

Assisting the Guardian of an Incompetent Adult

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Abstract

The following is a suggested form of a memorandum to be provided by lawyers to a new general guardian of an incompetent adult. This document will assist the guardian in understanding the extent of his or her responsibilities and the need to consider obtaining counsel and court approval before taking many actions on behalf of the ward.

Memo of Information for [Name of Guardian]

General Guardian of Adult Ward

This memorandum is intended to provide you useful guidance regarding your recent appointment as general guardian for [ward's name], your ward. You were appointed guardian on [date of qualification]. The guardianship estate will be subject to the supervision of the clerk of court of [name of county], and the file number in the clerk's office is [estate file number].

The related file at the clerk's office regarding the hearing adjudicating incompetency is [special proceeding file number]. This memorandum summarizes many of your duties. We suggest that after you have read this that we meet to answer any questions you may have, and to discuss in more detail how you should carry out your duties as guardian.

Appointment

The "Letters of Guardianship" received from the clerk is the document that shows your authority to act as guardian. You may need to present it at various times, such as when you wish to withdraw funds from, or close, any existing accounts or when you open new accounts as guardian. Whenever possible, you should show the original certified document (with the embossed seal) and leave a photocopy rather than the original.

Getting Started

As a newly appointed guardian, you first need to take control of all the ward's assets and prepare an inventory of those assets. Under North Carolina law, the inventory must be filed with the court within 90 days of your appointment as guardian. The first steps in this will be to make a listing of all property, and then to appraise assets as needed. Since preparing this inventory can take some time, we need to go over the information that you assemble well in advance of the due date for filing. If necessary we can seek an extension of time for filing this inventory.

A. Taking Control

To take control of the ward's assets you initially should examine all of the ward's papers (bank statements, tax returns, checkbook registers, etc.) to search for assets. You should take physical possession of personal property (such as furniture, car, jewelry, books or tools). Jewelry and other valuable personal property should be put into a safe deposit box opened in your name as guardian ("[guardian's name], guardian of the estate of [ward's name]"). You must maintain adequate insurance against damage on all property under your care.

Existing bank accounts in the ward's name should be closed and the funds deposited in new accounts opened in your name as guardian. You should get copies of the signature cards for those old accounts, at the time you close them. We suggest that the new guardianship account be titled as "[client's name], guardian of the estate of [ward's name]." If an account is held jointly with a third party, you will need to determine what amount belongs to each joint owner. When the ward is a joint owner of an account consisting entirely of the ward's own funds (especially where the other owner's reliability is questionable) you should consider withdrawing the entire account.

While you will have to account to the joint owner, that is easier than recovering funds improperly withdrawn by a third person. Please contact us before paying funds over to a joint tenant because it may be necessary to obtain court approval. In any event, never mix the ward's money with your own. Also, you should never borrow money from the estate or make gifts (even gifts to a charity or religious institution) from the estate without prior court approval.

Once accounts for the guardianship estate are opened, you may endorse and deposit any checks payable to the ward. You must carefully track all amounts spent or received, and have good documentation for all expenditures, as discussed below under "Accounting."

If the estate contains insurance policies, you should try to locate original policies, and contact the insurer to determine status of the policy, including whether the premiums are up to date. You may continue, modify, or terminate health and disability policies.

Any securities should be changed to your name as guardian. Be sure the company has the correct address to which dividends and interest payments may be sent.

Real property should be left in the ward's name. To eliminate any danger of the ward's selling real property to a good faith purchaser who doesn't know of the guardianship, a notice of the guardianship should be recorded in the county where the property is located. You must also be sure that adequate insurance is maintained on all of the ward's real property. You may maintain or repair the ward's residence as you reasonably believe fit, but you should seek the court's prior approval for any substantial expenditures.

You may continue in force any life insurance policies, annuities, mutual funds, and other dividend reinvestment plans, or retirement, profit-sharing, and employee welfare plans. Before you terminate, assign, or change beneficiaries on these, you should contact us since it may be best to obtain court approval first.

This memorandum cannot address all possible assets, so let us know if you are unsure about how to handle a particular item. There are also procedures for recovering assets if you learn of their existence but cannot get them back from whoever is holding them. We can talk about this as needed.

You should instruct the post office to forward all mail to your address. You may find a separate post office box helpful for this. You should phone all credit card companies to immediately cancel cards and follow up in writing. You should cancel utilities (electric, gas, oil, water, and cable television) to the home if the ward has moved out. Be sure to request that all future utility bills be sent to your address.

You should take steps to guard against unauthorized use of the ward's car, even by the ward. It will likely be in the ward's best interest that any car be sold, and you should seek pro rata refunds of any insurance that can be canceled. If you decide to store the car, be sure that it is adequately insured.

B. Preparing the Inventory

The purpose of the inventory is (1) to inform the court and all interested parties of the size of the estate and indirectly of the income likely to be available; (2) to help determine the sufficiency of the bond; and (3) to set the initial amount for which the guardian is held accountable and on which the continuing accountings must be based.

The original inventory should list all the assets owned by the ward as of the date of your appointment. Any funds received after that date will be listed either on a supplemental inventory,

or on the annual account. The inventory will not list expenditures; instead, expenditures will continue to be tracked and listed on the annual accounts.

Please provide us with all of the information needed for the inventory as quickly as possible so that we may have time to prepare the inventory and obtain additional information from you as needed.

Accounting

No later than the date that is one year and 30 days after you were appointed guardian, and annually from then on, you must account to the court for all receipts, disbursements, and property on hand. The total value of the original inventory, plus all receipts of funds, minus all disbursements, must equal the value of the property on hand at the time of accounting. All of this information will be shown on the annual account that will need to be prepared and filed with the court. The guardianship accounts therefore must be kept accurately. It is essential that you record not only the amount of any receipts but also the source of the funds. (In my experience, very often guardians have difficulties accurately reporting receipts, because they forget to write down from whom they received checks: for example, health insurance refunds, or other occasional-type receipts). Your account also should show the purpose of all amounts spent.

The most efficient way to keep track of the ward's finances is to maintain a guardianship checking account. Be sure to keep all records you receive relating to the ward's finances, including bills, invoices, receipts, and bank statements. We will want to review these items when helping you prepare each annual account to be filed with the court.

Absolutely do not commingle the funds of the estate with your own property. All accounts held for your ward should be opened separately in your name as guardian.

As much as possible, you should keep all cash of the estate in income earning accounts, except for what you reasonably need to keep in a checking account to meet the ward's day-to-day needs.

You may find that it is necessary to maintain a small petty cash account for incidental expenditures, which you need to account for nonetheless.

You may of course deposit guardianship funds in any North Carolina bank or any insured savings and loan association or credit union. It is best to limit the amount in any one institution to the limit of their FDIC insurance. That limit is currently \$100,000. Other permitted investments are discussed below under "Managing the Estate."

Duties and Powers of Guardian

As general guardian, you have responsibilities as guardian of the person and as guardian of the estate, of your ward.

A. Guardian of the Person

As guardian of the person, you have responsibility for the ward's "care, custody, and maintenance" much like a parent is responsible for his or her minor child. You must decide where he or she will live, what doctors or nurses are employed, what daily routines are followed, and similar personal matters.

You may be liable if you negligently allow the ward to injure another person or damage property. This would depend upon your failing to exercise reasonable control over your ward. An example of this might be allowing a ward to have access to a car when he has lost his license, or access to a gun when he does not understand the dangerous nature of the weapon. You might want to seek insurance to cover you against the liability you might incur as guardian. An insurance agent should be able to advise you.

In deciding where the ward will live, you may pick any place either inside or outside of North Carolina. However, you must give preference to selecting places in North Carolina if otherwise equivalent. You should arrange for the ward to live outside of a treatment facility if possible. If a treatment facility is the only appropriate option, you need to find a community-based treatment facility such as a group home or a nursing home. You must notify the court promptly of any change in your or the ward's residence. Please note that because you are a general guardian, if you move from North Carolina you will have to give up your guardianship.

Guardianship is not the same as civil commitment. If it may become necessary to consider institutionalizing the ward in a locked facility, please discuss that with us.

B. Guardian of the Estate

Support

Your basic duty to the ward as guardian of the estate is to provide for his or her support to the extent of the net estate available. You may also provide for those legally entitled to support from the ward, and in some circumstances for other relatives if there is surplus income available and the court approves. In determining the amount of support, you should take into account the value of the estate and the needs and resources of the person being supported.

The amount that you spend in the guardianship is generally limited to the income of the guardianship estate. Before you spend any principal of the estate, you need to get prior court approval. You should contact us if that appears necessary. We suggest that you establish a budget for maintenance and support, so that we can petition the clerk in advance for authority to spend up to that amount.

Whenever there are unusual circumstances that may require a substantial expenditure of the ward's money, you should check with us about getting prior court approval. If you spend the ward's money in a way that the clerk disagrees with, then you will be personally responsible to reimburse the ward's estate for that amount.

You must keep track of who payments are made to, and for what purpose (such as "April 1, 1999, to Duke Power for electricity," or "April 15, 1999, to Dr. James for examination," or "April 17, 1999, to Kroger for groceries"). You will have to provide this information for each accounting, along with a canceled check or receipt for the payment. We suggest that you show us your bookkeeping system soon after you begin using it, to ensure that you are maintaining your records adequately.

With prior court approval you may get authorization to pay a small allowance directly to the ward for personal use; you would then not have to account for those sums except to show they were paid to him or her.

You are permitted to borrow money for the ward if you believe it is in the ward's best interests, although we would caution against doing so, except for short periods of time and a low interest rate, and even then only for unusual circumstances. However, if you wish to mortgage or sell real estate, or to lease out real estate for more than three years, you will need to get prior court approval. The requirements for approval are quite detailed so we will need advance notice of any intended mortgages or sales.

Managing the Estate

Your basic duty in managing and controlling the estate is to use the care that an ordinarily prudent person, who has been entrusted as a fiduciary with the care of another's money would use. Beyond that general duty, there are more specific guidelines, as follows.

After you have completed the inventory to determine the size of the estate, please contact us before paying debts that were incurred by the ward, since some of those debts may be voidable due to the ward's mental condition even before the guardianship.

As guardian, you may pay reasonable expenses of guardianship administration such as court costs, safe deposit box charges, storage fees, appraiser's fees, and bond premiums. Like other expenditures, you must account for these amounts.

If the ward is owed money, you should act to collect the debt and bring a lawsuit at the expense of the guardianship estate if necessary. You can act to compromise debts without court approval, but we suggest that you contact us in any such dispute to ensure that the matter is properly concluded. We can assist you in determining the best action to take to collect debts as needed.

You may abandon or relinquish property that has no value, or is encumbered such that it is worthless to the ward, but this power must be exercised carefully.

You should make sure that all necessary taxes are paid on income or property, including for years prior to the guardianship. You can get copies of past state and federal tax returns by requesting them from the tax authorities. These returns should be carefully reviewed, especially if the ward prepared them, since they might be able to be amended in a way that would result in a refund to the ward's estate. You will need to file the ward's income tax returns, which will be due April 15 of each year just like other individuals' returns. Please contact us to assist with filing these returns.

You may wish to sell estate property at some point, either because the income of the estate is insufficient for support, to pay debts, or the sale is otherwise in the ward's best interest. You may sell without court approval a limited amount of tangible personal property (such as car, furniture or furnishing) totaling less than \$1,500 for the entire guardianship administration. All other sales of property, real or personal, require prior court approval. Because detailed requirements for sale must be met in order to obtain court approval, do not enter into any agreements to sell property without first consulting us.

You may make advances to the estate and pay yourself back, but you cannot charge interest without court approval. You must be able to provide the clerk with proof of any advancements that you make, such as by receipts for expenses paid from your own funds. You may not make advances from the estate to yourself, since all payments to you require prior court approval.

If there is a durable power of attorney in place for your ward, you may decide to leave the power of attorney in place, or to revoke it. If the power of attorney remains in effect, then the attorney-in-fact serving thereunder is required to account to you as guardian for actions under the power of attorney, in the same way that he or she would have been required to account to the ward if competent.

You are not limited only to the most conservative investments for the guardianship funds. Obviously you need to keep on hand sufficient funds to cover the regular expenses of the ward. You need to be cautious with the ward's principal. However, you should consider other prudent investments that would earn income and/or appreciate in a way that would continue to provide for your ward.

Some types of investments permitted include stocks, bonds, debentures, and mutual funds. However, any such investment needs to be considered on the basis of whether it is appropriate for your ward. You are permitted to hire an investment advisor and pay his services from the ward's funds. Obviously you should not speculate with the ward's funds, and our advice would be to err on the side of caution.

Fees

A guardian is entitled to receive a fee for services, as may be approved by the court. Typically the petition for fees is filed around the time the annual account is filed each year, although if there is an unusual situation, we sometimes approach the clerk for approval of fees mid-year. The petition for fees must include an explanation either of the formula used to calculate the fee or of the nature and amount (in time) of work performed and the hourly rate charged.

Under the North Carolina statutes, a guardian's commission cannot exceed 5 percent of the receipts and permitted expenditures of the estate (other than amounts paid for attorneys' fees, guardian commissions and court costs). Whether the clerk approves the maximum permitted commissions will depend on the time and trouble involved, so we suggest you keep records of your activities as guardian.

Our Continuing Role

We will of course assist you with preparing and filing the inventory. Our work as attorneys for the ward's estate will continue to see that the tax returns are filed and the annual accountings are prepared and filed with the court. The attorneys' fees incurred by the ward for these matters will provide you certainty that the papers are correctly filed. It will also allow you to better focus your energies on your ward's care, rather than on administrative matters.

We find that meeting mid-year to review the assembled bank records and checking account ledger is helpful to you and us to ensure that all is on track for filing the annual accounting. Near the close of the accounting year, we will contact you to remind you that an account is due. It is our policy to withdraw as attorneys of record if it appears that you are not prepared to file the account in any year.

Conclusion

As you already know, being a guardian is a difficult task and it can be overwhelming at times. If you have concerns or questions, please call to ask us for help. You are not expected to know all of the answers, but you should use care to ask questions to avoid making mistakes. It is much easier to avoid making mistakes than to correct mistakes after they are made. If you act improperly as guardian, you can expose yourself to substantial personal liability.

Our office will assist you in fulfilling all of your duties. We will work hard to make your appointment as guardian less confusing and difficult for you. So, please call us whenever you need our help or have questions. One phone call can save time, money, and many problems in the long run.

With that, we wish you the very best as you act in your capacity as guardian for your ward. We look forward to working with you.

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