian's responsibilities appropriately.

A Final Court Decree may appoint one person as Guardian of both the Person and the Estate of the Incapacitated Person, or may appoint one person as Guardian of the Person and a different person as Guardian of the Estate. The Court may also appoint co-Guardians of the Person or Estate. The powers and duties of the two different types of Guardianship differ and are therefore discussed separately in this manual. If you have been appointed both Guardian of the Estate and the Person you must comply with both sections and file all documents mentioned for both.

The manual describes, in general terms, the duties of each type of Guardian and the forms a Guardian must file with the Clerk of the Orphans' Court. This outline is not intended to give you specific legal advice regarding any particular situation, but we do hope that it will help answer general questions you may have. Please do not ask Court personnel to give legal advice on specific issues as they are not allowed to do so. This manual can also be found on the County website at <http://www.montcopa.org/2465/Orphans-Court---Guardianship-Information>.

One guiding principle which you should keep in mind is that although you should take family wishes into account regarding the best interests of the Incapacitated Person, you, as Guardian, need to exercise your own judgment, even if it differs from that of family members.

We thank you again for your willingness to help your fellow Montgomery County citizen.

The Honorable Lois E. Murphy  
The Honorable Cheryl L. Austin  
The Honorable Stanley R. Ott  
Orphans' Court Division  
Court of Common Pleas  
Montgomery County, PA

January 2016

## **Who or What is an Incapacitated Person?**

An Incapacitated Person is an adult of any age (18 or older) who cannot manage his or her own affairs, either his or her money or property, or daily life decisions or both. The legal definition of an Incapacitated Person is: “An adult whose ability to receive and evaluate information effectively and to make and communicate decisions in any way is impaired to such a significant extent that he or she is partially or totally unable to manage his or her financial resources or to meet essential requirements for his or her physical health and safety.” An Incapacitated Person may be a developmentally disabled adult or an adult who has lost the capacity to make and communicate decisions due to illness or injury. When a Petition is filed with the Court, the Court will hold a hearing to determine whether or not the Court should issue a decree declaring that a person is an Incapacitated Person.

## **What is a Guardian?**

A Guardian is someone who is appointed by the Court to manage the health or financial affairs of the Incapacitated Person. A Guardian may be appointed on an emergency basis, for a specified period of time, or for an indefinite basis. A Guardian may be appointed only to handle financial affairs or only to handle health and life decisions, or for both purposes.

## **What is a Guardian of the Person?**

A Guardian of the Person is someone who is appointed by the Court to manage the life decisions, including health affairs, of the Incapacitated Person. A Guardian of the Person makes decisions to protect the health, safety, and welfare of the Incapacitated Person. For example, an Incapacitated Person might not be able to remember if she has eaten or taken medication, or might no longer be able to cook for himself. The Guardian of the Person may be authorized by the Court to make decisions about where an incapacitated person shall live, who shall prepare meals, and to make decisions about consenting to medical and surgical procedures. The Guardian of the Person does not manage the finances, property or income of the Incapacitated Person unless the same person is appointed as Guardian of the Estate.

You might be appointed as either a Limited or Plenary (full) Guardian of the Person. A Plenary Guardian is given the full authority to make all decisions for the Incapacitated Person. A Limited Guardian is given only those powers and responsibilities specifically identified by the Court in the Court’s Final Decree. Either way your primary responsibility is to represent the rights and best interests of the Incapacitated Person. You should honor the expressed wishes and preferences of the Incapacitated Person to the greatest extent possible. If, however, those wishes conflict with what is in the best interests of the Incapacitated Person, you should follow your independent judgment to the extent necessary. For example, the Incapacitated Person might strongly wish to remain living alone at home, but this might not be safe living arrangement for him or her. In such a case, you have the responsibility to do what is in the best interests of the Incapacitated Person.

For a detailed explanation of what you must do as a Guardian of the Person, please see Pages 4-7.

## **What is a Guardian of the Estate?**

A Guardian of the Estate is someone appointed by the Court to handle all financial affairs of the Incapacitated Person. A Guardian of the Estate has a fiduciary duty not to mismanage the Incapacitated Person's money and to use it only for the good of the Incapacitated Person. A Guardian of the Estate is responsible for managing the income, investments, real estate, and any other property owned by the Incapacitated Person. Basically the Guardian of the Estate is managing money and property for the Incapacitated Person. The Guardian of the Estate is serving as a fiduciary for the Incapacitated Person. This means that the funds and property still belong to the Incapacitated Person. The Guardian of the Estate is merely acting on behalf of the Incapacitated Person. The Guardian of the Estate is authorized to spend income for the benefit of the Incapacitated Person. However, the Guardian of the Estate may not *sell* real estate without Court approval. Any expenditure of principal of the Incapacitated Person (the balance of funds or assets of the Incapacitated Person as of the date on which the Guardian was appointed, or that are later acquired, that are not monthly income) may be subject to challenge and review by the Court. If income is not sufficient to meet the needs of the Incapacitated Person, it may be appropriate or necessary to seek Court approval before spending principal. Principal may include assets of the incapacitated person held in bank accounts, Certificates of Deposit, annuities, retirement accounts, or other investments. Except for spending income for the routine care and maintenance of the Incapacitated Person, most other sales of assets, gifts or transfers, or expenditures of assets, including expenditures to pay Attorneys or professional fees, require the advance approval by the Court.

Please see Pages 7-10 for a more detailed description of what you must do as Guardian of the Estate.

## **What is an Emergency Guardian and How is it Different from a Final (or Plenary) Guardian?**

The main difference between being appointed an Emergency Guardian and a Final, or Plenary Guardian is the time frame of the appointment. If you are appointed an Emergency Guardian be sure to review the Court Order (Final Decree) which appoints you. Appointment of a Guardian on an emergency basis is sometimes necessary because of an immediate medical condition of the Incapacitated Person or some other time sensitive emergency. The Final Decree tells you the extent of your authority. An Emergency Guardian of the Person is usually appointed for 72 hours or some other limited time period. An Emergency Guardian of the Estate is usually appointed for a period of 30 days or fewer. The period of appointment may be extended by Court order if needed before a full hearing can occur.

## **What are the Duties of the Guardian of the Person?**

The items below list the specific things you *must* do as a Guardian of the Person, but this list of duties and responsibilities is by no means complete. If you are an individual appointed as the Guardian of an Incapacitated Person it may be helpful to consult with a qualified Attorney regarding all of your duties and responsibilities. If you have difficulty finding a lawyer, you may call the

Montgomery County Bar Association's Lawyer Referral Service during regular business hours, Monday through Friday at 610-279-9660 ext. 201.

### ***Familiarity with the Court Order Appointing You Guardian of the Person***

First, you should read carefully the Court Order appointing you as a Guardian, which is usually called a "Final Decree." You may be authorized to use power in certain limited ways, unless you have been appointed as a "Plenary" (full) Guardian of the Estate and/or Person. The Court's Final Decree may specify that the Guardianship is either "Plenary" or "Limited." If it is Limited, the Final Decree will identify specific limitations. If your appointment is subject to limitations you should be careful not to exceed them. The description of duties in this manual is always limited by any language in the Final Decree appointing you. That is, the Final Decree is what sets forth your authority and limitations, not this manual.

To take actions on behalf of the Incapacitated Person, you may need to obtain a Guardian's Certificate or a certified copy of the Court's Final Decree. There is a \$10 fee for a Guardian's Certificate and a fee of slightly more (\$13 plus \$1 per page) for a certified copy of the Court's Final Decree. The Guardian's Certificate confirms that you have been appointed by the Court and that you are still serving. The cost for these documents may be paid from the assets or income of the Incapacitated Person.

### ***Plan of Supportive Service***

Where appropriate you should assist in the development of a plan for supportive services for the Incapacitated Person. The plan should explain how the services will be obtained. Supportive services could include nursing, physical therapy, rehabilitation, meal preparation, cleaning, bathing, and other daily needs of the Incapacitated Person.

### ***Encouragement of Incapacitated Person to Participate in Decisions***

You must encourage the Incapacitated Person to participate in making decisions about his or her care to the maximum extent possible. You should also encourage the Incapacitated Person to act on his or her own behalf whenever he or she may be able to do so. You also should encourage the Incapacitated Person to develop or regain his or her capacity to manage his or her personal affairs as much as possible.

### ***General Care, Maintenance and Custody of the Incapacitated Person***

A Plenary (full) Guardian of the Person has general responsibility for the care, maintenance, and custody of the Incapacitated Person. Your primary guiding principle should be to do what is in the *best interests of the Incapacitated Person*, even when that might conflict with your personal beliefs or interest. If the best interests of the Incapacitated Person conflict irrevocably with your strongly held personal beliefs or interests, you may, and should, apply to the Court for guidance or to be relieved of your duties. You must avoid any conflict of interest, in determining and acting in the best interests of the Incapacitated Person.

### ***Place for Incapacitated Person to Live***

A Plenary Guardian of the Person can select where the Incapacitated Person will live. You should encourage the Incapacitated Person to express preferences and to participate in this decision to the maximum extent possible. If the Incapacitated Person is unable to participate in making this decision,

you should make a decision that you conclude is in the best interests of the Incapacitated Person. You should consider the safety of the Incapacitated Person and the ability of friends and family members to visit the Incapacitated Person when choosing the place where the Incapacitated Person will live.

### ***Visiting the Incapacitated Person***

There is no specific legal requirement regarding the number or type of visits you should make to the Incapacitated Person, however we would expect that you would visit in person at least once every three months, and preferable once each month. In addition to periodic visits, you may need to visit when medical decisions must be made, or to observe any new concerns, behaviors or needs. You are expected to know the needs of the Incapacitated Person and to have a good idea of his or her health and emotional status, in order to make informed decisions for him or her. Therefore is important that you see him or her frequently enough to feel comfortable making those decisions.

### ***Responsibility for Training, Education, Medical and Psychological Services of the Incapacitated Person***

A Plenary Guardian of the Person should assist the Incapacitated Person in the development of the as much self-reliance as is possible. The Court's Final Decree may give you specific responsibilities regarding the training, education, medical, and psychological services needed by the Incapacitated Person. You should also consider and provide appropriate social and vocational opportunities. Again, your guiding principle is the same: the best interests of the Incapacitated Person. Consideration of the express wishes of the Incapacitated Person and/or his or her family members is appropriate where it does not conflict with this principle. You should participate in supportive services to the extent that you can.

### ***Consents/Approvals for the Incapacitated Person***

The Order appointing you as Guardian may give you the authority to enter consent or approval for various medical, surgical, psychological or other treatments for the Incapacitated Person. As always, you should try to follow the express wishes of the Incapacitated Person and family members to the extent that these do not conflict with the best interests of the Incapacitated Person. Your independent judgment on these issues should not be overridden by family wishes.

Note that NO Guardian has the authority to admit the Incapacitated Person to an inpatient psychiatric facility or to consent to the relinquishment of parental rights of the Incapacitated Person.

In addition, you may NOT CONSENT to the following procedures or practices for the Incapacitated Person unless and until a Court approves it:

- a. Consent abortion, sterilization, psychosurgery, electroconvulsive therapy or the removal of a healthy body organ of the Incapacitated Person.
- b. Stop a marriage or consent to a divorce of the Incapacitated Person.
- c. Consent to the performance of or participation in any experimental biomedical or behavioral medical procedure by the Incapacitated Person.
- d. End of life decisions.

### ***Annual Report (due at end of first year)***

You are required to file an Annual Report each year, on the date that is the 12-month anniversary of your appointment as Guardian of the Person, and annually after that for as long as you remain Guardian. You can obtain a copy of the Annual Report form at the office of the Clerk of the Orphan's Court at One Montgomery Plaza in Norristown.

A PDF version of the Annual Report is available on the Court's website at <http://www.montcopa.org/2465/Orphans-Court---Guardianship-Information>.

The Annual Report may be filed electronically at <https://courtsapp.montcopa.org/ROWefiling> or a paper copy may be filed in person or by mail to Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404-0311. Please note that at this time the form cannot be completed online. You must download it, complete it, and then upload it via e-filing if you wish to file electronically. If you have any questions regarding the Orphans' Court Electronic Filing System you may call the Clerk of the Orphans' Court at 610- 278-3400.

A \$20.00 filing fee must be paid, however if the Incapacitated Person has no assets and is indigent, you may be able to file the Annual Report without the filing fee. In order to do that you will need to file a Petition to Waive Fees and receive a Court Order waiving fees.

In the Annual Report you should describe in detail the following:

- a. The current address and type of placement of the Incapacitated Person.
- b. The major medical or mental problems of the Incapacitated Person.
- c. A brief description of the living arrangements, social, medical, psychological, and other supportive services being received by the Incapacitated Person.
- d. Your opinion as to whether the guardianship should continue, be terminated or modified, supported by your reasons for this opinion.
- e. The number of length of times you have visited the Incapacitated Person during the last 12 months.

### ***Final Report***

Within sixty (60) days of the death of the Incapacitated Person or if the Guardianship is vacated, you are required to file the Final Report. The same form used to file the Annual Report is used to file the Final Report. Please note that at this time the form cannot be completed online. You must download it, complete it, and then upload it via e-filing. You may also mail it to Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404-0311. As with the Annual Report, the Final Report may be electronically filed and the filing fee, if not waived, is \$20.00.

## **What Must You Do as a Guardian of the Estate?**

The items below list the specific things you *must* do as a Guardian of the Estate, but the list of duties and responsibilities is by no means complete. If you are the individual serving as Guardian of an

Incapacitated Person's Estate it is recommended that you consult with a qualified Attorney regarding all of your duties and responsibilities. If you have difficulty finding a lawyer, you may call the Montgomery County Bar Association's Lawyer Referral Service during regular business hours, Monday through Friday at 610-279-9660 ext. 201.

As Guardian of the Estate of the Incapacitated Person you are a "fiduciary". Legally you are obligated to use prudent judgment in the management of the assets and income of the Incapacitated Person for his or her benefit only. You are also required to avoid conflicts of interest or decisions which might benefit you. You may not invest the money of the Incapacitated Person in businesses or corporations owned or controlled by you. Nor may you loan the Incapacitated Person's money to yourself for such enterprises unless you have specific advance permission of the Court to do so. In other words, you should handle the Incapacitated Person's money in an honest and unbiased way. The assets belong to the Incapacitated Person.

However, you also should not ignore the assets of the Incapacitated Person. Any idle assets should be prudently placed into productive form. For example, cash in a checking account might be moved to savings or a money market account so that income is produced. If possible, a vacant residential property should be leased to produce income.

As fiduciary you have the authority, within reason, to hire professionals to provide you with advice. If there are adequate assets to pay the expenses, you may seek to engage accountants, investment advisors, and Attorneys to assist you in the proper management of the assets of the Incapacitated Person. The reasonable fees and commissions for these experts may be charged to the Estate of the Incapacitated Person. These expenditures are subject to Court approval and if these expenses would exceed the income available, you should seek Court approval before spending principal.

### ***Familiarity with the Court Order Appointing You Guardian***

First, you should read carefully the Court Order, called a Final Decree, appointing you as a Guardian of the Estate. You might be authorized to use power in certain limited ways, unless you have been appointed as a "Plenary" (full) Guardian of the Estate and/or Person. If your appointment is subject to limitations you should be careful not to exceed them. The description of duties that follows in this manual is *always* limited by the Order appointing you. That is, the Order is what sets forth your authority and limitations, not this document.

You should also determine if you have been directed to enter Bond (insurance) and if so, obtain the Bond and file it with the Clerk of the Orphans' Court as soon as you begin serving as Guardian. If you have been directed to post a Bond, it may be purchased from any approved corporate surety and must be filed with the Clerk of the Orphans' Court before the Clerk can issue you a Guardian's certificate (also known as a "short certificate").

To take actions on behalf of the Incapacitated Person, you may need to obtain a Guardian's Certificate or a certified copy of the Court's Final Decree from the Clerk of the Orphans' Court. There is a \$10 fee for a Guardian's Certificate, and a fee of slightly more (\$13 plus \$1 per page) for a certified copy of the Court's Final Decree. The Guardian's Certificate confirms that you have been appointed by the Court and that you are still serving and may provide specific information about your authority. The cost for these documents may be paid from the assets or income of the Incapacitated Person.



## ***Inquiry and Discovery of Assets***

As Guardian of the Estate you must try to find all valuable assets of the Incapacitated Person, including determining their Fair Market Value on the date of your appointment. You are required to make a “reasonable inquiry” to discover their existence, location, and value. This may require you to obtain appraisals of real estate or statements from banks or securities firms as to the value of the securities or accounts. This may also include getting appraisals of jewelry or antiques or estimating the fair market value of these items. These assets include electronics such as computers, televisions, tablets and/or cellphones.

## ***Safeguarding of Assets***

Once you have discovered the assets and had their values determined, you are under a duty to safeguard them to protect them from being dissipated, lost, stolen or destroyed. You should take all reasonable measures to keep them safe and secure. For example, if a house is being left uninhabited, you might want to consider installing an alarm system, obtaining homeowner’s insurance, and giving local police your contact information.

## ***Management of Assets***

You must also manage these assets to attempt to produce income or have them appreciate in value (or maintain value) for the benefit of the Incapacitated Person. Risky investments are not permitted. You must use “reasonable prudence” in managing the assets. You may not mix (or “co-mingle”) the assets of the Incapacitated Person with your own assets. For example, you should have a separate bank account for the assets of the Incapacitated Person, in the name of the Incapacitated Person, with you listed as the Guardian with the right to sign checks. It may be best to put the assets in an interest-bearing account.

The money of the Incapacitated Person must be used *exclusively* for the benefit of the Incapacitated Person. It should not be used for you, or any of your family members without the prior approval of the Court. This is true even if you know that the Incapacitated Person would want your family member to have the money. For example, if the Incapacitated Person told your daughter that he was no longer driving and she should take his car, you would need to get the approval of the Court before signing over the title of the car to your daughter.

Under NO circumstances should you use the assets of the Incapacitated Person to give a gift to yourself or your family without advance Court approval.

## ***Payment of Debts, Obligations, and Expenses***

In general you are authorized to pay reasonable debts, obligations, and expenses of the Incapacitated Person. This includes medical expenses and maintenance of the Incapacitated Person and may include education if appropriate. Using principal without Court approval may subject you to challenge and liability. You may obtain a Court Order approving expenditures of principal by filing a Petition with the Court. You should create a budget for the Incapacitated Person. If it appears that income alone will not meet his or her needs, then you must file a Petition with the Court seeking approval of necessary expenditures from principal. You should tell the Court in the Petition exactly why and how much money you believe is needed from principal. You might want to tell the Court about costs that are likely to recur,

such as monthly fees for an apartment rental. The Court may approve expenditures from principal for a specified period of time, such as one or two years, pursuant to a budget. The Court may schedule a hearing to review the situation again at a later time.

### ***Inventory (due within 90 days of your appointment)***

You must prepare and file a document called a Guardian's Inventory with the Clerk of Orphans' Court within three (3) months after you are appointed. The Inventory should contain a list of all real estate, personal property, bank accounts, securities, and all other valuable assets belonging to the Incapacitated Person that you have been able to discover using reasonable efforts. The Inventory should also include the values of these assets as of the date of your appointment. It should also include a statement regarding any real or personal assets that you expect to acquire for the Incapacitated Person after the date of filing of the Inventory. The assets listed on the Inventory create the principal of the Incapacitated Person's Estate.

A copy of the required Inventory Form may be obtained from the Clerk of the Orphans' Court. You may mail the form to Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404-0311. A PDF version of the Inventory is available on the Court's website at <http://www.montcopa.org/2465/Orphans-Court---Guardianship-Information>.

The Inventory may be filed electronically at <https://courtsapp.montcopa.org/ROWefiling> or a paper copy may be filed in person or by mail to Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404-0311. Please note that at this time the Inventory Form cannot be completed online. You must download it, complete it, and then upload it via e-filing.

A \$5.00 filing fee must be paid, however if the Incapacitated Person has no assets and is indigent, you may be able to file the Inventory without the filing fee. In order to do that you will need to file a Petition to Waive Fees and receive a Court Order waiving fees.

If you have any questions regarding the Orphans' Court Electronic Filing System you may call the Clerk of the Orphans' Court at 610- 278-3400.

### ***Annual Report***

In addition to the Inventory, you are required to file an Annual Report on or before the 12-month anniversary of your appointment as Guardian of the Estate. You should list the current principal of the Estate and how it is invested, any expenditures you have made, any income to the Estate, and the needs of the Incapacitated Person for which you have provided financially since the date of your appointment as Guardian of the Estate. So, for example, you might report that you spent \$10,000 on food and housing for the Incapacitated Person over the course of the past year. You should detail how and where that money was spent. You must file an Annual Report every year on the anniversary of your appointment as Guardian for as long as you continue to act as Guardian.

A PDF version of the Annual Report is available on the Court's website at <http://www.montcopa.org/2465/Orphans-Court---Guardianship-Information>. You may file by mail by sending a copy to Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404-0311.

The Annual Report may be filed electronically at <https://courtsapp.montcopa.org/ROWefiling> or a paper copy may be filed in person or by mail to Clerk of the Orphans' Court, P.O. Box 311, Norristown, PA 19404-0311. Please note that at this time the Annual Report cannot be completed online. You must download it, complete it, and then upload it via e-filing if you wish to file electronically.

A \$20.00 filing fee must be paid, however if the Incapacitated Person has no assets and is indigent, you may be able to file the Annual Report without the filing fee. In order to do that you will need to file a Petition to Waive Fees and receive a Court Order waiving fees.

If you have any questions regarding the Orphans' Court Electronic Filing System you may call the Clerk of the Orphans' Court at 610- 278-3400.

### ***Final Report***

In the event that the Incapacitated Person dies or the Guardianship is vacated, you must file a Final Report within sixty (60) days of his or her death. The same form which is used to file the Annual Report is used to file the Final Report. It is also filed in the same ways, electronically or in person or via mail. Please note that at this time the Final Report cannot be completed online. You must download it, complete it, and then upload it via e-filing. There is also a \$20 filing fee for this report, unless filing fees have been waived by the Court.

### ***Estate Planning***

If the Incapacitated Person holds substantial assets you may file a Petition with the Court to authorize Estate planning on behalf of the Incapacitated Person. This might include establishing a trust, making gifts, disclaiming interests in property or powers of appointment, all of which might be needed to manage the property of the Incapacitated Person. If you think this may be appropriate, you may need the assistance of an Attorney, investment advisor and/or Certified Public Accountant to prepare a Petition to the Court.

### ***Burial Reserve***

If the person has no burial arrangements, you may want to ask the Court for approval to set aside funds in a burial reserve account to be used for that purpose.

### ***Medicaid Insurance/Medicare and Medicaid Benefits***

You should ensure that the Incapacitated Person is receiving all federal and state benefits to which he or she is entitled. This might include filing for Medicare or Medicaid benefits, Social Security benefits, or disability or other government benefits. For example, once the assets of the Incapacitated Person have been spent, he or she may be eligible for Medicaid and you would need to file that application. This is particularly important in helping to pay for the medical care of the Incapacitated Person and may also be important in helping to pay for the long-term nursing home care of an Incapacitated Person who requires nursing care.

## **Where Can I Go for Help?**

Feel free to contact the Guardianship Coordinator, Yvette Young, at 267-521-8739 or email her at [yyoung@montcopa.org](mailto:yyoung@montcopa.org) with any questions you might have. If Ms. Young cannot help you she will be happy to try to guide you to other resources.

## **Where Can I Find the Forms I Need to File?**

Here is a link to some of the forms you will need to file, including the Inventory and Annual Reports:  
<http://www.montcopa.org/2465/Orphans-Court---Guardianship-Information>.

Thank you for taking on the task of helping an incapacitated Montgomery County resident by managing his or her affairs, either monetary or otherwise. You are truly helping both the person and his or her community. On behalf of the Montgomery County Court of Common Pleas, Orphans' Court Division, we thank you.