



# GUARDIANSHIP PLANNING *Guide*

**RUSSO LAW GROUP, P.C.**

*Estate Planning, Elder Law & Special Needs*



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## **GUARDIANSHIPS**

### **(Article 81 of the Mental Hygiene Law)**

If a person no longer has the capacity to take care of their personal and/or financial needs, help can be found through an Article 81 Guardianship proceeding.

### **THE GUARDIANSHIP PROCEEDING**

An Article 81 Guardianship proceeding is commenced by the completion and submission of an Order to Show Cause and a Petition to the Court. These documents set forth the details of why a Guardianship is needed for the Alleged Incapacitated Person (“AIP”). Essential elements of the Petition include but are not limited to: (i) observations as to the AIP’s health, (ii) observations and information evidencing the AIP’s inability to manage their personal and/or financial affairs, (iii) the members of the AIP’s family, (iv) the assets and income of the AIP, (v) the existence of any advance directives and estate planning documents, (vi) the name of the proposed Guardian(s), and (vii) the powers requested.

The Guardianship Judge reviews the Petition and signs the Order to Show Cause. The Order to Show Cause sets a hearing date and indicates the name of the Court Evaluator appointed by the Court. The signed Order to Show Cause is then served upon the AIP and anyone else who has an interest in the proceeding as required by statute or as designated by the Court.

The Court Evaluator is the “eyes and ears of the court”. The Court Evaluator will interview all of the parties to the proceeding. The Court Evaluator will investigate the allegations in the Petition and make a written report to the Court. The report will include recommendations regarding the AIP and the proceeding. The fee for the Court Evaluator’s services will typically be awarded from the funds of the AIP in the discretion of the Court. The Court may also appoint an attorney to the AIP known as the Court Appointed Counsel on a case by case basis.

### **THE HEARING**

At the hearing, the Petitioner testifies as to the need for a guardian, who they desire to be appointed as Guardian and the powers requested. The Court Evaluator testifies as to their findings and recommendations. Other witnesses may also be called. The Court typically states its conclusions at the end of the hearing in a Bench Decision.

## **TESTIFYING IN COURT**

1. Be truthful.
2. Do not guess, speculate or assume.
3. Pause after each question to formulate the main points of your answer. Do not answer so quickly that your attorney cannot object, if necessary.
4. Listen carefully to the question being asked. Concentrate and answer only the question being asked.
5. Do not volunteer information. Resist the urge to answer the question not asked.
6. Do not be concerned if you cannot answer a question. Say, “I don’t know,” or “I don’t remember.”
7. If you remember only part of the answer, state what you remember and say that you cannot remember the rest.
8. Do not think out loud.
9. Do not try to be funny, sarcastic, or say something that depends on the tone of your voice for its meaning.
10. If you do not understand a question or words in a question, do not hesitate to say so.
11. Try to maintain a confident, calm appearance during, before, and after your testimony.
12. In the event that you are shown documents, take ample time to read each document prior to answering any questions about it. Do not comment about a document you are shown, except to answer the questions asked.
13. If there are any abnormalities evident on the face of the document you are shown, do not hesitate to refer to them if they affect your answer to any question. Be prepared to state how the irregularity affects the answer.
14. Counsel may object to questions. When an objection is made do not answer until you are advised to by your attorney or the judge. If the judge sustains the objection, do not answer the question. If the judge overrules the objection, you are to answer the question.
15. Most importantly, do not become flustered. No one expects a witness to be perfect. Just listen to your attorney’s advice and do the best you can.

## **POST HEARING**

Once the Judge determines that the AIP is in fact incapacitated or is a person in need of a Guardian, a proposed Order and Judgment is prepared by the Petitioner's attorney and filed with the Court for approval. The Order and Judgment sets forth the name of the Guardian(s), the powers granted to the Guardian, and the compensation due to the Court Evaluator and/or Court appointed Counsel for their services which will be paid from the Incapacitated Person's ("IP") assets or as otherwise directed by the Court. A signed Order and Judgment is necessary for the appointment of the Guardian.

The Guardian may be required to post and file a Bond with the Court. The Guardian will also have to sign and file certain documents for their appointment, including a Consent to Act, Oath and Designation, and other Court forms. Once all documents have been filed, the County Clerk will issue a Certified Commission to Guardian, which is the document enabling the Guardian to act.

## **GUARDIANSHIP TRAINING**

The Court will require the Guardian to take a class, offered through the Office of Court Administration, to teach the Guardian about their duties and responsibilities. The training classes are also offered through the local Bar Association. The Guardian receives a Certificate of Completion at the end of the class. Local bar associations maintain information on upcoming training classes.

## **INITIAL REPORT AND ANNUAL ACCOUNTING**

The Guardian will have to file an Initial Report within ninety (90) days of being commissioned, to report on the initial assets of the Guardianship and as to the IP's well-being. The Court appoints a Court Examiner who will review the required Guardianship accountings.

Further, the Guardian will need to file an Annual Report in the month of May, setting forth their acts as Guardian for the preceding year ending December 31st. The report accounts for the Guardianship assets and the IP's well-being.

The Initial Report and Annual Reports are filed with the Court and the Court Examiner. The Court Examiner reviews the reports for accuracy and makes a written report to the Court. The Court Examiner can request that the Guardian appear to give testimony confirming the report and also to bring in the supporting information and documentation. The Court Examiner can recommend having a Guardian's powers modified, if appropriate. The Court Examiner can seek the discharge of a Guardian who fails to submit the report on a timely basis, misuses the Guardianship funds, or does not accurately report on the assets and/or income.

## **COMPENSATION TO GUARDIAN**

The Guardian can seek compensation for services rendered as Guardian. Compensation is requested when filing the Annual Report. The Court Examiner will review the request for compensation and the Court will make an Order as to same. If the guardianship assets are low, the Court can reduce the standard compensation or deny the request. The Guardian can waive compensation.

## **ASSET PROTECTION PLANNING**

A Petition can request authority to do Medicaid and asset protection planning. The Petition must clearly establish the validity of the plan and that at no time will the AIP be left without assets or Medicaid to meet the medical needs. The Courts can authorize a Guardian to implement Asset Protection Planning, Estate Tax Planning and Medicaid Planning for an incapacitated person. The Court will base its decision on whether the plan is in the best interest of the incapacitated person and whether a reasonable person would also implement such a plan.

Medicaid planning can include transferring assets to appropriate persons so that the incapacitated person's assets are not unnecessarily expended on long term care. Examples of Medicaid planning authorized by the Court include spousal transfers of all assets; transfers to a child with disabilities; exempt transfers of residences to a live-in caregiver child; non-exempt transfers to family; and signing renunciations and disclaimers of inheritances which can affect an incapacitated person's ongoing Medicaid eligibility.

Such Medicaid planning has routinely been approved in our cases and was blessed in a case decided by the Court of Appeals, the highest Court in the State of New York, which relied in part on New York Elder Law Practice, by Mr. Russo and Mr. Rachlin of the firm. Matter of Shah, 95 N.Y.2d 148, 733 N.E.2d 1093, 711 N.Y.S.2d 824, 2000 N.Y. Slip Op. 05628 (N.Y. Jun 08, 2000). However, in light of current Medicaid rules, the Courts are approaching Medicaid planning involving non-exempt transfers with caution, until they are familiar with the application of the new laws.

## **APPLICATION TO SELL OR BUY REAL PROPERTY**

A Guardian must apply to the Court for the authority to sell or buy real property for the incapacitated person. The Court will review the terms of the Contract of Sale/Purchase, the Contract price and the need for the transaction. The Court appoints an independent Certified Appraiser to certify the fair market value of the property and to determine if the Contract price is reasonable. The Court can seek modification of a Contract or reject it.

## **DEATH OF THE INCAPACITATED PERSON**

### **Post-death powers of the Guardian**

- May pay funeral expenses
- Pay post-death bills within the scope of the Order and Judgment
- Defend/maintain litigation until an estate representative is appointed
- Notify banks/creditors
- Note: The legal authority of guardian ceases on the death of the incapacitated person and the Estate Fiduciary will have authority to take the above steps on appointment

### **Guardian may NOT**

- Close bank accounts
- Incur new expenses
- Cash checks
- Pay bills other than those permitted by the Order and Judgment

### **Guardian MUST**

- Petition to render Final Report
- Be discharged by the Court
- Turn property over to the Estate

## **PROCESS FOR FINAL REPORT**

### **Verified Petition for Ex Parte Order Permitting Final Account**

Petition seeking permission to file the Final Account and the reason (i.e., the death of the incapacitated person)

### **Order for Leave to File Final Account**

This is issued by the Court ordering you to file the Accounting.

### **Final Inventory and Account**

The Final Account must be filed with the County Clerk and the Court within 60 days.

### **Order Settling Final Inventory and Account**

Once the Final Accounting is approved by the Court, the Guardian's attorney submits an Order Settling Final Inventory and Account. This Order determines the compensation due the Guardian, if any, and gives instructions concerning the distribution of the remaining assets of the decedent.

### **Ex Parte Order Releasing Guardian**

The guardian's attorney submits this Order to discharge the Guardian.

## **TIMELINE**

The following is an estimated timeline of a typical guardianship case. This is merely a guideline. The Courts, in large part, control the time frames and it is not unusual for the timeline to be longer than expected. It is often beyond the control of Petitioner's attorney.

- From Retention of Counsel to Filing of Petition	4 - 6 weeks
- Signed Order to Show Cause (OTSC)	Typically 1 - 2 weeks after filing Petition
- Guardianship Hearing	4 - 6 weeks after filing OTSC
- Order and Judgment	6 - 8 weeks after Hearing
- Bond and Commission	4 - 8 weeks after Order & Judgment signed by Judge

## **LEGAL FEES**

Russo Law Group, P.C.'s policy is to accept private payment and not court awarded fees. Before commencement of legal services, the law firm will clearly outline the services to be rendered, the fees for such services and the manner of payment. A signed written retainer agreement will be required before any legal services are rendered outlining this arrangement. In certain cases, the law firm may represent the alleged incapacitated person or an interested party who is not the Petitioner.

If the situation is adversarial, the legal fees will be considerably higher than the legal fees in a typical guardianship. The funds of the alleged incapacitated person may never be used to pay for the legal fees, unless court ordered.

## **GUARDIANSHIP GLOSSARY**

**AIP** - Alleged Incapacitated Person, the individual for who a guardian is sought is most commonly referred to as the alleged incapacitated person, or the AIP, occasionally, this person is also referred to as the respondent.

**Bond** - Evidence that the company issuing the bond insures the performance of the guardian's duties. The bond protects the incapacitated person from the misdeeds of the guardian.

**Burden of Proof** - the responsibility of proving a fact.

**Certified Copy** - a copy of a document or record signed and certified by the officer who has

custody of the original document. For example, the court clerk will certify copies of the guardian's order of appointment.

**Commission** - the written authority issued by the court authorizing or directing the guardian to carry out the duties and responsibility of their appointment.

**Court Evaluator** - a person appointed by the court in a guardianship proceeding to investigate and report to the court on the condition, affairs, and situation of the person alleged to be incapacitated. The fees of the court evaluation are paid by court order from the funds of the incapacitated person or the Petitioner.

**Decision** - a determination by the court arrived at after it has considered the facts and applicable law.

**Dismissal** - a termination of the proceeding due to not finding incapacity.

**Do Not Resuscitate Order** - an order not to attempt cardiopulmonary resuscitation in the event a patient suffers cardiac or respiratory arrest.

**Examiner** - a person appointed by the presiding judge to examine the initial and annual reports submitted by guardians.

**Exhibit** - an item that is offered to the court for its inspection.

**Expert Witness** - a witness qualified as an expert in court who will be allowed to give their expert opinion to assist the judge or jury in understanding technical subjects.

**Health Care Proxy** - a document delegating the authority to make health care decisions.

**Hearing** - a formal proceeding in which issues are considered and witnesses are heard by a judge; the hearing generally results in a final decision on those issues.

**Hearsay** - a statement made by someone outside of court attesting to some fact that is then reported to the court.

**Interim Guardian** - a guardian appointed by the court to fill a vacancy created by the death, removal, discharge, resignation, or suspension of a guardian and to serve until a successor guardian is appointed.

**Initial Report** - the report on the incapacitated person's status that the guardian is required to file with the court within 90 days after the issuance of the guardian's commission.

**Intestate Succession** - describes the passing of property to heirs when the deceased person leaves no will.



**Joint Tenancy** - a form of ownership of property by two or more people, which is characterized by a right of survivorship.

**Mental Hygiene Legal Service** - is a legal service organization that provides legal assistance to patients or residents of certain facilities within the state.

**Motion** - an oral or written application or request to the court.

**Notice** - formal way of advising interested persons of the guardianship proceeding.

**Order** - an official command by the court requiring, allowing, or forbidding some act to be done.

**Order and Judgement** - the final decision of the court setting forth the rights and obligations of the guardian.

**Order to Show Cause** - a form of notice to the respondent and other persons entitled to notice of guardianship proceedings.

**Petitioner** - the party commencing the guardianship proceeding.

**Power of Attorney** - an instrument executed by one person (the principal) designating another person to act as their agent.

**Presumptive Distributee** - a person who would be entitled to take a share in the property of the alleged incapacitated person if the alleged incapacitated person were deceased.

**Respondent** - the person for whom a guardian is sought.

**Rules of Evidence** - rules that govern the admissibility of evidence.

**Service of Process** - formal notice to respondent and other persons entitled notice of the guardianship proceeding.

**Standby Guardianship** - is a guardian appointed at the time of the appointment of the guardian to act in the event that the guardian resigns, dies, is removed, discharged, or suspended or becomes incapacitated. The standby guardian is empowered to assume office immediately upon the resignation, death, removal, discharge, suspension, or adjudication of incapacity of the guardian subject only to the confirmation of the court appointment within sixty days following the assumption of the office.

**Subpoena** - a command to appear and give testimony or show certain documents or records at a specified time and place.

**Supreme Court** - is a single court with statewide jurisdiction, and is the Court which hears Article 81 Guardianship proceedings.

**Temporary Guardian** - a guardian appointed for a limited period of time with limited powers. A temporary guardian is appointed when there is a showing of danger in the reasonably foreseeable future to the health and well-being or assets of the allegedly incapacitated person.

**Tenancy by the Entirety** - a form of ownership of property by husband and wife, with a right of survivorship.

**Tenancy in Common** - a form of ownership of property with no right of survivorship.

**Trust** - an arrangement to manage property for the benefit of another person (the beneficiary); the person who establishes the trust is known as the settlor.

**Trustee** - the person who administers the trust.

**Venue** - the county where the guardianship proceeding is commenced.

**Verified Petition** - a petition that has been sworn to by the petitioner.

The above is merely informational and not legal advice. This memorandum was published in January 2025. The above information is based upon 2025 law, unless otherwise stated. You should contact us for any changes or updates in the law. Future changes in law may render the above information inaccurate.

The appointment of a Guardian is in the discretion of the Court. The Law Firm cannot guarantee or predict a Court's findings with the regard to the appointment of a Guardian or the powers granted; or further, the relief requested by the Client.

If you have any questions regarding this memorandum or desire advice as to long term care planning, please do not hesitate to call Russo Law Group, P.C. at 516-683-1717 or contact us at [www.VJRussoLaw.com](http://www.VJRussoLaw.com).

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