Guardianship of the Estate

PROTECT

Duties &
Responsibilities

GUARDIAN OF THE ESTATE
SUMMARY OF RESPONSIBILITIES

Ask the question:	• IS GUARDIANSHIP OF THE ESTATE NECESSARY? See sections 1.1 and 1.2.
If a guardianship of the estate is needed, initially you must:	• Review the Guardianship of the Estate Training materials (written guide and video) as early as possible. • Review the Guardianship Forms materials (written guide and video). • Determine whether you can post a surety bond, if required. • Appear for the guardianship hearing, if required.
As soon as possible after the Judgment is entered, you must:	• Qualify before the County Surrogate, including posting a surety bond if required. You CANNOT act as guardian until you qualify. • Obtain Letters of Guardianship and, if needed, Short Certificates. o In most cases, fees must be paid to the Surrogate for Letters and/or Short Certificates.
After qualifying as guardian of the estate, you must:	• Open a separate guardianship bank account. • Obtain a tax identification number for the guardianship bank account. • Retitle assets and accounts in the name of the guardianship. • Maintain records of guardianship account transactions. • Investigate and inventory the incapacitated person's assets and liabilities. o If required by the Judgment, file an initial inventory with the court and send copies to interested parties. • Keep original papers (insurance policies, deeds) in a safe and secure location. • File periodic reports as to the estate of the protected person, if required. • Discuss decisions with the protected person, and consider their input and preferences. • If the incapacitated person's preferences are unknown or potentially harmful, make decisions based on what you believe is in their best interest. • If a surety bond is required, continue to pay premiums to maintain the bond. • Notify the Surrogate of any changes to your address, or to the address of the incapacitated person. • Inform the Surrogate upon the death of the incapacitated person.
You must NOT:	• Accept gifts from the incapacitated person without specific court approval. • Give gifts from the guardianship estate, unless approved by the court. • Take payment beyond the commissions authorized by statute. • Entrust your guardianship duties to anyone else, unless authorized by statute.

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1. INTRODUCTION

Some legal and non-legal language in the realm of guardianships may be new to you. For your reference, a Glossary of Terms is included in this guide. The terms defined in this glossary are in bold font, italicized and marked with a dagger symbol (†) where they first occur in the text.

After viewing the contents of this guide, you will be able to:

- Fully consider the responsibilities of a ***guardian of the estate***†
- Understand what a ***surety bond***† is and why it is required
- Follow best practices for managing documents and records
- Understand guardian reporting requirements
- Recognize the difference between ***substituted judgment***† and ***best interest***† when making decisions about spending that impact the welfare of the ***protected person***†

IT IS EXTREMELY IMPORTANT THAT PROSPECTIVE GUARDIANS BECOME FAMILIAR WITH THE DUTIES OF GUARDIANSHIP *BEFORE* ACCEPTING APPOINTMENT.

Also, as part of the ***qualification***† process, you must file an acceptance that includes an acknowledgement that you have received these materials, understand the contents, and knowingly agree to take on the duties of guardianship.

1.1 Is Guardianship of the Estate Necessary?

Individuals considering guardianship are often concerned about having sufficient authority to handle all of that person's affairs. Typically, many people who apply to be appointed as guardians ask for appointment as guardian of both the person and the estate. As you will learn from this guide, the responsibilities of a guardian of the estate are significant. These duties, including the obligation to file periodic reports unless waived by the court, take time and effort.

If an ***incapacitated person***† has an estate—like income from earnings or pension, real property, stocks and bonds, etc.—then it is likely necessary that a guardian

† See Glossary of Terms

be appointed to take control of these assets and manage the estate. However, if a protected person has no estate, then it is not appropriate or advisable to seek appointment as guardian of the estate.

Carefully evaluate whether appointment as guardian of the estate is necessary. Review the Guardianship of the Person guide to understand the responsibilities of serving as a ***guardian of the person***† only. If you are uncertain about which appointment is needed, consider consulting with an attorney. You will find contact information for local lawyer referral services using the link below.

> County Lawyer Referral and Legal Services Offices
> HTTP://WWW.NJCOURTS.GOV/PROSE/10153_DEPTYCLERKLAWREF.PDF

If you have applied for appointment as guardian of both the person and the estate and decide that guardianship of the estate is unnecessary, you must inform the court prior to entry of the ***Judgment***†. Although Judiciary staff cannot provide legal advice or assist you in presenting your case, general questions regarding this topic may be addressed to the ***County Surrogate***†.

1.2 When Guardianship of the Estate is NOT necessary

By far, the most common situation in which guardians of the estate are *unnecessarily* appointed is when an incapacitated person has no assets (no real property, no personal property of substantial value) and receives only Social Security income. For example, a parent of a disabled adult child or a child of an elderly parent can serve as representative payee for Social Security *without* being appointed as guardian of the estate.

SOMEONE CAN SERVE AS REPRESENTATIVE PAYEE FOR SOCIAL SECURITY WITHOUT BEING APPOINTED AS GUARDIAN OF THE ESTATE.

A representative payee files reports with the Social Security Administration (SSA) and is subject to oversight by the SSA. If such a person is appointed as guardian of the estate, then he or she must additionally file reports with the County Surrogate—subject to court review. Some guardians find this process duplicative of the reporting to the SSA.

When a protected person has no estate, it may be better to seek appointment as guardian of the person only. If the protected person acquires assets in the future (like an inheritance), you may then consider the need for you or someone else to be appointed as guardian of the estate (in addition to the guardian of the person).

† See Glossary of Terms

1.3 Responsibilities of a Guardian of the Estate

As a guardian of the estate, your first priority is to gather together and protect the assets of the guardianship estate. This guide describes a number of different ways that you can take control of the assets—on behalf of, and for the benefit of, the guardianship estate.

1.4 Letters of Guardianship

Entry of the Judgment by the ***Superior Court judge***† establishes the guardianship. Until the guardian qualifies before the County Surrogate, however, he or she has no legal authority to act as guardian. For example, a guardian who has not yet qualified cannot access the incapacitated person's bank accounts.

UNTIL A GUARDIAN QUALIFIES BEFORE THE COUNTY SURROGATE, HE OR SHE CANNOT ACT AS GUARDIAN.

To qualify, the guardian must sign certain documents reflecting acceptance of the guardianship. If required by the Judgment, a guardian of the estate must post a surety bond. Modest fees must be paid to the Surrogate for the issuance of ***Letters of Guardianship***†. You should keep these original letters in a secure location, such as a safe or safety deposit box, and should not turn them over to any other person or facility. Qualification may occur immediately following the guardianship hearing, and must occur as soon thereafter as possible.

1.5 Short Certificates

When you qualify as guardian of the estate, or at any time during the guardianship, you may apply to the Surrogate for ***short certificates***†. Short certificates contain the basic information set forth in the Letters of Guardianship, stating that by Judgment of a particular date, you were appointed as guardian of the estate of a named incapacitated person. A short certificate will also state that as of the date it was issued, the guardianship remains in effect. As guardian of the estate, you may obtain additional up-to-date short certificates to provide to banks and other financial institutions as proof of your continuing authority.

† See Glossary of Terms

2. Surety Bonds

2.1 Why a Bond Would Likely Be Required

When you are appointed guardian of the estate, the court will typically order that a surety bond be posted to cover all the assets that belong to the protected person. Like an insurance policy, a bond safeguards the assets of a protected person.

If a guardian misappropriates (steals) or misuses the protected person's funds, does not maintain those funds, or does not keep accurate records, the court may require that the guardian's bonding company reimburse the incapacitated person's account for any losses. The bonding company can then file a lawsuit against the guardian of the estate to recover the amount the company was required to pay, including, in some cases, the attorney's fees incurred by the bonding company in seeking the reimbursement. A guardian of the estate who engages in theft or fraud can be removed by the court when appropriate and may be criminally prosecuted.

LIKE AN INSURANCE POLICY, A BOND SAFEGUARDS THE ASSETS OF A PROTECTED PERSON.

2.2 Determining Whether You Can Post the Required Bond

If you are applying to be appointed as guardian of the estate, you should anticipate that the court may require you to post a surety bond.

IT IS VERY IMPORTANT TO DETERMINE WHETHER OR NOT YOU CAN POST THE REQUIRED BOND *BEFORE* ANY JUDGMENT IS ENTERED.

Unfortunately, some guardianship cases proceed to entry of Judgment, and the guardian only discovers after he or she is appointed that they cannot get the bond—often due to credit issues. This situation requires another application to court to amend the Judgment, either by adding or substituting a different individual or institution as guardian, or by restricting the authority of the guardian to only those assets for which he or she can be bonded. The additional legal proceedings will prolong the period of time when the incapacitated person is without a guardian and potentially exposed to risk.

2.3 Cost of a Surety Bond

The price of the bond, that is, the bond premium, can be paid from (or reimbursed through) the guardianship estate. However, the prospective guardian of the estate must first post the bond in order to complete the qualification process. The amount of the bond will ordinarily be based on the principal value of the incapacitated person's property plus one year's anticipated income, less the value of any ***restricted asset(s)***[†].

IF THE VALUE OF THE ESTATE CHANGES, YOU MAY REQUEST A COURT ORDER EITHER REDUCING OR INCREASING THE AMOUNT OF THE BOND.

Since one of the duties of a guardian is to keep the court informed of any significant changes in the circumstances of the incapacitated person, you cannot simply keep quiet about substantial changes to the amount of the guardianship estate. Especially if the guardianship estate has diminished, it is often necessary to apply for modification of the bond amount in order to preserve the assets of the incapacitated person, because the fee charged for the bond premium is related to the value of the bond (i.e., the premium for a bond on a $200,000 estate is less than the premium for a bond on a $2,000,000 estate).

2.4 How to Obtain a Bond

IF YOU ARE REQUIRED TO OBTAIN A BOND, YOU SHOULD DO SO PROMPTLY AFTER YOUR APPOINTMENT AS GUARDIAN—IN ORDER TO QUALIFY.

As noted earlier, you cannot act as guardian of the estate until you post the bond and complete qualification. Generally, after the judge signs the Judgment, the County Surrogate will promptly prepare the bond paperwork that you will need to take to the bond company.

The court cannot recommend a bond company. Through a local insurance agent, you are free to choose a licensed bond company from which to purchase the bond.

A bond company will likely require your completion of an application including information about your finances and credit history as well as financial data about the guardianship estate. If approved for the bond, you must post the required bond—that is, file proof of the bond with the County Surrogate—in order to qualify as guardian of the estate.

[†] See Glossary of Terms

3. Guardian Limitations / Restricted Assets

When a court restricts an asset it means that you are not allowed to use, sell, or transfer that restricted asset without the court's approval. The court can restrict any asset of the protected person's estate but typically restricts real property. When the court restricts an asset, the restriction is outlined in the Judgment and the Letters of Guardianship so that all parties know what you can and cannot do as guardian of the estate.

If the court restricts an asset, you will not need to have its value covered by the bond. However, if you request that the restriction be lifted, the court may order that a bond be posted for the asset to be unrestricted.

Most often, this occurs when a guardian applies for court approval to sell real property that was previously restricted. If the proposed sale is granted, the amount of the guardian's bond is typically increased by the estimated proceeds of sale, less any related expenses (i.e., realtor's commission, closing costs).

RESTRICTED ASSETS ARE OUTLINED IN THE JUDGMENT AND THE LETTERS OF GUARDIANSHIP SO THAT ALL PARTIES KNOW WHAT YOU CAN AND CANNOT DO AS GUARDIAN OF THE ESTATE.

4. Access and Manage Protected Person's Account(s)

In order to manage a guardianship bank or brokerage account, to do business on behalf of the protected person, you will need to notify the financial institution of your appointment. When you first meet with the financial institution be sure to bring an up-to-date short certificate, along with a copy of the Judgment. Most banks' legal departments will want to see your short certificate in order to allow you access to the account. Also, if you have access to the protected person's social security number, date of birth and bank account number(s), be sure to bring that information with you as well.

☑ **DO NOT** USE YOUR OWN SOCIAL SECURITY NUMBER IN OPENING GUARDIANSHIP ACCOUNTS.

☑ **DO NOT** COMMINGLE GUARDIANSHIP FUNDS WITH YOUR OWN MONEY.

☑ **DO** RETITLE ASSETS.

4.1 Open Guardianship Account(s)

OBTAIN A TAX IDENTIFICATION NUMBER FOR THE GUARDIANSHIP ESTATE.

Upon appointment as guardian of the estate, you must open a checking account, and if appropriate, a savings or money market account for the guardianship estate. You must not use your own Social Security number in opening the guardianship account(s). For information about obtaining a tax identification number, contact the Internal Revenue Service (IRS) by visiting: WWW.IRS.GOV.

4.2 How Should Assets be Retitled?

Once you have presented your short certificate of guardianship, the account(s) will be retitled into the name of the guardianship. The way the account is titled depends on the institution; some may title the account as "Jane Doe, incapacitated person, by John Doe, guardian"; others may title it as "Jane Doe" and then the next line will read "John Doe, guardian of the estate."

The purpose of retitling accounts is to notify the institution (e.g., bank, brokerage firm, Department of Motor Vehicles) that you are an authorized person who should be directing how the asset is held, spent, or managed. If the incapacitated person has more than one bank account, then you should consider combining the funds from these accounts into a singular guardianship account—being mindful of the Federal Deposit Insurance Corporation (FDIC) coverage limits.

How Should Assets be Retitled? (continued)

If you are responsible for a large guardianship estate, it is advisable to consult with an accountant or financial advisor as to the management of the estate.

NOTE: Assets titled as Payable-on-Death or Transfer-on-Death to an individual are considered part of the protected person's estate plan, which you have an obligation to maintain. *See* section 5.5 Pay/Transfer on Death of this guide for more information regarding how to handle assets that are titled in this manner.

4.3 Recording Transactions

You should be very careful not to let any other individual have access to any guardianship bank accounts you manage.

While there is no law that prohibits you from using a debit card or cash to transact business on behalf of the protected person, it is best to avoid these methods whenever possible. Debit cards can be easily accessed by another individual, and it is difficult to prove that a cash transaction was used for the benefit of the protected person.

If it is necessary to use cash for a purchase, be sure to keep all receipts to prove the purchase was for the benefit of the incapacitated person. If there is a challenge to your handling of the guardianship assets, you may be required to produce the receipts to back up the expenditures.

5. RECORDKEEPING

5.1 What Types of Records Should You Keep?

GOOD PRACTICE TIPS

☑ MAINTAIN THE ASSETS OF THE INCAPACITATED PERSON SEPARATELY AND *DO NOT* ***COMMINGLE***[†] WITH THOSE OF THE GUARDIAN OR OTHERS.

☑ DEVELOP AND MAINTAIN A RECORDKEEPING AND STORAGE SYSTEM FOR ALL OF THE PROTECTED PERSON'S DOCUMENTS.

You are required to keep records of the income and expenses you manage as the guardian of the estate. The types of records you retain depend on factors such as the value of the estate, the types of assets that you handle, and the type of reporting required to be submitted to the court, if ordered in the Judgment. Such records may include bank statements, brokerage statements, invoices, receipts, and any other record you need to support your efforts as guardian of the estate.

As noted earlier, the court may order you to produce records including receipts to back up your expenditures from the guardianship estate, ensuring that the expenses benefited the protected person. Receipts are vital in that they show what was actually purchased, not just how much was paid. The information will ensure all parties know the expenses you are paying are for the benefit of the protected person.

5.2 Tracking Minimal Assets/Estates

WHEN THE PROTECTED PERSON RESIDES WITH THE GUARDIAN, RECEIPTS FOR THE PROTECTED PERSON'S SHARE OF HOUSEHOLD EXPENSES ARE NOT REQUIRED.

In some cases, guardians handle estates for protected persons who reside with the guardian or others as part of the household unit (e.g., a disabled adult child who lives at home with the guardians). It is acceptable for the assets or income of the protected person to be applied to cover a portion of household expenses. In such cases, the guardian is not expected to have receipts reflecting the protected person's share of household groceries or utilities. However, the guardian should report the total amount of money used from the guardianship estate to cover the protected person's share of such expenses. *For further information about this topic, see the Guide to Guardianship Reporting Forms or the related form(s) instructions posted on the Judiciary website* (HTTP://WWW.NJCOURTS.GOV/GUARDIANSHIP).

[†] See Glossary of Terms

5.3 Original Papers

You should maintain the original papers for all important documents, such as those listed below.

- Life insurance policies
- Insurance cards
- Health insurance
- Car insurance
- Home insurance
- Deeds
- Titles
- Birth certificates
- Death certificates

5.4 Retention Period

The length of time you maintain records for the protected person depends on a number of factors. At a minimum, it is recommended you keep all records regarding your activities as a guardian for as long as you are acting as guardian.

Keep in mind, however, that other laws may require you keep records for longer periods of time. It is typically good practice to follow the record retention requirements outlined by the Internal Revenue Service. *For further information, see the Frequently Asked Questions (FAQ) section of this guide.*

5.5 Pay/Transfer on Death

As the guardian of the estate, you have an obligation to maintain the estate plan of the protected person. Assets titled as Payable-on-Death or Transfer-on-Death to an individual, as set forth in a Last Will and Testament or a Trust, are considered part of the protected person's estate plan.

ASSETS TITLED IN THIS MANNER MUST BE USED ONLY AFTER ALL OTHER ASSETS HAVE BEEN EXHAUSTED.

For example, if you have a checking account, savings account, brokerage account, and an IRA, and that IRA has a Payable-on-Death beneficiary, you must use all the other assets to maintain the protected person's welfare first, before you use the assets held in the IRA. The reason for doing this is to protect that asset and have it available for the beneficiary, thereby fulfilling the protected person's final wish. This also applies to assets that are specifically gifted to a particular person in either the Last Will and Testament or trust of the protected person. You should be familiar with these documents and any designated beneficiaries named within them.

6. Notice to Service Providers

When contacting the protected person's service providers (utilities, etc.) to request future statements be sent to your address for payment, it is good practice to provide a short certificate for their records. This request should be made as soon as possible after your appointment. This will ensure that you receive the information necessary to pay the financial obligations of the protected person in a timely manner, as well as that the providers only take direction from you regarding the account.

You should also process a "change of address" request with the United States Postal Service to make sure that you receive all correspondence of the protected person. This will ensure that you are aware of all debts owed by the protected person, and that you are aware of all assets of the protected person.

NOTICE TO SERVICE PROVIDERS HELPS TO ENSURE:

(1) BILLINGS AND OTHER CORRESPONDENCE ARE RECEIVED TIMELY BY YOU; AND

(2) SERVICE PROVIDERS ONLY TAKE DIRECTION FROM YOU.

7. GUARDIAN REPORTING

Generally, an individual appointed as a guardian of the estate of an incapacitated person must periodically report to the court regarding the guardianship. Most guardians of the estate are required to report every twelve (12) months; however, the Superior Court judge who established the guardianship may order a different reporting frequency.

YOU MUST CONSULT THE JUDGMENT TO DETERMINE WHEN YOU ARE REQUIRED TO FILE AN ACCOUNTING TO THE COURT.

7.1 Guardianship Estate Inventory

Unless waived by the court, a guardian of the estate must file an ***inventory***[†] of the guardianship assets, typically within ninety (90) days of the date of the Judgment. This requirement, or waiver, will be stated in the Judgment.

The value listed on the inventory for a particular asset must be the value as of your date of appointment. All assets of the protected person's estate should be listed on the inventory. This list should include, but is not limited to, the type of assets shown below.

- Bank accounts
- Brokerage accounts
- Annuities
- Life insurance policies (*the cash surrender value*)
- Real property (*homes, vacant land, and burial plots*)
- Automobiles
- Jewelry/artwork/antiques
- Household items
- Cash/coins

A form of Guardian Inventory has been approved and is posted at:

HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11799_GRDNSHP_INVENTORY.PDF

For further information about determining value and documenting assets in order to prepare the inventory, see the Frequently Asked Questions (FAQ) in this guide.

[†] See Glossary of Terms

7.2 What is a Guardianship Accounting (i.e., Periodic Reporting)?

A guardian's accounting contains a summary of financial transactions that have taken place in the previous year of his or her administration as guardian of the estate. It contains information about the beginning value of assets held by the protected person's estate as of the date of your appointment as well as the ending balance of the assets as of the last date of the accounting period.

The initial beginning value of the assets held by the incapacitated person should generally mirror the value set forth in the Guardian Inventory. Any difference should be explained in the accounting. The transactions (receipts, disbursements, gains, losses and other adjustments) outline what happened in the middle to cause the beginning and ending balances to change.

7.3 Comprehensive Accounting Form versus EZ Accounting Form

THE DEGREE OF DETAIL REQUIRED DEPENDS ON THE VALUE OF THE ASSETS HANDLED BY THE GUARDIAN OF THE ESTATE.

The general principles set forth above regarding guardian reporting apply whether you are filing a ***Comprehensive Accounting***[†] or an ***EZ Accounting***[†]. However, the type of reporting form that you must file will be stated in the Judgment.

Sometimes, guardians of the estate are appointed for individuals who have little or no assets. Typically, such guardians *will not* need to file a Comprehensive Accounting, which is a lengthy form to which account statements must be attached. These guardians will generally be required to file a shorter, simpler form known as an EZ Accounting form.

Note that instead of filing a Judiciary form, it is possible that a Judgment may direct periodic filing of a copy of a Social Security Representative Payee Report for the most recent reporting period, or of a formal accounting.

For further information on financial reporting, see the Frequently Asked Questions (FAQ) section in this guide.

[†] See Glossary of Terms

The Comprehensive Accounting or EZ Accounting, like any guardianship report, must be filed along with a ***Report of Guardian Cover Page***[†]. If there are multiple co-guardians of the estate, all co-guardians may sign a single report. To assist you in determining how much information must be presented, you should review the separate Guide to Guardianship Reporting Forms.

ALL GUARDIAN REPORTS MUST BE FILED ALONG WITH A REPORT OF GUARDIAN COVER PAGE.

Detailed instructions are provided along with each online form, which can be completed on a computer and then printed (or completed by hand). The report forms are posted online on the Judiciary website, as listed below.

Report of Guardian Cover Page
HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11797_GRDNSHP_RPT_GRDN_COVER_PG.PDF

EZ Accounting Form
HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11800_GRDNSHP_EZ_ACCOUNTING.PDF

Comprehensive Accounting Form
HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11801_GRDNSHP_COMPREHENSIVE.PDF

Questions about filing guardianship reporting forms should be directed to the appropriate Surrogate's Court; see the link below for contact information.

Directory of New Jersey County Surrogates
HTTP://WWW.NJCOURTS.GOV/DIRECTORY/SURROGATEROSTER.PDF

For further information about filing accountings, see the Frequently Asked Questions (FAQ) in this guide.

8. GUARDIANSHIP MONITORING PROGRAM (GMP)

The New Jersey Judiciary ***Guardianship Monitoring Program (GMP)***[†] is a statewide court program established in 2013 to monitor and support guardians in their handling of the affairs of incapacitated individuals. The program is committed to helping ensure that these vulnerable members of society are treated with dignity and respect, while also assisting guardians with their challenging role.

> THE PURPOSE OF THE GMP IS TO SAFEGUARD INCAPACITATED INDIVIDUALS FROM POTENTIAL ABUSE, NEGLECT, AND EXPLOITATION BY COURT-APPOINTED GUARDIANS.

Judiciary staff as well as appointed and trained court volunteers review guardianship case information, including inventories and certain periodic reports submitted by guardians. The purpose of this review is to ensure that each guardian is handling the affairs of the incapacitated individual properly. The review is also intended to detect whether the protected person is subjected to abuse, neglect, financial exploitation or other problems. Cases in which such concerns are revealed are then referred to appropriate court leaders for additional review, as well as follow up as needed. This follow up may include a referral to a Superior Court, Chancery Division, Probate Part Judge when necessary.

It is important for guardians to know that certain periodic reports submitted to the court will be reviewed through the GMP. In accordance with their appointment, a guardian must cooperate with Probate Part judges, court staff and volunteers who may contact you for additional information or to provide direction regarding your guardianship matter.

For more information about the GMP, visit: NJCOURTS.GOV/GUARDIANSHIP.

[†] See Glossary of Terms

9. Substituted Judgment/Best Interest

Your role as the guardian is to listen to the incapacitated person and ensure that their preferences are being met as long as it does not cause harm. You are in a position to make decisions for the protected person in one of two ways:

1. using substituted judgment; or
2. based on the best interest standard.

9.1 Substituted Judgment

When making decisions using substituted judgment, you are doing exactly as it sounds: making the decision that the protected person would make if they had the capacity to do so. To the extent the protected person can understand the issue at hand, you have an obligation to discuss the decision you are going to make with the protected person and listen to their preferences in that situation.

SUBSTITUTED JUDGMENT IS APPLIED WHEN YOU MAKE THE DECISION THAT THE PROTECTED PERSON WOULD MAKE IF THEY HAD THE CAPACITY TO DO SO.

For example, if you believe it would be appropriate to sell an asset belonging to the protected person, you should discuss this with them. Try to put it in terms that they have the ability to understand. Discuss the benefits and the consequences of the decision you are about to make. Listen to their preferences and the reason for making the decision.

When using substituted judgment it is also helpful to talk to other family members or friends about conversations they have had with the protected person.

- Has the protected person ever talked about their preference for liquidation of their assets?
- Did they want that particular asset to be set aside as a gift for a friend or family member?

YOUR ROLE IS TO ENSURE THAT THEIR PREFERENCES ARE BEING MET AS LONG AS IT DOES NOT CAUSE HARM.

Your job is to determine what their preferences were when they were still capable of making those decisions.

9.2 Best Interest Standard

Making decisions using substituted judgment may be easier for a guardian of the estate dealing with someone who becomes incapacitated later in life as opposed to an adult who has been disabled since birth.

When dealing with an adult who becomes incapacitated later in life, they likely had capacity and had the ability to understand cause and effect relationships. As such, they have likely discussed their preferences before they became incapacitated and you may have a better understanding of what they want.

YOU WOULD BE MAKING YOUR DECISION BASED ON WHAT YOU BELIEVE TO BE IN THE PROTECTED PERSON'S BEST INTEREST.

With an individual who has been disabled since birth, this may be more difficult. In those situations (or in situations where the incapacitated person's preferences may cause serious harm or injury), you would be making your decision based on what you believe to be in the protected person's best interest.

9.3 Tough Decisions

It is never easy to make a decision for another adult that goes against their wishes, but you must keep in mind that your friend or family member does not have the ability to truly understand the consequences of their decision. Ultimately, the decision is yours. If you are making a decision that is in contrast to the stated or demonstrated preferences of the incapacitated person, you should be prepared to defend that decision.

THE COURT APPOINTED YOU AS THE GUARDIAN OF THE ESTATE—TO MAKE THE TOUGH DECISIONS.

10. GIFTING

10.1 Accepting Gifts from the Protected Person

It is typically looked at as a conflict of interest for you to accept any gift from the incapacitated person without first seeking court approval. The general rule is that you cannot and should not accept gifts from the protected person.

10.2 Giving Gifts

If you know at the time of the guardianship action that you may want to continue a plan of gifting and/or give gifts beyond those previously made by the incapacitated person, such as for tax savings, then you should consider requesting that the Judgment include specific provisions regarding gifting.

THE JUDGMENT SHOULD EXPLICITLY ADDRESS THE EXTENT OF YOUR AUTHORITY, AS GUARDIAN, TO MAKE GIFTS FROM THE GUARDIANSHIP ESTATE.

In New Jersey, a guardian of the estate of an incapacitated person is not automatically authorized to give gifts from the guardianship estate. Even if such gifts may serve a valid purpose, such as minimizing tax exposure, others may later question your authority and/or motive. Thus, it is always best that the Judgment explicitly address the extent of your authority, as guardian, to make gifts from the guardianship estate. Note that you also may apply for court approval each time you wish to give gifts from the guardianship estate.

10.3 General Gifting Considerations

A GUARDIAN WHO USES FUNDS FROM THE GUARDIANSHIP ESTATE TO GIFT OTHERS—**WITHOUT COURT APPROVAL**—COULD BE REQUIRED TO REIMBURSE THE ESTATE.

If you are seeking authority to provide a gift to someone from the incapacitated person, you should be prepared to supply the court with all the information shown below.

- The protected person's estate plan
- Whether there is a pattern of prior gifting
- The potential tax savings if the gifts are authorized

General Gifting Considerations (continued):

- The size of the estate
- The protected person's income and expenses
- The physical and mental condition and life expectancy of the protected person (the court wants to ensure that the gift would not diminish the protected person's ability to meet their needs during the course of their lifetime)
- The likelihood that the protected person's disability may cease or improve
- The likelihood that the protected person would make this gift if they were able to consent (this is an example of how substituted judgment comes into play in your decision making)
- The ability of the protected person to consent to the gifts

11. Payment for Service as the Guardian of the Estate

11.1 Commissions and Reimbursement

You are entitled to payment for services as the guardian of the estate of an incapacitated person. New Jersey statutes set forth specific ***commissions***[†] that may be taken by a guardian of the estate, based upon the amounts of corpus (that is, the principal of the estate) and income on the estate.

You are also entitled to reimbursement from the protected person's estate for any money you pay out of pocket for their benefit. For example, if you pay for a filing fee with the court, you would be entitled to be reimbursed for that expense.

QUESTIONS REGARDING THE AMOUNT OF COMMISSIONS THAT YOU MAY TAKE SHOULD BE DIRECTED TO AN ATTORNEY.

You have the option of applying to the Superior Court for approval of payment to yourself and/or others for providing services outside of standard guardianship duties. This can be especially helpful in situations where individuals, such as relatives of the incapacitated person, question your actions as guardian of the estate.

11.2 Attorney's Fees: Can You Hire an Attorney?

Yes, you may hire an attorney and you are entitled to have the fees for that attorney paid for by the protected person's estate—*as long as the court determines that the fees are reasonable and necessary*.

As guardian, you may apply to the court in advance for authorization to expend up to a specific amount for attorney's fees, to avoid any dispute as to whether such fees should be paid by you or by the guardianship estate.

[†] See Glossary of Terms

12. Action Required Upon Protected Person's Death

YOUR RESPONSIBILITIES AS GUARDIAN OF THE ESTATE DO NOT END WHEN THE PROTECTED PERSON DIES.

When the protected person dies, you must promptly notify the Surrogate's Court and forward a copy of the death certificate upon receipt. You should consult the Judgment to determine if you are required to notify anyone else within a specified period of time.

The death of the incapacitated person terminates the guardianship. However, the guardian is still responsible to account for funds and assets of the guardianship estate. In extraordinary circumstances, governed by statute, the guardian may handle burial and funeral costs and *may* pay certain fees for administration or probate.

If you are in doubt about the action required when the protected person dies, seek legal advice from an attorney. You will find contact information for local lawyer referral services using the link below.

County Lawyer Referral and Legal Services Offices
HTTP://WWW.NJCOURTS.GOV/PROSE/10153_DEPTYCLERKLAWREF.PDF

FREQUENTLY ASKED QUESTIONS (FAQ)

Q: What is the difference between substituted judgment and best interest?

A: When using substituted judgment, a guardian makes a decision that the protected person would make if he or she had capacity, typically based on the preferences previously expressed by the individual. In contrast, a decision made based upon best interest requires the guardian to determine what he or she believes would be best for the incapacitated person, either without knowledge of the protected person's wishes or because doing what he or she wants would be unreasonably dangerous or impracticable.

Examples: (1) Consider a situation in which an incapacitated person owns a valuable sports car that he can no longer use. Although the car is unused, the protected person wishes to keep it stored in an expensive garage. *Using substituted judgment*, the guardian would keep the car and continue paying the garage fees as long as possible because this is what the incapacitated person wants. (2) In contrast, if the guardian determines that it is impractical to honor the expressed preference to keep the car because of other expenses, then *applying a best interest approach* the guardian could sell the car.

As illustrated by the above examples, a guardian should first attempt to apply substituted judgment, in order to achieve the known and reasonable preferences of the protected person. If the incapacitated person's wishes are unknown, or if fulfilling them would be dangerous or impractical, then the guardian should shift from substituted judgment to a best interest approach.

Q: Is it really necessary to keep all records – even invoices and receipts – to show the expenses paid from the guardianship estate?

A: Determining what records to keep can be challenging, especially if the guardianship is complicated by factors like family conflict, prior financial mismanagement, or complex and valuable assets. While the same basic rules apply to all guardians of the estate, each guardianship is unique. Some cases will require greater vigilance in recordkeeping. When in doubt, consult an attorney for guidance tailored to the specific facts of your case. Below are some different scenarios for your reference.

Scenario 1: In some cases, parents care for their disabled adult child in their own home, applying modest public benefits received by the protected person towards shared household expenses. When there are no other relatives or

persons who might question a guardian's spending, detailed records and receipts may never be needed to justify certain expenses in court.

Scenario 2: In other cases, incapacitated persons reside in developmental centers or group homes that take care of payments for expenses like housing, food, and clothing. The guardian may do nothing other than turn over benefits to the facility to make those payments. When the guardian is not directly paying for each item needed by the protected person, maintaining receipts for these types of payments would be impracticable to produce.

Scenario 3: Perhaps the guardianship was hotly disputed from the beginning, with different family members and/or friends seeking to be appointed as guardian. Those who are not selected by the court may question the motives of the person appointed as guardian. As a result, they may apply to court for proof that he or she is doing the job properly.

Scenario 4: An incapacitated person may have been financially exploited prior to the establishment of the guardianship, and there may be ongoing legal proceedings regarding his or her assets. The guardian may have to keep detailed records in order to document exactly what assets and income were received when he or she took over handling the estate.

Scenario 5: Still other guardianships involve estates of great value – in the millions of dollars – where the amounts spent by the guardian may be questioned by prospective heirs of the incapacitated person.

Q What is the most recent guidance from the Internal Revenue Service (IRS) about the retention of financial records?

A: Keep copies of your filed tax returns. They help in preparing future tax returns and making computations if you file an amended return. For general information about the retention of financial and/or tax records, records which may also support guardianship accountings, visit: WWW.IRS.GOV.

Q: When preparing an inventory, how do I determine the value of assets?

A: The (cash) value of bank accounts, brokerage accounts, annuities and/or life insurance policies will be the value on the date you were appointed. A reliable way to determine the value of an automobile would be to use the Kelley Blue Book valuation.

Determining the value of other assets may be a little more difficult. Appraisals may be obtained for homes, jewelry, artwork or antiques. Appraisals can be very costly. If it is not your intent to liquidate the asset in the very near future, and since the value of such assets can change significantly in a very short period of time, it may be best to provide a reasonable estimate of the asset's value—instead of seeking an appraisal. Be sure to note on the inventory any values that are estimated.

Q: How much detail should I include in the inventory?

A: You should include as much detail as is necessary to reasonably identify the asset. For example, if the incapacitated person has a checking account at Bank of America, you would document it as "Bank of America checking account" and provide the last four digits of the checking account number.

When documenting an automobile, you should include the make, model, year and vehicle identification number (VIN). You should include the address and parcel number for real estate.

Documenting household items on an inventory can be a little more difficult. Some guardians will include a lump sum value of miscellaneous household property and others will include details such as one sofa, one end table and one coffee table. No matter the amount of detail you choose to record, you may want to photograph or video record the personal property. This step protects you in the event that persons interested in the assets of the guardianship estate claim that assets are missing or mischaracterized in the inventory.

Q: What is the schedule for filing periodic guardian reports?

A: If ordered to account annually, the due date will be based on the anniversary of your Judgment date. The first annual accounting should include all activity from the date of appointment through and including the last day of the twelfth month following the appointment. Subsequent accountings must be filed in accordance with the schedule set forth in the Judgment or any subsequent Court Order modifying the Judgment.

Q: What if the Judgment directs me to file something other than a Judiciary guardianship report?

A: Particularly for financial reporting, the Judgment may direct a guardian to file a Judiciary form – the Guardian Inventory, Periodic EZ Accounting, or Periodic Comprehensive Accounting – or another document. If the person subject to guardianship receives Social Security benefits but has no other assets, then the court may direct the guardian to file a copy of the Social Security Representative Payee Report for the most recent reporting period. This form is not posted on the Judiciary website but can be found on the Social Security Administration site, here: WWW.SSA.GOV/FORMS. It should be filed with a Report of Guardian Cover Page.

In other situations, especially if a guardianship estate is very valuable or complex, or if the guardianship was contested or a financial institution was appointed as guardian of the estate, the court may direct the filing of a formal accounting. Unlike informal guardianship reports, a formal accounting is filed by way of a Verified Complaint and Order to Show Cause, and it is audited by the Surrogate. There is no Judiciary form for a formal accounting. Typically, a formal accounting is prepared by an attorney, often with the assistance of an accountant. A formal accounting should be filed with a Report of Guardian Cover Page, and otherwise in accordance with the New Jersey Rules of Court.

All guardians must report in accordance with the terms of the Judgment. If you are directed to file a Judiciary form, then you must file using that form. Alternatively, if you are directed to file a different type of report, then you must do so.

GLOSSARY OF TERMS

Legal and non-legal language in the realm of guardianships is always changing. For reference, a glossary of terms is included in this guide. The terms defined in this glossary are marked with a dagger symbol (†) when they first occur in the text.

Best Interest Standard	Making a decision based on what you believe to be in the best interest of another person; for example, a guardian making a decision based upon what is believed to be in the best interest of an incapacitated person.
Commingle	To combine items and treat them the same way. In the context of guardianship, commingling refers to combining the funds of an incapacitated person with other funds, such as those of the guardian. The assets and income of the guardianship estate *must be maintained separately and cannot be commingled*.
Commissions	Compensation, set by statute, to which an individual, such as a guardian of the estate of an incapacitated person, is entitled. A guardian of the person is not entitled to commissions.
Comprehensive Accounting	One of two forms approved for guardians of the estate who are required to file periodic reports. The Comprehensive Accounting form is lengthier and more detailed than the EZ Accounting. It is appropriate when a guardian is managing a large and/or complex estate. The Comprehensive Accounting form is posted online at: HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11801_GRDNSHP_COMPREHENSIVE.PDF

County Surrogate	An elected Constitutional Officer who serves as judge of the Surrogate's Court for uncontested probate and estate matters. A Surrogate also serves as Deputy Clerk to the Superior Court for the Probate Part, as well as for adoptions in the Family Part.
EZ Accounting	One of two forms approved for guardians of the estate who are required to file periodic reports. The EZ Accounting form is shorter and much less detailed than the Comprehensive Accounting. It is appropriate when a guardian is managing a small and simple estate, such as one in which the incapacitated person has no real property and receives monthly income, like a pension. The EZ Accounting form is posted online at: HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11800_GRDNSHP_EZ_ACCOUNTING.PDF
General Guardianship	A "complete in every respect" type of guardianship in which the guardian is able to exercise all rights and powers of the incapacitated person in terms of the area of responsibility he or she is granted. Also known as full or plenary guardianship.
Guardian	An individual appointed by the court with authority over the person and/or the estate of a person who has been legally declared incapacitated. A guardian may have general or limited authority.

Guardian of the Estate	An individual appointed by the court to handle the financial affairs of another person who has been legally declared incapacitated. Unlike a guardian of the person, a guardian of the estate is not responsible for decisions regarding the personal well-being of the protected person. Rather, the guardian of the estate handles assets, income, expenses and liabilities.
Guardian of the Person	An individual appointed by the court to handle the personal affairs of another person who has been legally declared incapacitated. Unlike a guardian of the estate, a guardian of the person does not manage the financial affairs of the incapacitated person, except that a guardian of the person may serve as representative payee for Social Security benefits.
Guardianship Monitoring Program (GMP)	The New Jersey Judiciary Guardianship Monitoring Program is a statewide court program launched in January 2013 to monitor and support guardians in their handling of the affairs of incapacitated individuals. The program was implemented in all 21 counties as of July 2014.
Incapacity	Inability to govern oneself and/or to manage one's affairs. Incapacity may be general (as to all areas) or limited (as to specific areas only).
Incapacitated Person	An individual legally declared by the court as unable to govern himself or herself and/or unable to manage his or her affairs. Also known as a protected person. Formerly referred to as an incompetent or a ward.

Interested Parties	A person or agency that has an involvement with the incapacitated person who is the subject of the guardianship. Interested parties (or parties in interest) are typically the same individuals entitled to notice of the initial application for guardianship – i.e., the incapacitated person's spouse, parent, adult child, etc.
Inventory	A written summary of the assets, income, and liabilities of an individual. In the context of guardianship of the estate, an inventory is a document typically required to be filed within ninety (90) days of a guardian's appointment. The inventory must be filed on the approved form, at: HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11799_GRDNSHP_INVENTORY.PDF
Judgment	The official decision of a court in a case. For purposes of this guide, Judgment refers to the Judgment of Incapacity and Guardian Appointment, also known as the Judgment of Incapacity and Order Appointing Guardian.
Least Restrictive Alternative	The most minimally restrictive form of intervention appropriate to address a situation, enabling the incapacitated person to maintain as much independence as possible without putting him or her in danger.
Letters of Guardianship	Documents issued by the County Surrogate upon an individual's qualification as guardian, after the entry of a Judgment by the Superior Court. Proof of a guardian's authority.

Limited Guardianship	A less intrusive, more individualized, type of guardianship in which a guardian is appointed with authority as to some – but not all – areas. A limited guardianship is established based upon a court's finding that the person alleged to be incapacitated lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself.
Protected Person	Another term for an incapacitated person, that is, an individual legally declared by the court as unable to govern himself or herself and/or unable to manage his or her affairs. Formerly referred to as an incompetent or a ward.
Qualification	A process conducted before the County Surrogate, or Surrogate's staff, following entry of a Judgment. As part of qualification, the person appointed as guardian affirms his or her willingness to fulfill the duties of a guardian. If a bond is required, the bond must be posted in order for the guardian to qualify and obtain Letters of Guardianship.
Report of Guardian Cover Page	A general information form required to be filed along with any other guardianship reporting form(s). This form may be signed by all co-guardians of the person, or by all co-guardians of the estate. Available online at: HTTP://WWW.NJCOURTS.GOV/CIVIL/FORMS/11797_GRDNSHP_RPT_GRDN_COVER_PG.PDF

Restricted Assets	Assets over which a guardian of the estate does not exercise full control. The most common restricted asset is real property. The restriction can be found in the Judgment and sometimes the Letters of Guardianship. It typically provides that the guardian of the estate "cannot sell, transfer, mortgage, or otherwise encumber the real property of the incapacitated person absent court approval."
Service	Delivery of papers in a legally appropriate way. For example, notice of an application for appointment of a guardian is served upon the alleged incapacitated person by *personal service*, meaning that copies of the papers are personally delivered. For more information, see New Jersey Rules of Court (Rule 1:5) at: HTTP://WWW.NJCOURTS.GOV/RULES/INDEX.HTM
Short Certificates	Short forms of the Letters of Guardianship, stating that by Judgment of a particular date, the guardian was appointed with authority of the person and/or estate of the named incapacitated person. A short certificate will state that as of the date it was issued, the guardianship remains in effect. Additional short certificates may be purchased by a guardian, from the Surrogate, for $5.00 each as long as the guardianship remains in effect. Unlike the original Letters of Guardianship, short certificates should be provided to banks, service providers and other institutions that require proof of a guardian's authority.
Substituted Judgment Standard	Making a decision based upon what you believe that the protected person would do if they had the capacity to make the decision.

Superior Court Judge	For purposes of guardianships, the judge of the Superior Court, Probate Part, who decides if the alleged incapacitated person is in fact incapacitated and in need of a guardian. The Superior Court judge makes the substantive decisions about the guardianship, including the determination of capacity and the choice of guardian. The Superior Court judge conducts any hearing(s) and signs the Judgment.
Surety Bond	A contract between at least three parties: the obligee (the party who is the recipient of an obligation), the principal (the primary party who will perform the contractual obligation) and the surety (who assures the obligee that the principal can perform the task). A bond functions much like an insurance policy so that if the guardian of the estate misappropriates (steals) or misuses the money, or makes some other mistake, the incapacitated person will be protected. The price of that insurance policy (the bond premium) can be paid from the guardianship estate.
Surrogate's Court	A county office headed by the County Surrogate that may be in the same location as the Superior Court or may be in a different location. Probate Part actions are filed with the Surrogate's office, including actions to appoint a guardian. It is also where the guardian goes to qualify after entry of the Judgment.

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Acting Administrative Director of the Courts

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