

VOLUME 7B, CHAPTER 16: “PHYSICAL OR MENTAL INCAPACITATION”**SUMMARY OF MAJOR CHANGES**

All changes are denoted by **blue font**.

Substantive revisions are denoted by an * symbol preceding the section, paragraph, table, or figure that includes the revision.

Unless otherwise noted, chapters referenced are contained in this volume.

Hyperlinks are denoted by **bold, italic, blue, and underlined font**.

The previous version dated February 2012 is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	This chapter was updated with hyperlinks and formatted to comply with current administrative instructions.	Revision
All	Revised and rearranged the chapter for clarity.	Revision
160101	Added a paragraph entitled “Overview” to the chapter per current administrative instructions and renumbered chapter accordingly.	Addition
160301.B	Added paragraph referencing appointment of trustee information for retirees whose physical incapacity may affect their mental capabilities.	Addition

Table of Contents

VOLUME 7B, CHAPTER 16: “PHYSICAL OR MENTAL INCAPACITATION”	1
1601 GENERAL	3
*160101. Overview	3
160102. Definitions	3
1602 MENTAL INCAPACITY	4
160201. Legally Appointed Representative	4
160202. Authorized Mental Health Determination	4
160203. Competency Board Determination	4
160204. Appointment of Trustee	5
160205. Bond Requirement for Appointed Trustee	6
160206. Defense Finance and Accounting Service-Cleveland Appointed Trustee Authority	6
160207. Required Reports and Documents	6
1603 PHYSICAL INCAPACITY	7
*160301. Physical Infirmary	7
160302. Conservator or Guardian	7
160303. Court Orders	8
1604 COURT APPOINTMENT OF GUARDIAN OR OTHER LEGAL REPRESENTATIVE FOR PHYSICALLY OR MENTALLY INCAPACITATED RETIREE	8
160401. Request for Incapacity Determination	8
160402. Certification of Court Appointment	8
160403. No Requirement for Accounting Reports	8
1605 TERMINATION OF PAYMENTS AND DISCHARGE OF TRUSTEE	8
160501. Conditions for Termination of Payments	8
160502. Discharge of Trustee Duties	9
160503. Death of Incompetent Retiree	9
1606 COMFORT ITEMS DURING HOSPITAL STAY	9
160601. Hospital Stay of Mentally or Physically Incompetent Retiree	9
160602. Money Received For Comfort Items	9
1607 GENERAL MAINTENANCE OF ACCOUNTS	10
BIBLIOGRAPHY	11

CHAPTER 16

PHYSICAL OR MENTAL INCAPACITATION

1601 GENERAL

*160101. Overview

This chapter provides information and guidance on the duties and responsibilities performed on behalf of a retiree determined by a competency board to be mentally and/or physically incapable of managing his or her affairs. This chapter applies to members of a Uniformed Service who are on a retired list of that Service and members of the Fleet Reserve or Fleet Marine Corps Reserve. Federal law provides legal authority for the payment of amounts due incompetent retirees of the Uniformed Services to designated persons for their use and benefit, and for the use and benefit of their dependents where no committee, guardian, or legal representative has been appointed by a state court.

160102. Definitions

A. Physically or Mentally Incapacitated Retiree. A physically or mentally incapacitated retiree is an individual who is impaired by physical disability, mental illness, mental deficiency, advanced age, chronic use of drugs or alcohol, or other causes that prevent sufficient understanding or capacity to manage his or her own affairs competently.

B. Committee. A committee is a person, assembly, or board of persons to whom (or which) the consideration or management of any matter is committed or referred by some court as a person or persons having guardianship of the person and property of an insane person.

C. Conservator. A conservator is a guardian, protector, or preserver; a maintainer.

D. Court of Competent Jurisdiction. A court of competent jurisdiction has the power and authority of law at the time of acting to do the particular act; one that has jurisdiction both of the person and of the subject matter; one provided for in the United States (U.S.) Constitution; or created by the legislature and has jurisdiction of the subject matter and of the person.

E. Guardian. A guardian is a person who legally has the care of the person or property (or both) of another person who is incompetent to act for himself or herself.

F. Trustee. A trustee, as used in the legal sense, is:

1. A person who takes and holds the legal title to the trust property for the benefit of another,

2. One to whom another's property is legally committed in trust, or
3. A person holding the legal title to property under an expressed or implied agreement to apply it and the income arising from it, to the use and for the benefit of another person.

Note: As referenced in this chapter, a trustee is a person appointed by the Defense Finance and Accounting Service, Cleveland Site (DFAS-CL) to receive payment of retired or retainer pay on behalf of a retiree determined to be mentally incapable of managing his or her affairs.

1602 MENTAL INCAPACITY

160201. Legally Appointed Representative

A. Legally Appointed Representative. In any case in which a legal committee, guardian, or other representative has been appointed by a court of competent jurisdiction for the retiree, DFAS normally accepts such appointment and no trustee will be appointed by DFAS. For more information regarding court appointments see section 1603.

B. No Legally Appointed Representative. Amounts due a retiree for retired or retainer pay who, according to a board of medical officers or physicians, is mentally incapable of managing his or her own affairs, may be paid for that retiree's use or benefit to any person designated by the Director, DFAS-CL under paragraph 160204 without the appointment in judicial proceedings of a committee, guardian, or other legal representative.

160202. Authorized Mental Health Determination

Federal agencies authorized to make determinations of the mental competency of a retired service member hospitalized in a facility under its jurisdiction are the:

- A. Department of the Army,
- B. Department of the Navy,
- C. Department of the Air Force,
- D. Department of Health and Human Services, and
- E. Department of Veterans Affairs (VA).

160203. Competency Board Determination

Upon receipt of information that a retiree may be mentally incapacitated, a board of no fewer than three medical officers or physicians (including one specially trained in the treatment of mental disorders) is convened to determine whether the retiree is competent. The board also is convened when requested to do so by proper authority.

A. The convening authority ensures that three members of the board certify the board's findings.

B. The convening authority of the appropriate Military Service must send one copy of the board's findings, as applicable, to:

Defense Finance and Accounting Service
Retired Pay Department
P.O. Box 998021, Room 1579,
Cleveland, OH 44199-8021

160204. Appointment of Trustee

A. Appointed Trustee Authority. The authority of the Secretaries of the Military Departments to appoint trustees under Title 37, United States Code, section 602 (37 U.S.C. 602) has been delegated to the Director, DFAS-CL.

B. Persons Eligible for Appointment as Designated Trustee

1. If a retiree is found mentally incapacitated and has no court appointed legal committee, guardian, or other representative, then a trustee may be appointed to act on the retiree's behalf. The Director, DFAS-CL, may designate one of the following persons as trustee for all incompetent military retirees if the trustee is 21 years of age or over:

- a. Lawful spouse (not subject to the age requirement);
- b. Legitimate son or daughter or legally adopted son or daughter;
- c. Parents;
- d. Head of an institution, if the retiree is a patient; or
- e. Any other person or persons if in the best interest of the retiree.

2. While next of kin or other relatives of the retiree ordinarily are preferred for designation as trustee, any other person, willing and suitable to act as such, may be designated as a temporary or permanent trustee unless a committee, guardian, or other legal representative is appointed by a court of competent jurisdiction. If more than one qualified person applies to be named as trustee for a mentally incompetent retiree, then the Director, DFAS-CL, will determine which applicant is the more appropriate trustee.

C. Submitting Application and Documentation for Appointment of Trustee

All applications to appoint a trustee and related documentation should be submitted to:

Defense Finance and Accounting Service
Retired Pay Department
P.O. Box 998021, Room 1579,
Cleveland, OH 44199-8021

160205. Bond Requirement for Appointed Trustee

The trustee designated to receive monies on behalf of the incompetent retiree must furnish a suitable bond in all cases when the amounts to be received may be expected to exceed \$1,000. The bond so required and furnished must have, as the surety a company approved by the U. S. Government and must be in such amount as required by the Retired Pay Department, DFAS-CL. The person who has been designated as trustee acts in this capacity without remuneration; however, if a bond is required, the premium fee charged by the bonding company may be paid from the funds received on behalf of the mentally incompetent retiree. Any other expenses incurred in securing the bond may not be paid from the amount payable to the incompetent retiree.

160206. Defense Finance and Accounting Service-Cleveland Appointed Trustee Authority

The trustee appointed by the Retired Pay Department, DFAS-CL, has the authority only to receive, expend, and account for monies received from the military. The appointment does not convey authority to act as a trustee in a civilian capacity without prior authority from a court of competent jurisdiction. The trustee must use the monies received for the benefit of the incompetent retiree. Payment made to a person so designated under 37 U.S.C. 602 discharges the obligation of the U. S. as to the amount paid. The Government may not appoint a trustee in any case in which a court of competent jurisdiction has appointed a legal committee, guardian, or other representative.

160207. Required Reports and Documents

The designated trustee submits accounting reports annually or at such times as directed by the Retired Pay Department, DFAS-CL. The reports must show all funds received, all expenditures made on behalf of the incompetent retiree, and a statement of the condition of the trustee account at the time the report is submitted. The trustee also may be required to provide all receipts, canceled checks, voucher accounts, savings account passbooks or statements, and/or other records concerning the trustee account. If the trustee fails to report promptly at the end of the accounting period, then the appointing authority may either temporarily suspend or terminate further payments to the trustee and may designate a successor trustee.

1603 PHYSICAL INCAPACITY

*160301. Physical Infirmary

A. Physical infirmity alone does not warrant the appointment of a guardian for the estate of a person. In some cases, incompetence to manage an estate or property has been found primarily from evidence of advanced age and physical infirmity, and a guardian or conservator has been appointed. In some jurisdictions, there are statutes, held to be constitutional, which authorize the appointment of guardians of the estates of those who, because of old age or physical incapacity, are incapable of managing their property.

* B. In the case of a retiree suffering from a physical condition, that renders him or her mentally incapable of managing his or her affairs, see section 1602 for guidance in preparing and submitting the application for trustee, and the DFAS-CL requirements in establishing and appointing a trustee.

160302. Conservator or Guardian

In several states, statutes authorize persons who, although of sound mind, believe themselves incapable of managing their own estates or of caring for their own property, to apply for, request, or consent to the appointment of a conservator or guardian of the estate or of their persons, or both. The conservator or guardian, when appointed, possesses over the estate substantially the same power and is subject to substantially the same duties as a guardian of an incompetent person. The following are examples for determining whether the appointment of a conservator may be necessary for a physically incapacitated [retiree](#):

A. A person who is bedfast and physically incapacitated as the result of two strokes is not necessarily incompetent so as to require the appointment of a guardian.

B. A 77-year-old woman suffering from complete paralysis of the left side was unable to speak except for an occasional word, could not swallow, and could write only with difficulty and very briefly, but could hear, read, watch television, walk with assistance, and could be out of bed and sit up for short periods of time. According to medical testimony, she was mentally competent, but the evidence was sufficient to support a finding that she was physically incompetent and unable to manage her property.

C. When an adult person has sufficient mental capacity to understand the nature and consequences of the application for a conservator, that person's wishes, if conducive to welfare and contentment of mind may properly be given great weight in determining whether a conservator (rather than a guardian) should be appointed.

D. The physical condition of the person for whom a conservator is required can be considered only insofar as it may affect the person's mental condition.

160303. [Court Orders](#)

Because of the variety of county and state statutes regarding the appointment of legal representatives for physically incapacitated [retirees](#), DFAS-CL accepts and processes court orders appointing such representatives. It is not the responsibility of DFAS-CL to authenticate each order.

1604 COURT APPOINTMENT OF GUARDIAN OR OTHER LEGAL REPRESENTATIVE FOR PHYSICALLY OR MENTALLY INCAPACITATED RETIREE160401. [Request for Incapacity Determination](#)

The incapacitated retiree or any person interested in the welfare of the retiree may petition a court of competent jurisdiction for a finding of incapacity and appointment of a guardian or other legal representative.

160402. [Certification of Court Appointment](#)

A copy of the appropriate court order certifying to the appointment of the guardian, committee, or conservator is required before payments may be made to the appointee.

160403. [No Requirement for Accounting Reports](#)

Accounting reports similar to those identified in paragraph 160207 are not required. Such reports, if required by the court, are matters of concern between the court-appointed guardian or legal representative and the court.

1605 TERMINATION OF PAYMENTS AND DISCHARGE OF TRUSTEE160501. [Conditions for Termination of Payments](#)

Payments due an incompetent retiree cease to be paid to the trustee upon receipt of notification by the DFAS-CL of:

- A. [Death of the incompetent retiree](#);
- B. [Death or disability of the trustee](#);
- C. [Receipt of notice that a committee, guardian, or other legal representative has been appointed for the incompetent retiree by a court of competent jurisdiction](#);
- D. [Failure of a trustee to render required accounting reports](#);
- E. [Probable cause to believe that there is improper use of monies received on behalf of the incompetent retiree](#); or

F. Receipt of notification that a board of medical officers or other appropriate medical authorities has now found the retiree to be capable of managing his or her own affairs. The appointing authority may, at his or her discretion, accept the findings of a VA or Public Health Service medical facility, or the findings of other public or private medical facilities that a person formerly found incompetent is now competent.

160502. Discharge of Trustee Duties

A. When payments cease to be paid to the trustee as described in paragraph 160501, the trustee files a final accounting report with the Retired Pay Department, DFAS-CL. When the final accounting report has been approved, the trustee is discharged and the surety is released of its bond.

B. If payments are terminated under subparagraph 160501.B, D, or E, then the Retired Pay Department, DFAS-CL, may appoint a successor trustee. Upon death or disability of a trustee, the trustee's legal representative makes the final accounting report.

160503. Death of Incompetent Retiree

Upon the death of the incompetent retiree, any funds remaining in the fiduciary account, maintained on behalf of the incompetent retiree by the trustee, must be made payable to the deceased retiree's estate.

1606 COMFORT ITEMS DURING HOSPITAL STAY

160601. Hospital Stay of Mentally or Physically Incompetent Retiree

The commanding officer of any military hospital or the director of a VA hospital may designate an officer under the command to receive and receipt for a sum of money from the accrued pay of a retiree who, as a patient at the hospital, is found physically or mentally incapacitated in a report of medical officers.

160602. Money Received For Comfort Items

During the retiree's hospital stay, the sum of money received from the accrued pay of a retiree may be used only for the purchase of comfort items for the use and benefit of that retiree when all of the following conditions exist:

A. A trustee has not been designated and a guardian or other legal representative has not been appointed by a court of competent jurisdiction;

B. There are no other funds available for use on behalf of the retiree; and

C. Competent medical authority agrees that the items to be purchased will serve the comfort of the retiree.

1607 GENERAL MAINTENANCE OF ACCOUNTS

Once the appointment of trustee, guardian, committee, or other official party has been made, DFAS-CL must change or update the account per the appropriate provisions of this Regulation.

BIBLIOGRAPHY

CHAPTER 16 – PHYSICAL OR MENTAL INCAPACITATION

1601 – GENERAL

160101	37 U.S.C. 601
160102	15A C.J.S. Committee
	15A C.J.S. Conservator
	21 C.J.S. Courts 22
	39 C.J.S. Guard and W2
	89 C.J.S. Trusts 3

1602 – MENTAL INCAPACITY

160201	37 U.S.C. 602(a)
	37 U.S.C. 602(e)
160202 – 16203	37 U.S.C. Chapter 11
	37 U.S.C. 601-604
160204	37 U.S.C. 602(f)
160205 – 160207	37 U.S.C. 602(c) and (f)

1603 – PHYSICAL INCAPACITY

160302	39 Am Jur 2d, Guardian and Ward, 21 and 22
160302.A	In re Cass/Guardianship 155 Neb 792, 54 NW 2d 68, 1952
160302.B	Loss vs. Loss, 251 12d 515, 185 NE 2d 228, 1962
160302.C	Hogan's Appeal, 135, Me 249, 194A 854, 113 ALR 350, 1937
160302.D	Shapter vs. Pillar, 28 Col 209, 63P 302, 1900
160303	39 Am Jur 2d, Guardian and Ward, 21 and 22

1605 – TERMINATION OF PAYMENTS AND DISCHARGE OF TRUSTEE

160501 – 160502	37 U.S.C. 602(f)
-----------------	------------------