

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 October 2009 is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	This chapter is being updated with hyperlinks and formatted to comply with current administrative instructions.	Update
160106	Added proviso to the definition for “trustee.”	Add
1602	Added section on mentally incompetent retirees and renumbered sections accordingly.	Add
160404	Changed address from “Continuing Government Activity” to the “Retired Pay Department.”	Update
160501	Added paragraph on appointment of trustee.	Add
160504	Address changed from “Continuing Government Activity” to the “Retired Pay Department.”	Add
160506 160507 160509 160510.G 160511	Changed references to “Continuing Government Activity” to reflect “Retired Pay Department.”	Update
160508	Added paragraph on payment to designated person.	Add

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CHAPTER 16

PHYSICAL OR MENTAL INCAPACITATION

1601 DEFINITIONS

160101. Physically or Mentally Incapacitated Retiree

An individual who is impaired by physical disability, mental illness, mental deficiency, advanced age, chronic use of drugs or alcohol, or other causes which prevent sufficient understanding or capacity to competently manage his or her own affairs.

160102. 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.

160103. Conservator

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

160104. Court of Competent Jurisdiction

A **court of competent jurisdiction** is the court having 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 Constitution; or created by the legislature and which has jurisdiction of the subject matter and of the person.

160105. 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.

*160106. Trustee

Trustee as used in the legal sense, is a person who takes and holds the legal title to the trust property for the benefit of another, one to whom another's property is legally committed in trust; or 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. **As referenced in this chapter, trustee means 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 member determined to be mentally incapable of managing his or her affairs.**

1602 MENTAL INCAPACITY*160201. No Legally Appointed Representative**

Amounts due for retired or retainer pay, that are otherwise payable to a member who, in the opinion of a board of medical officers or physicians, is mentally incapable of managing his or her own affairs, may be paid for that member's use or benefit to any person designated by the Director, DFAS-CL under section 1605 of this chapter, without the appointment in judicial proceedings of a committee, guardian, or other legal representative.

160202. 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 member, DFAS shall accept such appointment and no trustee shall be appointed by DFAS. For more information regarding court appointments see section 1605 of this chapter.

1603 PHYSICAL INCAPACITATION**160301. Physical Infirmary**

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.

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.

160303. Submission of Court Orders

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

160304. Examples for Determination

The following are examples for determining whether the appointment of a conservator may be necessary for a physically incapacitated member:

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. She was, according to medical testimony, 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.

1604 MEDICAL EXAMINATION

160401. 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).

160402. Board to Determine Competency

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 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.

160403. Convening Board Authority

The convening authority ensures that the board's findings are certified by three members of the board.

*160404. Board Findings

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

Defense Finance and Accounting Service
Retired Pay Department
P.O. Box 998021, Room 2331,
Cleveland, OH 44199-8021

1605 APPOINTMENT OF TRUSTEE

*160501. Member Determined Mentally Incapacitated

If a member is found to be 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.

160502. 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.

160503. Designated Trustee

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 age requirement);
- B. Legitimate son or daughter or legally adopted son or daughter;
- C. Parents;
- D. Head of an institution, if member is a patient; or
- E. Any other person or persons if in the best interest of the member.

*160504. 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 2331,

Cleveland, OH 44199-8021

160505. Persons Eligible for Appointment as Trustee

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, shall determine which applicant is [the](#) more appropriate trustee.

*160506. 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 United States 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, then 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.

*160507. DFAS-CL 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. 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.

*160508. Appointment of Trustee Discharges [United States Obligation](#)

[Payment made to a person so designated under 37 U.S.C. 602 discharges the obligation of the United States as to the amount paid.](#)

*160509. Routine and Upon Demand Reports and Documents May be Required

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, cancelled checks, voucher accounts, savings account pass books 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.

160510. 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;
 - 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 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; 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.
- * G. If payments are terminated under subparagraph 160510.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.

*160511. Discharge of Trustee Duties

When payments cease to be paid to the trustee, as described in paragraph 160510, 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.

160512. 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 COURT APPOINTMENT OF GUARDIAN OR OTHER LEGAL REPRESENTATIVE FOR PHYSICALLY OR MENTALLY INCAPACITATED RETIREE

160601. Retiree Incapacity Determination by a Court of Competent Jurisdiction

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.

160602. 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.

160603. No Requirement for Accounting Reports

Accounting reports, similar to those identified in paragraph 160509, 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.

1607 COMFORT ITEMS WHILE IN THE HOSPITAL

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, has been found to be physically or mentally incapacitated in a report of medical officers. This money 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.

160701. No Designated Trustee or Legal Representative Appointed

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

160702. No Other Funds Available for Retiree

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

160703. Approval Authority for Comfort Items

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

1608 GENERAL MAINTENANCE OF ACCOUNTS

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

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* 160506 – 160511	37 U.S.C. 602(f)