

**COURT OF CHANCERY OF THE  
STATE OF DELAWARE**

**Handbook for Guardians of Adults with Disabilities**

**This handbook is for informational purposes only. It is not a substitute for legal advice, which can only be given by an attorney. Attorneys and Petitioners should review statutes and Court rules regarding requirements applicable to Delaware guardianships.**

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## **I. Introduction**

This Handbook is for individuals who are applying to be, or have been, appointed the guardian of someone's person and/or property by the Delaware Court of Chancery ("Court") and everyone interested in understanding the role of a guardian.

Delaware law empowers the Court to appoint a guardian for a person with a mental or physical disability who also is in danger and needs assistance in the form of a guardianship. Taking the step to become a guardian for an adult should be a last resort and should only be considered when other alternatives have failed or are no longer appropriate. Alternatives to guardianship include acting as a surrogate decision maker, supported decision maker, having the individual execute an Advance Health-Care Directive, Advance Mental Health-Care Directive, and/or Durable Personal Power of Attorney appointing an agent. Many individuals with mental or physical disabilities have the ability to understand the nature of these documents and what the documents will allow others to do for them. These alternatives also allow the person with a disability to retain his or her individual rights, have a voice in choosing who may make decisions on his or her behalf, and avoid the cost and difficulty of petitioning the Court to appoint a guardian.

When appropriate and upon a petition to the Court, the Court may appoint a guardian for an adult with a disability who is unable to appoint an agent and who:

By reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons.<sup>1</sup>

A disability alone does not warrant appointment of a guardian unless the disability results in the person becoming at risk of suffering harm as specified in the statute. As in Delaware law, this Handbook refers to the person over whom a guardianship is sought as the "Respondent" and a person for whom the Court has appointed a guardian as the "Protected Person."<sup>2</sup> There are different types of guardianship that may be requested. A "plenary," or full guardianship is a guardianship in which the appointed guardian has all the powers and duties allowed by Title 12, Chapter 39 of the Delaware Code, and is described in the following sections of this handbook. An "interim" or "emergency" guardianship is one in which a guardian is appointed without notice to others or a hearing before the Court. An "interim" or "emergency" guardianship may be requested when the person with a disability needs immediate assistance for urgent medical care or otherwise to prevent imminent serious physical harm or substantial economic loss or expense. An interim guardian may be appointed for a period of up to thirty (30) days, which may be

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<sup>1</sup> 12 *Del. C.* § 3901(a)(2).

<sup>2</sup> The current version of Delaware's guardianship statute, as well as the Court's rules, use the term "person with a disability". You also may hear Court staff or judicial officers use the term "ward." All are used interchangeably and mean the same thing.

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extended by the Court for good cause shown. To request appointment as an interim guardian, the Petitioner must state in the petition the facts which demonstrate the person with a disability is in danger of incurring immediate serious physical harm or substantial economic loss absent the emergency appointment of a guardian and before the time it would typically take to appoint a guardian in an uncontested case (about 30 days).

There are some powers that a court-appointed guardian may not exercise on behalf of a Protected Person, and there are some rights that a Protected Person retains, such as the right to vote. In some circumstances, the Court may place additional restrictions or limitations on a guardian's power, and may expressly allow a Protected Person to retain certain types of autonomy and control, such as a right to receive a certain amount of money each month over which the guardian has no authority. Limitations of this nature are made on a case-by-case basis and in consultation with the attorney *ad litem*, the Petitioner, and the Respondent. Delaware has a preference for limited guardianships and the Court expects persons petitioning for guardianship to think about how the guardianship could be limited and what rights the Respondent could and should retain. The Court also expects guardians to allow the Respondent to grow after a guardianship is imposed and to approach the Court when the opportunity to limit the guardianship arises.

Guardianship appointments may be divided by subject matter, either guardian of the person, the property, or both, based on the need of the Respondent. The primary powers and duties of the guardian of the person are discussed at Section III of this

Handbook. The primary powers and duties of the guardian of the property are discussed at Section IV of this Handbook. Where the Court limits the appointment to either guardian of the person or property, it does not grant the powers or impose the duties on the guardian of the other type of guardianship.

A guardian can be an individual, most frequently a family member, or a business. It is extremely important that the guardian realize that the guardian is a fiduciary and must act accordingly. A fiduciary is a person to whom property or power is entrusted for the benefit of another. This is a position with great responsibility. *Everything the guardian does in that capacity must benefit the Protected Person.* This is generally known as the fiduciary duty of loyalty to the person. A guardian must be at least as careful with the Protected Person's property and finances as a reasonably careful person would be with his or her own property and finances. When making decisions, the guardian is expected to act with due care and, to the extent known and appropriate, act as the Respondent would have acted if the Respondent had capacity to do so. This requires a balance, respecting the Respondent's prior management of their life and assets but also ensuring the Respondent's is protected and provided for.

All guardianships are created and subject to review by the Court. Hearings are held in each county. The office of the clerk of the Court is known as the Register in Chancery, and the personnel in the Register in Chancery assist the Court in supervising guardianship proceedings. If you do not have an attorney, personnel in the Register in

Chancery can provide you with some forms for filing your petition for guardianship, but they cannot provide legal advice. Your attorney plays a key role in the guardianship process. If you cannot afford a lawyer, help may be available through Delaware Volunteer Legal Services at the phone number listed in the Resources section of the Handbook. The Court may waive fees associated with the petition for low-income Petitioners, if the Petitioner files a request for the waiver. The form of the waiver (*in forma pauperis*) is on the Court's website. In deciding whether to approve a waiver, the Court's Magistrate Judges look to the federal poverty guidelines. In the Court, the judge ruling on the petition may be a Chancellor, a Vice Chancellor, or a Magistrate Judge, and the parties should address them accordingly.

## **II. Procedural Requirements for Obtaining Guardianship**

There are several steps involved in obtaining guardianship of an adult. They are A) filing a Petition and related forms, B) appointment of an independent attorney to protect the rights of the Respondent, C) mediation among the interested parties if the petition is opposed, D) a hearing, unless the Court waives the hearing, and E) compliance with formalities to obtain a final order in which the Court appoints a guardian. Each of these steps is discussed in detail below. The Petitioner may seek reimbursement for costs and fees relating to the guardianship from the funds of the Respondent, if those funds are sufficient to reimburse without detriment to the Respondent.

### **A. Beginning the Process: The Petition**

A person seeking the appointment of a guardian must file a petition, along with required or supporting documents, as discussed in detail below.

#### **1. Information Required in the Petition**

Delaware law requires that the petition include specific information about the Petitioner, the proposed Guardian (if different from the Petitioner) and the Respondent. Each of these is listed here and is also included in the Petition form provided on the Court's website.

- Petitioner's name, address, and relationship to the Respondent.
- Respondent's name, age, marital status, domicile, and place of residence.
- Proposed guardian's name, address, and relationship to the Respondent.

- Names and addresses of any potentially interested party. If an interested party is under 18 years old, include the age of the minor and the name and contact information for their parent or guardian. Interested parties are defined in Delaware law as:
  - Respondent's spouse or next of kin. Next of kin are the person(s) entitled to inherit through the estate of the Respondent if the Respondent died without a will, including the Respondent's spouse, children, parents, siblings, and, if there are none of those, more remote family members.<sup>3</sup>
  - Respondent's agent under a power of attorney or living will (sometimes called an advance health care directive or advance mental health-care directive),
  - Respondent's executor or alternate executor appointed in a will,
  - Any trustee or trust protector appointed under a trust in which the Respondent has an interest,
  - Any person primarily responsible in the past six months for the care of the Respondent or the Respondent's finances, and

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<sup>3</sup> Title 12, Sections 502-503 of the Delaware Code define the intestate heirs. Generally speaking, the intestate heirs are someone's spouse and children. If there are no living children, the person's parents are intestate heirs. If there are no living children or parents, siblings are intestate heirs. If there are no living children, parents, or siblings, then the next of kin (including aunts, uncles, nieces, nephews, cousins, etc.) are intestate heirs.

- If the Respondent resides in or was admitted to a health care facility, include the date that the Respondent was admitted and the reason for the admission. It is helpful to the Court to include the Respondent's current condition, particularly if the condition has changed since the admission.
- Whether the Respondent has a will, power of attorney, advance health care directive, advance mental health-care directive, or living will. If the Respondent has any of these documents, include the location of the original document and the name(s) of the agent(s) named in each document.
- Whether the Respondent was a member of the armed forces.
- Whether the Respondent was represented by a Delaware attorney within two years of the filing of the petition. If so, include the name and contact information of the attorney and the nature of the attorney's representation, if known.
- Whether the Respondent has a guardian to manage his or her person or property. Usually, this is not the case for adult Respondents unless a guardian was appointed for the Respondent in another state. If another state has already appointed a guardian for the Respondent, there is a procedure for transferring the guardianship to Delaware, which is discussed briefly in Section VII(D).

- A list of the Respondent’s assets and their estimated value. Assets commonly include bank accounts, investment accounts, stocks, bonds, retirement accounts, real estate, collectibles and collections, automobiles, boats, and any other money or property, such as life insurance with cash value. Be as specific as possible and identify any assets that are owned jointly with another person. The petition must include the name of the joint owner in identifying the jointly held assets.
- A list of the sources and amounts of income received by the Respondent. Common sources of income include Social Security, Veteran’s benefits, pensions, retirement accounts, rental income, and royalties.
- A list of the Respondent’s obligations and liabilities, such as debts (credit cards, loans, mortgages, etc., including both balances and minimum monthly payments), monthly expenses (housing, utilities, food, etc.), clothing and toiletries, any health care expenses (providers, medications, insurance premiums, etc.), or any other regular expenses incurred by the Respondent.
- A list of any alternate resources or payment sources for the Respondent’s care. Examples of these include Veteran’s benefits, Medicaid, or Supplemental Security Income (“SSI”).

The petition must also include:

- A statement that the Respondent is unable properly to manage his or her person or property because of a disability, and as a consequence is in danger of dissipating his or her property or becoming the victim of designing persons;
- A statement that the Petitioner consents to the Register in Chancery being appointed agent for the guardian to receive service of process for proceedings related to the guardianship if the guardian is not available in Delaware to receive service;
- If an interim guardianship is being sought, specific facts demonstrating that the Respondent is in danger of incurring imminent serious physical harm or substantial economic loss or expense that may occur before a hearing could be held;
- Information about what rights or responsibilities the Respondent could retain through a limited guardianship; and
- Information on whether the petitioner is aware of any reports made to Adult Protective Services

The petition must request the Court to appoint a guardian of the Respondent to take charge of and manage the Respondent's person or property, or both.

If the Petitioner fails to include any of these items in the petition, the Court may refuse to accept the petition until the Petitioner corrects the petition to include the omitted

information. The petition must be notarized or signed in the presence of a member of the Register in Chancery staff.

## 2. Documents To File with the Petition

In addition to the petition, the Petitioner must file the following documents before the Court will review and accept the petition. The Court provides forms for each of these documents on its website.

### *a. Physician's Affidavit*

The Petitioner shall have a physician's affidavit, using the Court's most recent form available on the Court's website, completed by a medical or osteopathic doctor authorized to practice medicine who has personally examined the Respondent in the last three (3) months, unless the Court approves otherwise. In the physician's affidavit, a physician who has recently treated the Respondent states that,

Based on tests and my examination of this patient, it is my professional opinion that she/he ***does have*** a disability that significantly interferes with the ability to make responsible decisions regarding health care, food, clothing, shelter, or finances.

The physician should be specific about the nature of the Respondent's disability. Most physicians state this in the form of a diagnosis (such as dementia, autism, or Alzheimer's disease) or a statement that a specific disability resulted from a medical event or trauma (such as stroke or accident). The physician's affidavit should specify

how the condition impacts the ability of the Respondent to function (such as whether they are able to make medical decisions or manage their own money). The physician's affidavit must be notarized.

*b. Personal Information Sheet*

Each Petitioner (or the proposed guardian if different from the Petitioner) must complete a personal information sheet and provide detailed information about the Petitioner so that the Court can ensure it can contact the Petitioner. The personal information sheet must be notarized or signed in the presence of a member of the Register in Chancery staff.

*c. Affidavit of Proposed Guardian's History*

In this form, each Petitioner (or the proposed guardian if different from the Petitioner) must provide information about the proposed guardian's criminal and bankruptcy history. If an answer to a question is "yes," the proposed guardian must give a detailed explanation relating to that question. This affidavit requires the proposed guardian to agree to allow a criminal background check by the Court and must be notarized or signed in the presence of a member of the Register in Chancery staff. This information will be reviewed by the Court when determining if the proposed guardian is fit to serve in that role. Under Delaware law, certain convictions may bar a person from serving as guardian and the Court, in its discretion, may find certain criminal or financial history renders a proposed guardian unfit to step into a fiduciary role for the Respondent.

The Court may request that a proposed guardian obtain a copy of their criminal history and bring that documentation to a scheduled hearing for discussion. If the proposed guardian fails to comply, or the Court discovers that the proposed guardian failed to disclose criminal history on the affidavit, their petition may be denied, and other action taken as appropriate.

*d. Proposed Preliminary Order*

The Petitioner must submit a proposed preliminary order for the Court to complete and issue.<sup>4</sup> In the preliminary order, the Court will appoint an attorney *ad litem* to represent the Respondent and will schedule a hearing to review the Petition for guardianship. The proposed preliminary order leaves a space for the Court to insert the name of the attorney *ad litem* and the date and time of the hearing.

*e. Proposed Final Order*

As with the proposed preliminary order, the Petitioner must submit a proposed final order with blanks for the Court to complete and issue.<sup>5</sup> The final order will appoint a guardian for the Respondent (who then becomes a “Protected Person”) and specifies the rights and responsibilities of the guardian. The proposed final order may also indicate rights and responsibilities retained by the Protected Person. The proposed final order must contain the following statements:

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<sup>4</sup> Pro se petitioners are not required to submit a proposed preliminary order.

<sup>5</sup> Pro se petitioners are not required to submit a proposed final order.

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- A Court order is required to open the Protected Person's safe deposit box(es), to sell a motor vehicle and to sell or encumber any real estate.
- The guardian must execute a bond (secured or unsecured) and file it within seven (7) days after the Court signs the final order. No copy of the final order will be provided to the guardian, or anyone else, until the bond has been signed and filed with the Court.
- The attorney *ad litem* is discharged.
- The Petitioner's attorney (if any) must ensure that the guardian properly opens any guardianship bank account required by the final order, file proof of compliance (that a bank account was opened), and file the inventory (if required) within thirty (30) days of entry of the final order.

The person appointed guardian may be able to pay (or be reimbursed for previous payment of) attorneys' fees and Court costs, including costs of mediation, from the Protected Person's assets, upon proper request of and approval by the Court. These requests and orders may be included in the final order. In addition, if an interested party objects to the petition or particular guardian and can show that the objection resulted in a benefit to the Protected Person, then the interested party may also be able to recover attorneys' fees and costs from the Protected Person's assets. In each instance, the Court must approve such payment from the Protected Person's assets before any party may receive such reimbursement or payment.

*f. Waivers of Notice and Consent*

Any interested party who agrees to the appointment of the proposed guardian may sign a waiver of notice and consent (a form is provided on the Court’s website) to that effect and file it with the petition or any time before the hearing. If any interested party does not sign a waiver of notice and consent, the Petitioner must mail<sup>6</sup> the non-consenting interested party notice of the hearing by certified mail at least thirteen (13) days prior to the hearing date and file an affidavit of mailing, unless the interested party’s whereabouts are not known. A separate affidavit explaining efforts taken to locate an interested party is required for each interested party if their contact information cannot be located. If the Petitioner does not provide this required notice, or submit complaint waivers, the hearing will be cancelled, and the guardianships process will be delayed. Delaware law requires notice to all interested parties and providing that notice is the Petitioner’s responsibility.

**B. Role of the Attorney *Ad Litem***

As indicated above, the Court will appoint an attorney *ad litem* when it issues the preliminary order. The attorney *ad litem* represents the Respondent and protects the

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<sup>6</sup> Notice sent by mail must be provided to the interested parties with any petition filed during the administration of the guardianship. Likewise, each time any petition is filed during the administration of the guardianship, interested parties may sign waivers of notice and consent. If all interested parties consent, the Court may consider the petition before the notice period expires. Otherwise, the petition will be held for the notice period and presented to the reviewing judge only after that period lapses with no objection filed.

rights of the Respondent from anyone who might seek guardianship for improper reasons. The attorney *ad litem* advocates for the best interest of the Respondent. In general, the Court will not award a guardianship because the Respondent used poor business judgment, is eccentric, or made unwise decisions. The Court may, however, appoint a guardian of a mentally ill person if the mental illness causes the person to be victimized or to neglect his or her health. The attorney *ad litem* investigates whether the Respondent is competent and/or in need of a guardian. There is a checklist the attorney *ad litem* must follow, which is available on the Court's website. The Court expects the Petitioner and the proposed guardian to be cooperative in the attorney *ad litem*'s investigation and assist if and as appropriate. The attorney *ad litem* provides his or her findings to the Court in a written report.

The attorney *ad litem* will provide a copy of the petition to the Respondent and tell the Respondent about it. The attorney *ad litem* shall tell the Court whether they believe the Respondent can understand the nature of the guardianship and if the Respondent objects to the guardianship. If the Respondent opposes the petition, the attorney *ad litem* will notify the Court of the Respondent's opposition and whether the attorney *ad litem* is in agreement with the Respondent's position. If the attorney *ad litem* does not agree with the Respondent's position, then the Court may appoint a second attorney *ad litem* to represent the Respondent as if engaged by them. If the Respondent is not able to express

his or her views, the attorney *ad litem* will include this information in the report to the Court.

The attorney *ad litem* usually charges fees for his or her services. The Court's rules dictate that the attorney *ad litem*'s fees not exceed \$750, unless the case become contested, or the Court approves a greater fee. The Court may approve a greater fee if the attorney *ad litem* is required to devote extraordinary time and expense to the matter. Ultimately the attorney *ad litem*'s fees are the Petitioner's responsibility. However, the Court may authorize these fees to be paid from the Protected Person's assets in the appropriate situation. If the Petitioner is indigent and has an approved *in forma pauperis* application, the Court may pay the attorney *ad litem* from Court funds.

**C. Mediation of Opposed Petitions**

If the Respondent, attorney *ad litem*, or any interested party opposes the appointment of a guardian (in general) or objects to the proposed guardian, the Court may order the parties to attend mediation. Mediation is a method to attempt to resolve the matter without a hearing. Mediation is discussed in more detail in Section V.

**D. The Hearing**

The Petitioner must attend the hearing where the Court considers the petition unless the Court waives the hearing. (If all interested parties sign a waiver of notice and consent and the Petitioner is represented by an attorney, the Court generally waives the hearing and enters the final order.) At the hearing, which is typically held telephonically,

the Petitioner will need to dial in before the schedule start time and be prepared to talk to the judge. The Court may want the Petitioner to answer questions about the petition, why the Petitioner seeks to serve as guardian, or the Petitioner's plans to care for and protect the Respondent. If the Petitioner is not represented by an attorney, the Court will also review the duties and responsibilities of a guardian during the hearing. If the Petitioner fails to appear at the hearing, it will be cancelled, and the Petitioner will need to demonstrate good cause for the petition to be rescheduled for another hearing.

**E. The Bond**

Once the Court appoints the guardian, the guardian must sign a bond within seven (7) days of the hearing. The bond commits the guardian to pay the State of Delaware an amount generally equivalent to the value of the Protected Person's assets, plus one year of the Protected Person's income, in case the guardian fails to perform all duties imposed on it by Delaware law.

The Court may order a bond without surety. "Without surety" means that the guardian does not need to pay money to an insurance or bonding company for a bond to ensure that the guardian will use the Protected Person's property only for the Protected Person's benefit. The Court has discretion whether to waive surety. Typically, if the bond is being set for less than \$1 million, surety will not be required.

**F. The Final Order**

After filing the executed bond with the Register in Chancery, the Register in Chancery will release the final order and provide the guardian with a certified copy. The final order proves the guardian's authority to act on behalf of the Protected Person. The guardian must manage the Protected Person's person and property according to the terms of the final order. Without a final order, medical professionals or financial institutions may refuse to recognize a guardian's authority to act on behalf of the Protected Person. The Court provides one certified ("official") copy of the final order without a fee. However, if the guardian needs duplicates, then the Court charges a fee.

### **G. After The Final Order**

Once the Court enters the final order, a guardian's general responsibilities are to comply with the terms of the final order and act in the best interests of the Protected Person. While specific filing requirements are discussed here briefly, this Handbook also discusses these requirements in greater detail throughout the remaining pages of the Handbook.

#### **1. Proof of Compliance**

If the final order requires the guardian to open a guardianship bank account, then the guardian must file a Proof of Compliance within thirty (30) days of the date of the final order. The Proof of Compliance form is provided by the Register in Chancery and must be completed by an official at the bank (with a branch located in Delaware) where the guardian opens the guardianship account. It proves to the Court that the guardian has

complied with the final order in opening the guardianship bank account and transferred the Protected Person’s assets in the bank account to the guardianship account.

## 2. Inventory

If the final order requires the guardian to file an inventory, then the guardian must file it within thirty (30) days of the date of the final order. The inventory states the location and value of all assets owned by the Protected Person as of the date of the final order. More detailed discussion of the inventory is in Section IV(B)(2). If the actual value of the assets exceeds the value anticipated at the time of the filing of the bond, the Court may order the guardian to file a new bond to cover the actual value of the Protected Person’s assets and income.

## 3. Annual Update and Medical Statement

A guardian of the person or the property (or both) must file an annual update and medical statement as directed by the Court. The Court provides this form on its website. The due date for annual updates follows the following schedule:

<b>Qtr.</b>	<b>If you were appointed between...</b>	<b>...then your Annual Update and Medical Statement is due every year on...</b>
1 <sup>st</sup>	January 1 <sup>st</sup> to March 31 <sup>st</sup>	January 1 <sup>st</sup>
2 <sup>nd</sup>	April 1 <sup>st</sup> to June 30 <sup>th</sup>	April 1 <sup>st</sup>
3 <sup>rd</sup>	July 1 <sup>st</sup> to September 30 <sup>th</sup>	July 1 <sup>st</sup>
4 <sup>th</sup>	October 1 <sup>st</sup> to December 31 <sup>st</sup>	October 1 <sup>st</sup>

You should provide your email address to the Register in Chancery, which will send a reminder of your deadline about one month in advance. If you miss this deadline, you risk escalating fines, penalties, and removal as guardian.

#### 4. Accounting and Monthly Allotment

If the final order requires the guardian to file an accounting, then the guardian must prepare and file the accounting in accordance with the Rules of the Court. More detailed discussion of the accounting is in Section IV(B)(6). If the guardian is required to account, the final order also will set a monthly allotment, which is the amount the guardian may expend each month from the Protected Person's assets and income. By setting the monthly allotment, the Court is not approving a monthly withdrawal of the full allotment by cash or check to the guardian, to use on behalf of the Protected Person. Rather, the monthly allotment is the maximum amount that can be expended by the guardian and is meant to encompass the payment of various bills and expenses when due. The guardian should not exceed the monthly allotment unless a petition to expend or to exceed the monthly allotment has been filed with, and approved by, the Court. A Petitioner should request a monthly allotment that adequately covers a Protected Person's typical monthly expenses. If a Protected Person's monthly expenses later increase, a petition to increase the monthly allotment may be filed with the Court. The monthly allotment is discussed further in Section IV(B)(4)(c).

There are some exceptions to the requirement to account, but the Court must expressly waive the accounting requirement. Reasons for waiving the account requirement include: i) the Protected Person does not have substantial assets, and the Protected Person's only source of income is Social Security, which is handled by a representative payee; ii) the Protected Person lives in a nursing home and has qualified for long-term care Medicaid; or iii) the Protected Person's income is paid directly or through a Miller Trust to the nursing home to be applied to the cost of caring for the Protected Person. In these types of situations, the Court will generally approve a guardian's request to waive the requirement to file an accounting. Even if the Court waives the accountings, the guardian must still file an annual update and medical statement.

#### 5. Other Requirements

In addition to the standard filing requirements, the guardian must usually obtain Court approval in other circumstances, including:

- Seeking authority for the Protected Person to marry or divorce.
- Terminating the guardianship if the Protected Person sufficiently improves or recovers from the disability that initiated the guardianship (see Section VII regarding termination of guardianship).
- Reporting any change of residence of the Protected Person.
- Reporting any change of contact information for the guardian.

- Reporting the Protected Person's qualification for Medicaid after entry of the final order.
- Reporting within ten (10) days the death of the Protected Person.

### **III. Powers and Duties of Guardian of the Person**

“Outside of the criminal arena, imposition of a guardianship represents the most significant deprivation of the right to self-determination a court can impose.”<sup>7</sup> Guardians appointed by this Court are expected to appreciate and respect the immense power provided to them and to act always and solely in the best interest of the Protected Person and to allow the greatest amount of autonomy possible given the Protected Person’s disabilities.

#### **A. Introduction and Overview**

Serving as a guardian requires a person to be diligent in performing his or her duties and patient with and sensitive to the needs of the Protected Person. There are a number of duties the guardian owes to the Protected Person. Basically, the guardian must assure the health, physical, and emotional well-being of the Protected Person. Unless limited by Court order, a guardian has the authority and responsibility, on behalf of the Protected Person, to:

- Determine where he or she lives,
- Provide for his or her care and comfort, including food, clothing, shelter, and social or family connections,
- Obtain services to achieve his or her best possible quality of life,

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<sup>7</sup> *Matter of J.T.M.*, 2014 WL 7455749, at \*1 (Del. Ch. Dec. 31, 2014).  
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- Monitor the need for continued guardianship,
- Authorize or refuse medical treatment for him or her,<sup>8</sup> and
- Take care of his or her clothing, furniture, vehicles, and other belongings.

The guardian of the person also has duties to the Court. The guardian should know the extent and limitations on the authority granted by the Court in the final order and under Delaware law. The guardian must always comply with the Court's orders.

If the Court appoints separate guardians for the person and the property of the Protected Person, then the guardians will need to cooperate when decisions about the care of the Protected Person involve spending decisions.

### **B. General Guidelines**

The guardian of the person should treat the Protected Person with dignity and assure that others also treat the Protected Person with dignity.

In general, the guardian of the person should try to make decisions the way the Protected Person would have made them if the Protected Person was able. A guardian of the person should be guided by the known wishes, likes, and preferences of an individual, whether expressed before the entry of the final order or during the administration of the guardianship. Whenever possible, the guardian should discuss decisions with the Protected Person. If the Protected Person cannot express his or her preferences, then the

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<sup>8</sup> There are limitations on a guardian's ability to refuse life-saving or life-sustaining medical treatment for a Protected Person. *See* Section III(D).

guardian of the person should speak to family and friends about the Protected Person's preferences with respect to medical treatment, living arrangements, activities, social contacts, burial arrangements, or any other decision that the guardian must make.

The guardian of the person must substitute the Protected Person's preferences for the guardian's own preferences. The guardian of the person should attempt to maintain the Protected Person's relationships with others unless doing so would pose a threat of substantial harm to the Protected Person. For example: If baby sister was always Mom's favorite and Mom is happier when she gets to see baby sister, older brother, as guardian, has an obligation to make contact possible no matter what his personal relationship with baby sister is and even if Mom is living in older brother's home.

There are two circumstances when a guardian of the person may depart from the preferences of the Protected Person. First, if the guardian simply cannot determine what the Protected Person would have wanted, the guardian should make decisions that are based on the best interest of the Protected Person, preserving the Protected Person's best possible quality of life. Second, if the guardian knows what the Protected Person would want, but the guardian believes that following the Protected Person's preferences would not be in the Protected Person's best interest and might result in a risk of physical or emotional abuse or other harm, the guardian should make a decision that is in the Protected Person's best interest even though it may be contrary to the Protected Person's wishes. For example, if baby sister has hit Mom or stolen her medications in the past,

then the guardian of the person may restrict baby sister's access to Mom to monitored visits with a trusted overseer present. A guardian should not cut off all contact with a person important to the Protected Person unless there is no alternative for avoiding danger.

**C. Decisions Regarding Place of Residence**

Determining where a Protected Person lives is a common and difficult decision a guardian of the person must address. Unless the final order states otherwise, the guardian should ensure that the Protected Person lives in the setting that best meets the Protected Person's goals, needs, and preferences. If it is possible for the Protected Person to remain at home safely, the guardian of the person may wish to consider:

- Financial programs such as senior tax credits and reverse mortgages, home repair, weatherization and disability modification programs offered by the various housing authorities, and emergency heat cost assistance offered by utilities and some religious organizations; and
- In-home care services, meal preparation, shopping services, home delivered meals, personal care, home health care, hospice care, respite care, and non-residential adult day programs.

Notwithstanding a Protected Person's strong desire to remain at home, or return to his home, it may be the case that a more restrictive residential environment, such as an assisted care facility, is necessary to meet the Protected Person's needs.

When the guardian determines the Protected Person must move to minimize risk of substantial harm to the Protected Person and to secure his or her best treatment, the guardian must consider a number of factors. The guardian of the person should consider the availability of medical, psychological, and therapeutic services as well as social services, education, training, and vocational services that will maximize the Protected Person's self-reliance and independence.

The guardian should also consider the residential placement's proximity to the people and activities that are important to the Protected Person to ensure they can continue to see their families and friends. If the Protected Person needs assisted living or nursing home care, lists of licensed nursing homes and assisted living facilities are available on the website of the [Delaware Division of Long-term Care Residence Protection](#) and rating comparisons are available through [Medicare](#).

Once a Protected Person is admitted to a residential care facility, the guardian of the person must monitor the quality of care and scope of services provided to the Protected Person. The guardian should attend care plan meetings and visit the care facility regularly to review the Protected Person's chart or records with the staff and generally ensure the Protected Person receives proper care and maintains his or her rights and dignity. If the guardian of the person believes that the Protected Person's rights are being violated or that the Protected Person is subject to neglect or abuse, the guardian

must contact the long-term care ombudsman and/or the Delaware Division of Health Care Quality.

The guardian must notify the Register in Chancery immediately and comply with any other requirements included in the final order with respect to a change of residence, if the Protected Person changes residences after the entry of the final order. This includes promptly moving to transfer guardianship if the Protected Person is moved outside the State of Delaware. See Section VII(D).

**D. Health Care and End of Life Decisions**

A guardian of the person has the right to make health care decisions for the Protected Person, whether routine or relating to end of life decisions. But the guardian must appreciate there are certain limitations or additional requirements for end-of-life decisions that are addressed below. Generally speaking, the guardian is making health care decisions to ensure the Protected Person gets the care and treatment necessary. The guardian may also share medical and other information with those people the Protected Person would want to keep informed, unless doing so would be harmful to the Protected Person. In general, however, the guardian has a duty to maintain the Protected Person's confidential information.

The guardian should make these decisions in consultation with the Protected Person (if possible), his or her written wishes, the Protected Person's physician, and if appropriate, the Protected Person's loved ones. If the Protected Person is able to convey

his or her wishes, whether in writing or orally, the guardian should respect these wishes if possible. The guardian should take responsibility for obtaining medical second opinions when necessary. If the Protected Person's current express wishes are contrary to those expressed earlier or another controversy exists relating to medical decisions, the guardian should petition the Court for a decision.

Decisions whether to withhold or withdraw life sustaining treatment may also require a petition to the Court. A guardian, including an interim guardian, may not withhold or withdraw artificial nutrition or hydration, mechanical ventilation, or other health care for the Protected Person unless the Protected Person approved, in writing, such end-of-life care or withdrawal of treatment when they had the capacity to do so or prior approval is obtained from the Court. To receive such approval, that petition must comply with Rule 178-A, which requires (in part) two physician's affidavits. The Court also may hold a hearing and request testimony from medical professionals who are treating the Protected Person when considering a petition to withhold or withdraw life support.

## **IV. Powers and Duties of Guardian of the Property**

The guardian of the property must ensure that the Protected Person receives funds and benefits to which the Protected Person is entitled and shield the Protected Person from such things as exploitation or inadvertent loss of funds. In many cases, the guardian of the property is also guardian of the person. The Court expects a guardian of the property always to act in and advocate for the best interest of the Protected Person.

The guardian must apply for any private or public benefits on behalf of the Protected Person, such as Medicare, long-term care Medicaid or Veterans Affairs benefits. Such benefits will preserve as much of the Protected Person's assets and income as possible.

By statute, a guardian is not required to use the guardian's own assets for the Protected Person's needs unless there is some independent requirement to do so. For example, a guardian who is also a spouse may have a duty to support the Protected Person separate from any guardianship duties. In addition, an individual guardian who does not act in the best interests of the Protected Person may become personally liable for losses to the Protected Person that result from:

- Health care costs charged to the Protected Person because the guardian failed to apply for Medicare/Medicaid or appeal an incorrect denial of benefits;
- Failure to reasonably invest or manage property;

- Failure to pay expenses on time which results in penalties, interest, overdraft fees, etc.; and
- Damage to an asset of the Protected Person because it was not maintained, stored in a safe location or manner, or properly insured.

**A. Powers of Guardians of the Property**

Unless restricted by the Court, the powers of a guardian of the property are broad.

A guardian of the property may exercise the same powers of control over the Protected Person's property as the Protected Person (if competent) could exercise, except the power to create a will. However, the guardian of the property must petition the Court for authority to exercise most specific powers, such as non-routine expenditures, sale of real estate, or other similar actions. The guardian must provide notice to the interested parties when petitioning for authority to exercise such powers.

In general, a guardian of the property, **with prior Court approval**, has the following authority on behalf of the Protected Person to:

- Make gifts and charitable contributions that the Protected Person would have made if they still had capacity to do so;
- Convey or release any interest in property;
- Exercise or release the Protected Person's power to act as trustee, personal representative, custodian of minor child, or as holder of a power of appointment;

- Enter into contracts;
- Create trusts of guardianship property;
- Exercise or grant options to purchase securities or other property;
- Name the Protected Person's estate as beneficiary of insurance policies or annuities or to surrender such policies for the cash value;
- Elect a share in the estate of the Protected Person's deceased spouse; or
- Renounce or disclaim any interest in property received through inheritance or by transfer.

**B. Duties of Guardians of the Property**

After the Court enters the final order, the guardian of the property must 1) locate and control the Protected Person's assets and income, 2) file an inventory of the Protected Person's assets and sources of income with the Court within thirty (30) days of the date of the final order, 3) divide any assets the Protected Person owns jointly with another person, 4) protect and ensure the Protected Person's assets and income are used for the benefit of the Protected Person or the Protected Person's legal dependents, 5) file required federal and state government documents such as tax returns and apply for available government benefits such as Medicare, Medicaid or Veterans Affairs benefits, and 6) unless waived in the final order, file regular accountings of receipts and expenditures from the Protected Person's assets and income. The guardian of property

may also 1) sell or otherwise transfer securities and personal property, with prior Court approval, and 2) sell or otherwise transfer real estate with prior Court approval.

1. Locate and Control the Protected Person's Assets and Income.

The guardian must locate all assets and income of the Protected Person and place them into court-approved accounts. A careful review of all the Protected Person's papers, especially bank statements and prior tax returns, will help identify income-producing assets. With the increase in use of online information, it is important to access the Protected Person's digital accounts, assets, and computer, if any. Any such assets should be included in the inventory and appropriate protective action taken. Each clue should be investigated for property possibly owned by the Protected Person. It may be helpful to send a letter to the local banks to ask whether the Protected Person has any accounts or safe deposit boxes at that bank. A standard form letter explaining that the Court has appointed a guardian for the Protected Person, and the guardian needs the information should bring a prompt reply from all the local banks. The bank may require a copy of the Order appointing the guardian before releasing information.

In addition, the guardian may have to act as an advocate for the Protected Person in legal proceedings when the Protected Person is a party to litigation that affects the Protected Person's rights such as to quiet title of real estate, or to complete property division in a divorce proceeding. These proceedings are outside the scope of the guardianship action in the Court; if the guardian needs to bring action to recover assets of

the Protected Person, the guardian must do so timely and in the appropriate forum. The guardian is encouraged to seek legal counsel to assist if and as necessary.

## 2. File an Inventory of the Protected Person's

The guardian must file an inventory of the assets and income of the Protected Person within thirty (30) days of the date of the final order. This sometimes confuses people because they have taken the final order and opened a guardianship account. However, opening the guardianship account happens after the final order, so the guardianship account is not listed on the inventory. Instead, the inventory lists accounts and balances as they existed on the date of the final order. The inventory form is available on the Court's website.

The inventory identifies and provides the value of all the property and income of the Protected Person that a guardian knows about, including such things as cemetery plots, life insurance policies (cash or face value), and prepaid funeral arrangements. It is not necessary to list each specific item of tangible personal property, unless the item has significant monetary value, such as an antique, collectible, or other appraisable item. The value of all other items of tangible property may be listed in one entry based upon the guardian's estimate of the property's fair market value.

Each entry in the inventory must include an objective estimate as to the item's value. In addition, if any account or asset is jointly owned by the Protected Person and another person, the inventory must identify the joint owner(s), survivorship interest, and

percentage of ownership of any account or asset. Valuing the property listed in the inventory is easy when the asset is a bank account. When the asset is a car, a blue book value would be sufficient.

The inventory contains the guardian's sworn statement that the guardian made a diligent inquiry into the property and the estate of the Protected Person and that the inventory contains all assets that the guardian discovered. If the guardian discovers additional assets, the guardian must file an amended inventory.

### 3. Divide Any Assets the Protected Person Owns Jointly

The guardian may need to divide assets owned jointly by the Protected Person and another person. Upon request, the Court may approve the separation, distribution, or re-titling of jointly owned assets. Commonly accepted reasons for allowing the separation of assets include planning for long-term care Medicaid or to allow a spouse to live independently from the supervision of the Court.

### 4. Protect the Protected Person's Assets and Income

The guardian is charged with protecting and preserving the Protected Person's assets and income. This includes marshalling the assets and income, safeguarding them once received, and only expending funds, or selling property, when doing so will meet the Protected Person's needs and be in the Protected Person's best interest. As explained in this section, there are restrictions on how certain funds should be held, expended, or sold, and the guardian is expected to know and follow those requirements.

*a. Bank and Other Accounts*

The guardian must place the Protected Person's funds into an account titled as directed in the final order in an approved bank. The Court requires all guardianship accounts to be titled as "Court of Chancery Guardianship Account for [John Doe, Protected Person], [Mary Doe,] Guardian" with the restriction "Withdrawals Only by Order of the Court". In the final order, the Court will establish the amount of money the guardian may withdraw from the account each month without further Court approval. If a necessary expenditure exceeds the monthly allowance, before paying the expenditure the guardian must file another petition for Court approval with notice to or consents from interested parties.

The Court will approve opening the guardianship account at most banks with a Delaware branch; there are some banks that are exceptions, and the Court will not approve credit unions. The Court requires that CDs and other types of investment accounts be titled in the name of the guardianship. The guardian generally should not liquidate investment accounts (such as stock brokerage accounts) until the Protected Person needs the funds.

Some banks require the guardian to close the Protected Person's existing accounts and transfer them into the guardianship account(s). Other banks will allow the guardian to retitle an existing account into the name of the guardianship. Still others require the guardian to open both a savings and a checking account, and the bank transfers the

amount of the authorized monthly withdrawal into the checking account each month while maintaining a “hold” on the other account.

In addition to opening guardianship bank accounts, the guardian must notify “depositors” of the new account information so that direct deposits of income can be made into the new account. An example of a depositor is the Social Security Administration, which will require a guardian to apply to be appointed representative payee before processing a request to redirect the deposit. Contact the [Social Security Administration](#) for information about becoming a Representative Payee.

*b. Protecting Assets*

The guardian has a duty to preserve the Protected Person’s assets to the extent possible. The guardian should obtain insurance for property such as houses, personal property, and cars to protect against loss from fire, theft, vandalism, etc. Failing to do so may make the guardian personally liable for any damage or loss that occurs to the Protected Person’s property.

Protecting the Protected Person financially usually requires the guardian to sign one or more contracts at some point. Each signature should be noted as “Guardian” to indicate that payment will be made from the Protected Person’s funds and not from the guardian’s own funds. The greatest concern usually arises when a nursing home or long-term care facility asks the guardian to sign as a responsible party. Federal regulations prohibit facilities from requiring a guarantor.

The Court has an extra level of protection related to tort settlements and other claims to be released. The guardian is not automatically authorized to settle or release claims; it must petition to obtain approval from the Court.

*c. Spending Assets*

Except when a Protected Person is married or responsible for supporting a dependent, all expenditures from the Protected Person's assets and income must be for the benefit of the Protected Person. In cases in which a monthly allotment is set, that amount establishes an upper limit on what may be spent each month from the Protected Person's assets and income; the guardian should not spend that amount in months when the Protected Person's expenses do not warrant it. Conversely, if the Protected Person has extraordinary expenses in a given month, the guardian should file a petition to expend, which will allow the guardian to exceed the monthly allotment in that month. If the Protected Person's expenses routinely exceed the monthly allotment, the guardian should file a petition to increase the monthly allotment.

In cases where the Protected Person has dependent support obligations, the guardian must clearly disclose such obligations to the Court and request sufficient funds from the monthly allotment (in the final order) to accommodate the needs of both the Protected Person and the dependent. Except in those circumstances, payments should not be made from the Protected Person's assets or income for expenses that were not incurred by or on behalf of the Protected Person.

## 5. File Tax Returns and Other Required Filings

A guardian stands in the shoes of the Protected Person and has the same responsibilities as the Protected Person would have. If the Protected Person must file tax returns, so must the guardian. Tax returns may be required by the IRS even if no tax is due. A guardian should consult with a tax expert to determine the Protected Person's filing and payment requirements.

If the taxes due cannot be paid from the monthly allowance, the guardian must file a petition to expend funds for payment of the taxes or for services related to preparing and filing the tax returns. Obtaining the Court's approval can take time; the guardian should file the petition to expend early to ensure adequate time to receive the Court's order and pay the tax on time. Failure to pay the tax on time may result in the guardian being personally responsible for any penalties and interest due.

A guardian of the property must pay the Protected Person's health insurance premium from the Protected Person's assets and income. The guardian must also investigate whether the Protected Person qualifies for government benefits that would assist in paying for food or medicine. Information about such benefits is available in the Legal Handbook for Older Delawareans, which is listed in the Resources.

The Social Security Administration provides benefits to eligible persons based on age, income, work history, or disability. The Protected Person may be eligible for additional health care related benefits through Medicare and for long-term care through

Medicaid. Medicare is a federal health insurance program, primarily providing benefits to those persons age 65 and older or disabled. The Medicare program provides limited coverage of home health care and of nursing home care. There are state, federal and local programs to assist low-income Medicare beneficiaries.

Medicaid is a program jointly funded by the state and federal government that provides benefits to eligible individuals for long-term home health and nursing home care and a variety of other benefits. Eligibility for long-term care Medicaid is based on the Protected Person's countable assets, income, and medical condition. If the Protected Person is a veteran of the United States armed forces, the guardian should investigate whether the Protected Person qualifies for not only medical and prescription assistance but also for veteran's compensation, pensions, or similar assistance available for low-income veterans. Qualifying for government and/or private benefits may require the assistance of an attorney, for which the Court routinely approves payments.

6. File Accountings of Receipts and Expenditures (Unless Waived by the Court)

A guardian must keep complete records of the income (*e.g.*, interest, pension, dividends) and assets (*e.g.*, accounts, stocks, tort settlement) received and spent (how, when and how much) for the Protected Person. A copy of a cancelled check, along with an invoice for payment or receipt, is adequate to prove expenses. It should be clear from the receipt or by notation what the expenditure was for, *e.g.*, medication, clothes, etc.

Often, the Protected Person's income is direct deposited into the bank account and is usually easily identified on the statement. Other deposits will require supporting documentation. For example, if the guardian sells personal property, the guardian must submit copies of receipts from the auctioneer or consignment shop with the annual accounting. Recording each transaction in one place, such as a check register, at or near the time of the transaction will make the accounting much easier to complete, and can save the time and expense of asking a bank to provide copies of deposits or checks. The accounting must itemize in detail the income and expenditures of the Protected Person's property and income.

If the final order requires the guardian to file an accounting (exceptions for filing accountings are discussed in Section IV(B)(6) above), then the guardian must prepare and file the accounting in accordance with the Rules of the Court. Under the Court's rules, newly appointed guardians must file an accounting nine (9) months after the guardianship order is approved, accounting for the first six (6) months of expenditures of the Protected Person's assets and income. The guardian must submit accountings for every 12-month period thereafter on the first business day of the calendar quarter of the date of the final order. In addition, the Court may direct a guardian to account at any other time that it deems proper. The following chart explains the due dates for the accountings:

<b>Qtr.</b>	<b>If you were appointed between...</b>	<b>...your first accounting is due for a six (6) month period beginning with the date you were appointed and is due...</b>	<b>...your second and all subsequent accountings are due for a twelve (12) month period beginning where your prior accounting ended and is due...</b>
1 <sup>st</sup>	January 1 <sup>st</sup> to March 31 <sup>st</sup>	On your nine (9) month anniversary	January 1 <sup>st</sup>
2 <sup>nd</sup>	April 1 <sup>st</sup> to June 30 <sup>th</sup>	On your nine (9) month anniversary	April 1 <sup>st</sup>
3 <sup>rd</sup>	July 1 <sup>st</sup> to September 30 <sup>th</sup>	On your nine (9) month anniversary	July 1 <sup>st</sup>
4 <sup>th</sup>	October 1 <sup>st</sup> to December 31 <sup>st</sup>	On your nine (9) month anniversary	October 1 <sup>st</sup>

The guardian must provide the Court with copies of all bank statements, receipts, and proof of expenses listed on the accounting. Failure to provide the required documentation can result in rejection of the accounting and raise issues with respect to the guardian's continued fitness to act in that capacity. There are two more exceptions to the rule that all expenses must be documented. First, there may be instances where the guardian is allowed to pay a reasonable monthly amount representing the Protected Person's share of normal household expenses to the homeowner without further documentation. The second exception arises when a personal allowance is provided directly to the Protected Person. Neither the guardian nor the Protected Person need account for the Protected Person's personal funds, if a monthly contribution or personal allowance is approved by the Court.

If the Court so authorizes, the accounting may include reimbursement from the Protected Person's funds to the guardian for expenses incurred by the guardian on behalf of the Protected Person, including Court costs, filing fees, attorney's fees (such as attorney *ad litem*'s fees), reasonable expenses incurred for the benefit of the Protected Person such as clothing, toiletries, etc. Any such requests for reimbursement must include itemized receipts documenting the expenditure. The guardian may also apply to the Court for compensation for acting as guardian, as discussed in Section VI. The guardian may only receive compensation if the Court approves it.

The Court Rules establish the schedules to be included in an accounting. An accounting filed with the Court must include the following schedules:

- The value of the principal (assets) on hand at the time the accounting begins and the manner (nature) of the principal held, e.g., by account number, policy number, etc. For the first accounting, begin with the assets and values reported in the inventory. For subsequent accountings, begin with the ending values and assets of the immediately preceding accounting.
- The additions to principal, when made and the source from which they were obtained. For example, if a stock splits or has a stock dividend, the source, nature and value of the item received must be listed and supported by documentation. On your first accounting, additions to principal may simply be assets not included in, or undervalued on, your inventory.

- The income received, when received and from what source.
- The deductions from principal, when made and for what purpose. In the first accounting, a deduction from principal may simply be a reduction in value from having obtained an appraisal after the date of the final order or from selling an asset at a reduced value than the value estimated for the inventory.
- The expenses paid, who the expense was paid to and the purpose of the expenditure.
- The principal on hand at the time the accounting ends and the manner (nature) of the investment of that principal.

In addition, the guardian must file a list of the names and addresses of interested parties with the account, as well as a sworn declaration signed by the guardian affirming that the account is accurate. The account itself must be e-filed; the accounting and supporting documents must be delivered in hard copy to the Register in Chancery of the county in which the guardianship is located. The guardian may also file waivers of notice and consent to the accounting from interested parties. If the guardian does not file the waivers of notice and consent, after it has reviewed the accounting, the Court will notify the interested parties that the guardian has filed an account. The interested parties then have thirty (30) days to review the account in the Register in Chancery's office and make any objections to the account.

The Court, through the Register in Chancery, audits all accountings closely. Through the audit, the Court is confirming that all income was properly deposited, and all expenditures have adequate support and were for the benefit of the Protected Person. During the audit, the Register in Chancery may have to place the accounting on hold for more information or documentation. The guardian is expected to promptly provide the requested information or an explanation as to why they cannot do so. If irregularities are discovered during the auditing process, the Court may schedule a hearing to discuss concerns or issue an order to the guardian directing them to pay a fee and appear at a hearing to answer for the issues discovered. At those hearings, the Court will consider whether the guardian should be held responsible for issues discovered in the accounting through an order requiring reimbursement, judgment against the guardian, or removal as guardian. The Court will issue a bill for the accounting which is paid from guardianship assets. The first accounting bill is calculated using the beginning principal, additions to principal, income while subsequent accountings are calculated using additions and income pursuant to court rules.

#### 7. Sell or Otherwise Transfer Securities and Personal Property

A guardian has the authority to sell stock or exercise stock rights. Although not specifically required by statute, it is recommended that the guardian file a petition with the Court to approve the sale of stock of a Protected Person before doing so. The Court

prefers to know in advance, and some transfer agents (of stocks and securities) will want specific language in an order authorizing the transaction.

The guardian may need to petition the Court for authority to sell the Protected Person's personal property (e.g., such as household contents, jewelry, etc.). The Court may want to see an appraisal of the personal property to be sold, unless it is something that is going to be sold in bulk by an auctioneer.

A petition to sell a motor vehicle is required to sell the Protected Person's vehicle. The petition will need to include a printout showing the Kelley Book value and information about the buyer. The petition is available on the court's website.

The petition should indicate how the property is to be sold, to whom it will be sold, and the amount for which it is to be sold. Petitions to sell are held for thirteen (13) days, unless all interested parties consent, and then presented to a judicial officer of the Court for approval. The guardian or his or her attorney may need to appear in Court at a scheduled time to have the petition to sell approved.

Because the guardian is a fiduciary for the Protected Person, the guardian may not sell any of the Protected Person's assets to themselves. To do so would put the guardian in a conflicted position as someone charged with receiving the maximum price for the Protected Person, while also seeking a good deal as the buyer. If there are no other buyers and an asset should be sold in the best interest of the Protected Person, the guardian may petition for approval to stand on both sides of the transaction. The

guardian will need to demonstrate that good faith efforts were made to find another buyer and the proposed sale is fair and in the best interest of the Protected Person.

#### 8. Sell or Otherwise Transfer Real Estate

First, obtaining authority for a guardian to sell real estate is more complicated than selling personal property. The first step is for the guardian to file a motion to appoint a real estate appraiser. The Court will appoint a licensed, certified appraiser to perform an appraisal within thirty (30) days of entry of the order. The appraiser must be independent of the parties to the sale and disinterested in the transaction. The appraiser must be paid from the guardianship account within fifteen (15) days of receiving the appraisal and file proof of payment with the Register in Chancery. If the Protected Person does not have any available funds in the guardianship bank account, the guardian must notify the Register in Chancery of the financial shortfall in writing within ten (10) days of receiving the appraisal.

Real estate can be sold at public auction, but it is more often sold privately either by the guardian or by a real estate agent hired by the guardian. When the property is listed for sale, it should be noted that any offer is “subject to the approval of the Court of Chancery.” The guardian is then authorized to market the property at a price so that the selling price is at the appraised value or higher at closing.

Second, when the guardian receives an acceptable offer, the guardian must then file a petition for approval before the sale is completed. The guardian must submit the

real estate contract to the Court that states the contract is “subject to the approval of the Court of Chancery.” If the offer is lower than the appraised value, the guardian must include an affidavit explaining the reasoning for selling the property below the appraised value and why accepting the offer is in the best interest of the Protected Person. At a minimum, the guardian should advise the Court about (1) the monthly expenses relating to the real estate, (2) whether the home is vacant, (3) how long the home has been marketed and (4) the number of showings and offers received. The Court will use all of the information to determine whether the lower sale price is acceptable.

In cases where long-term care Medicaid pays benefits on behalf of the Protected Person, notice of the proposed sale also needs to be sent by certified mail, return receipt requested, to the Delaware Attorney General in addition to the interested parties. Petitions to sell real estate are held for twenty (20) days, unless all interested parties consent, and then are presented to the Judicial Officer for approval.

Third, the guardian must file a “Return of Sale” proving the guardian has deposited the proceeds into the guardianship account. The Court may also require proof that the proceeds have been used in particular ways, for example, paying off a lien secured by the real estate.

Although some Protected Persons may own several parcels of real estate, in most cases, the Protected Person’s home is his or her largest asset. If the Protected Person is no longer living at home and the real estate is sold, the net proceeds are available to pay

for the Protected Person’s continuing care expenses. If the Protected Person outlives his or her assets, it may be appropriate to petition the Court to terminate the guardianship of the property.

## **V. Mediation**

Mediation is a process by which a neutral person (the mediator) assists two or more parties to a contested guardianship to reach a mutually acceptable solution. The mediator does not make decisions regarding the resolution of the controversy.

Mediation can take place either before the Petitioner files a petition, after the Petitioner files the petition to appoint a guardian (usually prior to the hearing), or at any time after entry of the final order when disputes arise. Mediation may save money and help a family on the path to supporting the Respondent. The earlier in the process that mediation is attempted, the more mediation is likely to save money and avoid further polarization of the families. The Court encourages and frequently orders opposing interested parties to mediate.

### **A. Before Mediation**

In general, if the Court orders mediation, it will either immediately appoint a judicial mediator (i.e., a member of the Court) or give the “opposing parties” time to identify and agree upon a mediator. The parties may agree to mediate in the matter and the mediator is usually a local attorney. Different mediators may have different

approaches or styles of mediation, which may impact how the mediation proceeds. If the opposing parties cannot agree upon a mediator, the Court will appoint one.

The mediator will schedule the mediation and notify the opposing parties of the time and place of the mediation. The mediation may take place at any place upon which the opposing parties agree, including at the courthouse, in the mediator's office, or even in the Respondent's place of residence.

The mediator may request that the opposing parties sign an agreement to mediate, which may define the issues subject to mediation, the obligation of the parties with respect to fees and costs, agreement to the presence of non-participants, and any other matter the mediator deems appropriate. The mediator may direct the parties to provide information or a statement of their position prior to mediation.

#### **B. During Mediation**

The opposing parties must attend mediation. The mediator also must send notice of the mediation to all interested parties. All interested parties should be encouraged to participate to avoid later objections to any agreement reached at mediation. The mediator has the discretion to request the presence or availability of any additional person who the mediator believes has knowledge helpful to resolution of the mediation. Further, the mediator may allow interested parties to participate in the mediation by telephone, zoom or other remote technology, where appropriate. The participation by interested parties is

within the discretion of the mediator. No one else may be present for the mediation without the approval of the opposing parties.

To offer the opposing parties an opportunity to resolve their differences without “airing dirty laundry” in the Court, mediation proceedings are private and confidential, unless the mediator discovers evidence of abuse of any person. Mediation participants cannot compel the mediator to testify in Court regarding the discussions or happenings at mediation. If the mediator chooses to speak privately with a mediation participant, the mediator may not reveal information learned to others without the participant’s express permission. All participants to the mediation are also required to keep any information they learn during mediation, and what happened during mediation, confidential. This information may not be shared with parties who were not present at mediation, including the Court and court staff, except to the extent agreed upon by all participants.

The mediator may also terminate the mediation if the mediator feels that continuing will not result in a resolution or a participant is not mediating in good faith. The opposing parties must participate in good faith.

### **C. After Mediation**

Following the mediation, the mediator will file a report with the Court on the result of the mediation, including whether the parties reached an agreement or are continuing to mediate. If the mediation resulted in a resolution of the conflict between the opposing parties, they will usually sign a written document confirming the terms of the agreement,

which the opposing parties then file with the Court. The Court must approve the mediation agreement.

A mediation agreement may include any of the following:

- The Petitioner withdrawing the petition to appoint a guardian;
- The Respondent or other opposing parties withdrawing their objections to the petition;
- Consent of the agreed-upon guardian to rights or responsibilities determined at mediation, which are incorporated into the final order; and
- Allocation among the parties of fees and costs relating to the petition to appoint a guardian, including attorneys' fees (if any), filing fees, or mediation costs; the mediator must report to the Court any such allocation of fees.

**D. Costs of Mediation**

The cost of mediation depends largely upon agreement among the parties (including the mediator) and whether the mediator is a judicial mediator from the Court or a non-judicial mediator. Non-judicial mediators are compensated at the rate and in the manner agreed upon by the mediation participants. A judicial mediator does not receive compensation, but the Court charges the participants a fee of \$1,500 per day (or partial day) of mediation. In addition, a judicial mediator may waive, modify or allocate court costs considering the participants' economic circumstances or for other good cause and

may impose costs of mediation on a participant who the mediator believes failed to mediate in good faith.

If the State of Delaware or a State agency is a party, the portion of the Court costs allocable to the State shall be waived. Unless the parties agree to a different allocation of the costs of mediation, such costs are normally shared equally among the parties participating in mediation. As discussed in Section IV(B)(6), costs of mediation may be recovered from the Protected Person's assets upon approval by the Court.

## **VI. Guardian Compensation**

There are three categories of persons who may be appointed guardian for an adult: an individual guardian (*e.g.*, family members or friends of the Protected Person), a professional guardian (*i.e.*, court-approved businesses that act as guardians), and the Delaware Office of the Public Guardian (“OPG”). In certain circumstances, the OPG may receive compensation from the Protected Person’s assets. Professional guardians receive compensation from the Protected Person’s assets under Rule 131 based on fee schedules filed with the Court and through a process where they bill for their time and petition for court approval before payment is made. Individual guardians of the person or property may also receive compensation based on Court Rule 132-A, **but individual guardians must receive Court permission before paying themselves any compensation.**

The standard allowable compensation for guardians is \$250.00 for guardianship services for any six (6) month accounting period, and \$500 for guardianship services provided for anyone (1) year accounting period. A guardian may receive compensation in excess of the allowable compensation amount if the Court finds the guardian has provided unusual and extraordinary services.

All applications for compensation are made by petition to the Court with notice to the interested parties. After the petition is considered and approved by the Court, the guardian may then withdraw the approved funds from the account of the Protected

Person, or may request that payment of the approved compensation be deferred until a later time.

If there are co-guardians, the Court may require that they split the compensation, or determine other compensation amounts, depending on the circumstances of the case. Conversely, if the guardian relies on a professional adviser to perform guardianship services, for example, then the Court may reduce the compensation.

## **VII. Terminating the Authority of a Guardian**

The Court may remove a guardian when A) it appears that the guardianship is no longer necessary, B) the guardian has failed to comply with its duties, including failure to act in the Protected Person's best interest, C) the Protected Person has died, D) the guardianship is transferred to another state or Court, or E) the guardian has died or resigned.

When petitioning to terminate or transfer the guardianship, the Protected Person (if able to comprehend the issue) and all interested parties (including the guardian) must receive notice. Though not required to do so, the Court may conduct a hearing before making a final determination on the petition to terminate the guardianship.

### **A. Guardianship No Longer Necessary**

The Protected Person, or any other person the Court deems to have sufficient interest, may petition to terminate the guardianship when the Protected Person has regained capacity. The Petitioner should submit a physician's affidavit stating that the Protected Person:

Does not have a disability that significantly interferes with the ability to make responsible decisions regarding health care, food, clothing, shelter, or finances.

This is the same physician's affidavit as discussed in Section II(A)(2)(a) above and is available on the Court's website.

If the Protected Person seeks to terminate the guardianship, he or she is entitled to legal representation. On occasion, the Court has appointed counsel to represent the Protected Person in a termination proceeding. The Petitioner must offer credible proof that termination of the guardianship is appropriate. Any party opposing the termination must then prove by clear and convincing evidence that termination is not appropriate.

When the Court terminates the guardianship because the Protected Person has recovered capacity, it enters an order that:

- Terminates the guardianship,
- Restores the guardianship property to the former Protected Person,
- Provides for the payment of costs and expenses incurred during the guardianship, and
- Requires a full accounting from the guardian of the property.

In addition, the Protected Person, or any other person that the Court deems to have sufficient interest, may petition the Court seeking to terminate the guardianship because it is no longer necessary due to the availability of other measures that are in the best interest of the Protected Person. In that situation, an affidavit is filed with the Court specifying the means of substitute decision-making to be used and the consent of the person responsible for utilizing it. If the Court finds the guardianship is no longer necessary, the guardianship may be administratively closed without prejudice.

In some cases, where a Protected Person remains incapacitated but his or her assets have been completely expended, a guardian of the property may seek to be relieved of the requirement of filing accountings. In cases where the Protected Person no longer has any assets and receives only income from Social Security, i.e., retirement or disability benefits, the Court may enter an order terminating the guardianship of the property and relieving the guardian of his or her liability under the bond. The guardian must first petition the Court for such relief and provide notice to all interested parties or waivers and consents from all interested parties. A final accounting must be approved before the Court will sign an order terminating a guardianship of the property. In such cases, the guardianship of the person will most likely continue until the death of the Protected Person.

**B. Failure of A Guardian to Comply with Duties**

The Court may order the guardian to appear at a hearing (i.e., issue a “Rule to Show Cause”) if the Court has reason to believe the guardian has failed to comply with his or her duties. The guardian must show why he or she should *not* be removed. The Court may order such a hearing if the guardian has failed to:

- File required documents,
- File accountings accurately,
- Amend inaccurate accountings,
- Protect the person’s property from accidental loss,

- Use the Protected Person’s property solely for the Protected Person’s benefit (this can include a guardian reimbursing him or herself from the Protected Person’s assets or income without Court approval), or
- Protect the Protected Person from abuse or neglect (this does not mean a guardian must authorize medical treatment that violates the Protected Person’s implied or express objection or the tenets and practices of a recognized church or religious denomination to which the Protected Person belongs).

Failure of the guardian to comply with his or her duties may result in the Court issuing a judgment requiring the guardian to repay or pay into the guardianship account(s), removing the guardian, and/or appointing a successor guardian. The Court may also refer the case to the Guardianship Monitoring Program, Adult Protective Services, the Division of Health Care Quality, the Delaware Department of Justice, or a local law enforcement agency for investigation and potential criminal prosecution.<sup>9</sup>

While the guardian may initially be able to use guardianship assets to pay the cost of

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<sup>9</sup> Court of Chancery Rule 180-D created the Guardianship Monitoring Program of the Office of the Public Guardian, which is responsible for the monitoring of the Court’s guardianship docket statewide. The Court may refer any guardianship case to the Guardianship Monitoring Program for review or investigation. The Court order referring the case to the Guardianship Monitoring Program specifies the issues or concerns to be investigated. Interested parties raising concerns in a specific guardianship case should put their concerns in writing, (on agency letterhead, if applicable,) and file them with the Register in Chancery. Any questions regarding the Guardianship Monitoring Program should be directed to the Office of the Public Guardian.

obtaining legal advice regarding the guardianship, the guardian generally cannot use guardianship assets to pay for legal representation in defending against charges of failure to comply with duties.

In cases involving failure of a guardian to comply with its duties, the Court may enter an order that:

- Terminates the authority of the guardian being removed,
- Appoints a new guardian, and
- Requires the removed guardian to account for and transfer all the Protected Person's assets and income to the new guardian.

The Court may also require the removed guardian to reimburse the guardianship accounts for costs and expenses incurred in the investigation resulting in the guardian's removal and for missing assets.

### **C. Death of the Protected Person**

The guardian must notify the Court within ten (10) days of the Protected Person's death. The guardian must also file a petition to terminate the guardianship, but this need not happen within the ten (10) days. The guardian (or another person) may need to open a probate estate and have a personal representative appointed for probate purposes before filing the petition to terminate the guardianship. The petition to terminate may be filed with the final accounting, unless accountings were waived.

The petition to terminate due to the death of the Protected Person must state the Protected Person's date of death, attach a copy of the death certificate, notify the Court of the personal representative of the estate or attach a small estate affidavit, and submit a proposed order terminating the guardianship. A guardian appointed solely as guardian of the person need only ask the Court to terminate the guardianship upon the Protected Person's death. The Court provides forms for termination due to death of the Protected Person on its website.

The order to terminate guardianship upon death of the Protected Person:

- Terminates the authority and duties of the guardian,
- Terminates the guardianship itself,
- Transfers the remaining guardianship assets to the personal representative of the Protected Person's estate or heirs (if no probate is required), and,
- Cancels the guardian's bond.

**D. Transferring Guardianship to Another State or Court**

Unless the Court directs otherwise, a guardian may move a Protected Person outside the State of Delaware, if doing so is in the Protected Person's best interest and something the Protected Person would have wanted, if they had capacity to make decisions on their living situation. If the Protected Person's residence changes to another state (or country), then the guardian must transfer the oversight of the guardianship to the new state (or country) of residence. To transfer a guardianship, the guardian must

petition the Court to authorize the transfer and petition the appropriate court in the new state (or country) of residence to accept the transfer of guardianship.

The Court may order a hearing and will issue a provisional order granting the transfer unless there is a claim that the transfer is not in the Protected Person's best interests. The Court will enter an order confirming the transfer and terminating the Delaware guardianship upon the receipt of an order accepting the guardianship issued by a court in the state (or country) receiving the guardianship and any other required documents, such as a final accounting.

**E. Resignation or Death of Guardian**

A guardian may request permission to resign by filing a petition with the Court. The Court will determine if resignation is appropriate and in the best interest of the Protected Person. The Court also may require the guardian to complete certain tasks before resignation is effective. If the guardian is permitted to resign and the guardianship continues, the Court will appoint a successor guardian. The resigning guardian must file an accounting and transfer all guardianship assets to the successor guardian or Court-appointed receiver.

If a guardian dies while serving, the personal representative of the deceased guardian's estate must notify the Court and the Protected Person's next of kin of the guardian's death. The personal representative serves as guardian until the Court appoints a successor. The personal representative must file a petition for the appointment of a

successor guardian within sixty (60) days of appointment as personal representative if no other interested party has so filed. The personal representative must file an account on behalf of the deceased guardian within three (3) months of his or her appointment as personal representative of the deceased guardian's estate.

## VIII. Glossary

Attorney <i>Ad Litem</i>	The attorney appointed by the Court to represent the Respondent who is the subject of a guardianship petition.
Court	The Court of Chancery has authority to appoint guardians for adults.
Fiduciary	A person to whom property or power is entrusted for the benefit of another.
Final Order	The order appointing the guardian and establishing the powers and duties of the guardian.
Guardianship Monitoring Program	Pursuant to order of the Court, the Program operating under the Office of the Public Guardian conducts routine periodic reviews of guardianship cases and investigates at the Court's request the conduct of a guardian.
In Forma Pauperis	A procedure to obtain a waiver of Court costs for low-income individuals.
Interested Parties	<ul style="list-style-type: none"> <li>• Respondent's spouse or next of kin,</li> <li>• Respondent's agent under a power of attorney or living will, (sometimes called an advance health care directive),</li> <li>• Respondent's executor or alternate executor appointed in a will,</li> <li>• Trustee or trust protector appointed under a trust in which the Respondent has an interest, and</li> <li>• Any person primarily responsible in the past six months for the care of the Respondent or the Respondent's finances.</li> </ul>
Next of Kin	The person(s) entitled to inherit through the estate of the Respondent if the Respondent died without a will, including the Respondent's spouse, children, parents, siblings, and, if there are none of those, more remote family members.
Opposing Parties	In mediation, the Petitioner and anyone filing opposition to the proposed guardianship or guardian.
Plenary Guardianship	Where the final order establishes the guardianship and appoints the guardian without limitations other than those established by law.
Preliminary Order	The order appointing the attorney <i>ad litem</i> and setting a date for the hearing.

## **IX. Resources**

- [Court of Chancery](#) and Court of Chancery [forms](#)
- [Delaware Volunteer Legal Services, Inc.](#) or (302) 478-8680.
- [Delaware Aging & Disability Resource Center](#)