

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 asterisk (*) 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 [April 2016](#) is archived.

PAR AGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
160208, 160209, 160210 and 160302	Added paragraphs “Durable Power of Attorney,” “Principal,” “Agent,” and “Effectiveness of a Durable Power of Attorney” to clarify information on powers of attorney pursuant to Public Law (PL) 114-328, section 645, effective December 23, 2016.	Addition
160301.B	Added information to describe an agent holding a valid and legally executed durable power of attorney.	Addition
160306	Updated the dollar amount from \$1,000 to \$25,000 for when the trustee designated to receive monies on behalf of the incompetent retiree must furnish a suitable bond.	Revision
160601.G	Added a subparagraph on failure of a durable power of attorney to return a completed report of existence as another condition for the termination of payments.	Addition
160603	Added additional information to settle pay of deceased incompetent retirees.	Addition
1608	Deleted section 1608, “General Maintenance of Accounts.” Section 1608 provided procedural guidance rather than policy.	Deletion
Figure 16-1	Added Figure 16-1 to provide a template for the “Report of Existence.”	Addition
References	Renamed “Bibliography” to “References.”	Revision
References	Updated references.	Revision

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CHAPTER 16

PHYSICAL OR MENTAL INCAPACITATION

1601 GENERAL

160101. Purpose

This chapter provides information and guidance on the duties and responsibilities performed on behalf of a retiree determined 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 the state court has not appointed a committee, guardian, or legal representative.

160102. Authoritative Guidance

[The authoritative references are listed at the end of this chapter.](#)

1602 DEFINITIONS

160201. 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.

160202. 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.

160203. Competency Board

The competency board consists of at least three qualified medical officers or physicians, one of whom is specially qualified in the treatment of mental disorders. The Secretary of the department having jurisdiction of the member appoints the board.

160204. Conservator

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

160205. 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; has jurisdiction both of the person and of the subject matter; is provided for in the Constitution of the United States; or created by the legislature and has jurisdiction of the subject matter and of the person.

160206. 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.

160207. Trustee

A trustee, as used in the legal sense, is:

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

Note: As referenced in this chapter, a trustee is a person appointed by the Defense Finance and Accounting Service (DFAS) Cleveland (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. The term "trustee" does not include an agent holding a valid and legally executed durable power of attorney pursuant to Title 37, United States Code (U.S.C.), [section 602\(a\)\(2\)](#).

*160208. Durable Power of Attorney

The term "Durable Power of Attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, where the authority of the agent is not terminated by the principal's incapacity. A durable power of attorney is distinctive from a regular power of attorney and allows the agent to act on the principal's behalf beyond the incapacity of the principal. There are two types of durable powers of attorney which are immediate and springing.

- A. [Immediate](#). The immediate power of attorney starts immediately after the durable power of attorney has been executed.
- B. [Springing](#). The springing power of attorney goes into effect after a specific event occurs (for example, when the person granting the power of attorney becomes mentally incapable of managing his or her affairs).

Note: DFAS-CL will accept either the immediate or a springing durable power of attorney, but will only honor either upon a showing of mental incompetency.

*160209. Principal

A principal is an individual who grants authority to an agent in a power of attorney.

*160210. Agent

An agent is a person granted authority to act for a principal under a power of attorney.

1603 MENTAL INCAPACITY

*160301. Legally Appointed Representative

A. Legally Appointed Representative. When a court of competent jurisdiction appoints a legal committee, guardian, or other representative for the retiree, DFAS will normally accept such appointment and will not appoint a trustee or recognize an agent holding a durable power of attorney. For more information regarding court appointments see section 1605.

* B. Agent Holding a Valid and Legally Executed Durable Power of Attorney. Amounts due a retiree for retired or retainer pay, who is mentally incapable of managing his or her own affairs, may be paid for that retiree's use or benefit to an agent who presents a valid and legally executed durable power of attorney and also presents evidence showing that the retiree (principal) is incapable of managing his or her affairs in accordance with the process provided in paragraph 160302.

C. No Legally Appointed Representative or Agent Holding a Valid and Legally Executed Durable Power of Attorney. When there is no legally appointed representative and no agent holding a durable power of attorney, 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 160305 without the appointment in judicial proceedings of a committee, guardian, or other legal representative.

*160302. Effectiveness of a Durable Power of Attorney

In order for an agent holding a durable power of attorney to receive amounts due a retiree (principal) who is mentally and/or physically incapable of managing his or her own affairs, evidence of the retiree's (principal's) incapacity must be provided. Pursuant to Public Law 114-328, section 645, the evidence DFAS will accept to show that a member is incapable of managing his or her affairs must reflect the following:

A. A durable power of attorney, either immediate or springing; and

B. A medical statement with a current evaluation (within the past 4 months) prepared and signed by a Doctor of Medicine or Psychiatrist, i.e., not a Psychologist, Doctor of Osteopathic Medicine, Nurse, Physician Assistant, Registered Nurse, or Clinical Social Worker. The statement must include:

1. A statement that the retiree is (at the time of evaluation) medically incapable of managing his or her affairs;
2. A description of the condition afflicting the retiree which led to this diagnosis;
3. A statement regarding the retiree's prognosis for possible improvement; and
4. A statement that the determination of incapacity was made based on both a physical examination and mental evaluation of the retiree.

Note: Upon presentation of the evidence as described in subparagraph 160302.A and 160302.B, the amounts due to the retiree may be paid to the agent. Amounts due may only be used for the use and benefit of the retiree. Neither accounting reports nor a surety bond will be required unless, in the discretion of the Director, DFAS-CL, special circumstances warrant. DFAS will not normally allow an agent holding a durable power of attorney to receive amounts due an incompetent retiree in a case in which a court of competent jurisdiction has appointed a legal committee, guardian, or other representative.

160303. Authorized Mental Health Determination (in cases where there is no agent holding a durable power of attorney)

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).

160304. Competency Board Determination

When there is no agent qualifying under paragraph 160302, 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 convenes 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 and Annuitant Pay Department
1240 East 9th Street, Room 1599
Cleveland, OH 44199-8021

160305. Appointment of Trustee (in cases where there is no agent holding a durable power of attorney)

A. Appointed Trustee Authority. The authority of the Secretaries of the Military Departments to appoint trustees under 37 U.S.C. § 602 has been delegated to the Director, DFAS-CL.

B. Persons Eligible for Appointment as Designated Trustee

1. If a competency board finds a retiree mentally incapacitated and the retiree has no court appointed legal committee, guardian, or other representative, **when there is no agent qualifying under paragraph 160302**, the Director, DFAS-CL, may appoint a trustee 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, DFAS may designate any other person, willing and suitable to act as such, as a temporary or permanent trustee unless a court of competent jurisdiction appoints a committee, guardian, or other legal representative. If more than one qualified person applies to

be 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

Submit all applications to appoint a trustee and related documentation to:

Defense Finance and Accounting Service
Retired and Annuitant Pay Department
1240 East 9th Street, Room 1599
Cleveland, OH 44199-8021

*160306. 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 may exceed \$25,000. 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 designated as trustee acts in this capacity without remuneration; however, if a bond is required, the trustee may pay the premium fee charged by the bonding company from the funds received on behalf of the mentally incompetent retiree. The trustee may not pay any other expenses incurred in securing the bond from the amount payable to the incompetent retiree.

160307. 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 United States 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.

160308. 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. 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.

1604 PHYSICAL INCAPACITY

160401. 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 1603 for guidance [regarding the use of a durable power of attorney to receive amounts due the retiree](#), guidance in preparing and submitting the application for trustee [in the absence of a durable power of attorney](#), and the DFAS-CL requirements in establishing and appointing a trustee.

160402. 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.

160403. 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.

1605 COURT APPOINTMENT OF GUARDIAN OR OTHER LEGAL REPRESENTATIVE FOR PHYSICALLY OR MENTALLY INCAPACITATED RETIREE

160501. 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.

160502. Certification of Court Appointment

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

160503. No Requirement for Accounting Reports

Accounting reports, similar to those identified in paragraph 160307, 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.

1606 TERMINATION OF PAYMENTS AND DISCHARGE OF TRUSTEE

*160601. Conditions for Termination of Payments

DFAS will terminate payments that are due an incompetent retiree and paid to a trustee appointed under paragraph 160304 or an agent recognized under paragraph 160302 upon notification receipt of:

- A. Death of the incompetent retiree;
- B. Death or disability of the trustee or agent;
- C. Appointment of a committee, guardian, or other legal representative for the incompetent retiree by a court of competent jurisdiction;
- D. Failure of a trustee (or agent if required) to render required accounting reports;

E. Probable cause to believe that there is improper use of monies received on behalf of the incompetent retiree;

F. Findings from a board of medical officers or other appropriate medical authorities indicating that the retiree is capable of managing his or her own affairs. The appointing authority may accept, at his or her discretion, 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; or

* G. Failure of an agent or trustee to return a completed Report of Existence. See Figure 16-1.

160602. Discharge of Trustee Duties

A. When payments to the trustee terminate as described in paragraph 160601, the trustee files a final accounting report with the Retired Pay Department, DFAS-CL. Upon approval of the final accounting report, the trustee is discharged and the surety is released of its bond.

B. If payment terminates for reasons described under subparagraph 160601.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.

*160603. 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 or agent, must be made payable to the deceased retiree's estate. A notification of death from any source is sufficient to suspend payments of retired pay to the trustee or agent. To settle (pay) the arrears of the member's retired pay, the following documentation must be on file:

A. A copy of the death certificate;

B. Completed Standard Form 1174, Claim for Unpaid Compensation of Deceased Member of the Uniformed Services, from the beneficiary; and

C. Proof of recoupment of outstanding payments. All outstanding checks or direct deposits (not negotiated before the annuitant's death or forwarded past the date of entitlement) or the proceeds thereof must be returned to DFAS-CL before a settlement of arrears of military retired pay may be made.

1607 COMFORT ITEMS DURING HOSPITAL STAY

160701. 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.

160702. Money Received For Comfort Items

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

- A. DFAS did not designate a trustee and a court of competent jurisdiction did not appoint a guardian or other legal representative;
- B. There are no other funds available for use on behalf of the retiree; and
- C. Competent medical authority agrees that the purchase of items will serve the comfort of the retiree.

*Figure 16-1. Report of Existence

DEPARTMENT OF DEFENSE	
DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIRED PAY 8899 E 56 th Street Indianapolis, IN 46249-1200	
<hr/>	
OFFICIAL BUSINESS	
<hr/>	
REPORT OF EXISTENCE Please PRINT requested information.	
FULL NAME OF RETIREE (LAST, FIRST, MI)	
RETIREE'S SOCIAL SECURITY NUMBER	
TRUSTEE'S FULL NAME	
NUMBER, STREET, RFD, APT. NUMBER	
CITY, STATE, ZIP CODE (IF FOREIGN ADDRESS: CITY , POSTAL CODE, COUNTRY)	
REMARKS	
THIS REPORT STATES THAT MY WARD, WHOSE NAME APPEARS ABOVE, IS AVAILABLE AND ELIGIBLE TO RECEIVE MILITARY RETIRED/RETAINER PAY.	
SIGNATURE OF GUARDIAN, TRUSTEE, CONSERVATOR, OR OTHER	DATE:
DFAS-CL 1800/100 (REV. 6-99)	

REFERENCES*CHAPTER 16 – PHYSICAL OR MENTAL INCAPACITATION**

1601 – GENERAL

160101 37 U.S.C. § 601

1602 – DEFINITIONS

37 U.S.C. § 602
15A Corpus Juris Secundum (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

1603 – MENTAL INCAPACITY

160301 37 U.S.C. § 602
160302 [Public Law 114-328, section 645,](#)
[December 23, 2016](#)
37 U.S.C. § 602
160303 – 160304 37 U.S.C., Chapter 11
37 U.S.C. §§ 601-604
160305 37 U.S.C. § 602
160306 – 160308 37 U.S.C. § 602(c) and (e)

1604 – PHYSICAL INCAPACITY

160402 39 American Jurisprudence (Am Jur) 2d,
Guardian and Ward, 21 and 22
160402.A In re (Latin for “In the matter of”)
Cass/Guardianship 155 Neb 792,
54 NW 2d 68, 1952
160402.B Loss vs. Loss, 251 12d 515, 185 NE 2d 228, 1962
160402.C Hogan's Appeal, 135, Me 249, 194A 854,
113 American Law Review 350, 1937
160402.D Shapter vs. Pillar, 28 Col 209, 63P 302, 1900
160403 39 Am Jur 2d, Guardian and Ward, 21 and 22

1606 – TERMINATION OF PAYMENTS AND DISCHARGE OF TRUSTEE

160601 – 160602 37 U.S.C. § 602(e)