

GUIDELINES

FOR COURT-APPOINTED ATTORNEYS

IN GUARDIANSHIP MATTERS

(2005 Revised Edition)



Approved by the Supreme Court
Prepared by the Judiciary-Surrogates Liaison Committee
Issued May 2005

GUIDELINES FOR COURT-APPOINTED ATTORNEYS IN GUARDIANSHIP MATTERS

Rule 4:86-4(b) obliges the court to appoint legal counsel to represent persons alleged to be mentally incapacitated. These guidelines are intended to assist a court-appointed attorney in fulfilling the requirements of the Court Rules in the representation of an alleged mentally incapacitated person.

As a court-appointed attorney for an alleged incapacitated person, it is your responsibility to meet with the alleged incapacitated person, make inquiries of persons having knowledge of the alleged incapacitated person's circumstances and his or her physical and mental state and his or her property. You must file a written report of findings and recommendations with the court at least three days before the guardianship hearing.

In many cases, upon investigation, there will be little question of incapacity and your report should clearly express this conclusion and the facts upon which it is based. However, there are cases in which the issue of mental incapacity is a close question of fact. In such circumstances, you may need to petition the court for an independent physical or psychiatric evaluation of the alleged incapacitated person by a medical or mental health professional and advance the argument that the plaintiff has not met the burden and the case should be dismissed. Additionally, the issue of who is the proper

person to be appointed the guardian of the person or of the property, or both, is sometimes present.

In all cases, a court-appointed attorney must be aware of the obligations and responsibilities inherent in the legal representation of an alleged mentally incapacitated person. The court-appointed attorney acts as an advocate for the interests of the alleged incapacitated person and takes an active part in the proceedings. *Matter of Mason*, 305 N.J. Super. 120, 127 (Chan. Div. 1997). See also the *Rules of Professional Conduct* which mandates that an attorney representing a disabled person should maintain, as much as possible, a normal attorney-client relationship with that person. *RPC 1.14(a)*.

Attorneys must be mindful that a declaration of mental incapacity need not necessarily deprive a person of the right to make all decisions. The primary duty of the attorney for an alleged incapacitated person is to protect his or her client's rights, including the right to make decisions on specific matters.

Ordinarily, an attorney should abide by the client's decisions concerning the objectives of representation and act with reasonable diligence in representing and advocating on behalf of the client. In the context of a guardianship case, this necessitates that you must try to communicate with your client, the alleged incapacitated person, and present the alleged incapacitated person's opinions and

preferences to the court, provided the opinions or preferences are not patently absurd or pose an undue risk of harm. *In the Matter of M.R.*, 135 N.J. 155 (1994).

Even if incapacity is uncontested, the alleged incapacitated person may want to contest other issues. Frequently an incapacitated person has the ability to understand matters affecting his or her own well-being. These alleged incapacitated persons may express personal opinions and preferences, for example, about the identity of the proposed guardian or where they want to live. Your task, as the court-appointed attorney, is to identify these opinions and preferences and convey them to the court. However, if a conflict between the preferences of the alleged incapacitated person and his or her best interests arise, you may wish to inform the court of the conflict and the possible need that a guardian *ad litem* be appointed. See, *In the Matter of M.R.*, 135 N.J. 155 (1994).

The following procedures typically should be observed:

1. Call the plaintiff's attorney to obtain background information. Obtain copies of the complaint, order for hearing, physicians' affidavits and any other pleadings from the plaintiff's attorney.

2. Personally interview the allegedly mentally incapacitated person so that his or her condition may be observed and reported. Attempt to converse with the client. Examine available medical records. Speak with caregivers and other persons familiar with the alleged incapacitated person's physical and mental state as well as with the alleged incapacitated person's property. Inquire into the physician's opinions about the functional abilities of the alleged incapacitated person.

3. Try to interview the person who seeks to be appointed the guardian and attempt to elicit the intentions of the proposed guardian for the future care of the alleged incapacitated person and the proposed guardian's qualifications to be guardian.

4. Make reasonable inquiry concerning the extent of the alleged mentally incapacitated person's assets. Identify any assets that are not mentioned in the plaintiff's pleadings. If questions arise about the prior handling of those assets, bring them to the attention of the court. Your inquiry should include whether the alleged incapacitated person has any property interests, as a beneficiary of a last will and testament or trust.

5. Determine whether your client has given a power of attorney in the past and, if so, who is the attorney-in-fact therein appointed, who is in possession of the power of attorney and have the powers therein ever been exercised. Obtain a copy of the power of attorney, review the same and report on its content to the court, since it may supply insight into the incapacitated person's financial condition and preferences. Also, in the infrequent circumstance where no one is seeking the guardian appointment, inquire whether the person acting the incapacitated person's attorney-in-fact is willing to be appointed guardian.

6. Inquire whether the alleged mentally incapacitated person has made a last will and testament or executed an *inter vivos* trust instrument and, if so, who is in possession of the last will and testament or trust instrument. Obtain a copy of the last will and testament or trust, review the same and report on their content to the court, since either document may supply insight into the incapacitated person's financial condition and preferences.

7. Inquire if the alleged mentally incapacitated person has prepared an advance directive for his or her health care and, if so, who is the health care proxy therein named and who is in possession of the proxy. Obtain a copy of the advance

directive for health care, review the same and report on its contents to the court, since it may supply insight into the incapacitated person's medical preferences. Also, in the infrequent circumstance where no one is seeking the guardian appointment, inquire whether the person acting as the incapacitated person's health care proxy is willing to be appointed guardian.

8. File a written report with the court at least three days prior to the date of guardianship hearing and serve a copy on the plaintiff's attorney and any other party who has appeared in the matter. The report, at a minimum, should address:

- A. The information gained and your observations as a result of your inquiries and interviews.
- B. A recommendation concerning the court's determination on the issue of mental incapacity. State your opinion on whether the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs. If applicable, propose less restrictive alternatives such as a conservatorship or a limited guardianship. If applicable, indicate in your report whether or not the alleged incapacitated person's condition warrants some personal autonomy and, if so, indicate the extent of personal autonomy that the court should consider allowing the incapacitated person to retain.

For example, the court may decide that an incapacitated person's ability to control living arrangements or certain financial decisions *et cetera*, notwithstanding the entry of the judgment of incapacity, are retained. Note. In 2000, a model guardianship judgment was approved that promotes the greater use of limited guardianships as suggested by the Supreme Court in *In the Matter of M.R.*, 135 N.J. 155, 171 (1994).

- C. State whether a guardian of the person or estate, or both, should be appointed, and if so, whether the individual seeking the appointment is suitable and appropriate. Consult R. 4:86-6(c) for priority rights for appointments.
- D. Provide a recommendation to the court concerning the amount of a surety bond that the guardian should post with the court before assuming the guardianship duties.
- E. Make a recommendation to the court whether the scope of the proposed guardian's authority should be restricted or limited. For example, should the authority of the guardian to sell or mortgage the incapacitated person's property be limited.
- F. State whether a case management plan for the mentally incapacitated person should be submitted to the court by the guardian.

- G. Report any additional property of the alleged incapacitated person that is not disclosed in the plaintiff's pleadings. State whether the alleged mentally incapacitated person has expressed any wishes for the disposition of property and/or assets. If preferences have been expressed, indicate those preferences in the report so the court may consider including them in the judgment.
- H. Provide information concerning your investigation whether the alleged incapacitated person executed a last will and testament, power of attorney, *inter vivos* trust or advanced health care directive. Make recommendations concerning whether good cause exists for the court to order that any power of attorney, health care directive, or revocable trust, created by the alleged mentally incapacitated person, be revoked, or whether the authority of the person or persons acting thereunder should be modified or restricted.
- If your recommendation is to revoke, modify or restrict any authority granted in such instruments, you should convey this conclusion to the plaintiff's attorney, so, if not previously noticed, the trustee, attorney-in-fact or health care proxy can be noticed by the plaintiff's attorney to appear at the guardianship hearing.
- I. Advise the court of your opinion on whether the alleged mentally incapacitated person should appear at the hearing.

J. Include any other matters that should be brought to the attention of the court.

9. If you conclude that the fact of incapacity is clear and you do not believe that it is necessary that medical witnesses testify, advise the court and the plaintiff's attorney of that view before the hearing, to avoid an unnecessary expense. If there is no jury, the court, with the consent of counsel for the alleged incompetent, may take the testimony of the physician by telephone or may dispense with a physician's oral testimony and rely on affidavits submitted pursuant to *R. 4:86-2(b)*. *R. 4:86-6(a)*.

10. Prior to the hearing, submit an affidavit or certification of services in support of an application for payment of an attorney's fee and expenses.

11. Appear in court on the date of hearing to represent your client, the alleged incapacitated person. Be prepared to place an oral summary of your findings and conclusions on the record and, if appropriate, to cross-examine the plaintiff's witnesses.

The plaintiff has the burden of proof and must present evidence of the need for guardianship of the person or property, or both. The plaintiff must establish that the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs. The plaintiff should also establish that no less restrictive form

of intervention is reasonable that is consistent with the person's welfare and safety. Additionally, the plaintiff should also present evidence that the proposed guardian is a fit and proper person to be appointed and that he or she is capable of carrying out the responsibilities of a guardian.

12. Finally, if the alleged incapacitated person possesses assets, request that the court consider your fee request and provide for the same in the judgment.