

GUARDIANSHIP

What is Guardianship?

Guardianship is the process designed to protect and exercise the legal rights of individuals who lack the capacity to make their own decisions for their care or property, and who have not made plans to address what happens when they become incapacitated. Guardianship in Florida is governed by the Florida Guardianship Law (Chapter 744, Florida Statutes) and the Florida Probate Rules, R. 5.540 – 5.800.

Is Guardianship the Answer?

Just because someone has a disability does not mean that they are in need of a guardian. Florida law favors the least restrictive alternative to Guardianship whenever possible. Alternatives to Guardianship include a Durable Power of Attorney (Chapter 709, Florida Statutes), Advance Directives such as a Living Will or Health Care Surrogate Designation (Chapter 765, Florida Statutes), a Representative Payee for purposes of Social Security Administration (SSA) payments, a Medical Proxy (Chapter 765, Florida Statutes), or a Trust (Revocable, Irrevocable, or Special Needs, a/k/a Supplemental Needs). If there are legally valid documents in place that serve as an alternative to Guardianship that sufficiently address the problems of the alleged incapacitated person (AIP), and that accomplish the objective of providing assistance to the AIP with the least amount of interference with his or her legal capacity to act on their own behalf, then a Guardianship is not appropriate. Since the adjudication of incapacity and the appointment of a guardian is a deprivation of civil and legal rights, it is desirable to find the least restrictive alternative. *F.S. § 744.331(6)(b)*, *F.S. §744.462*, *F.S. § 744.1012*, *Smith v. Lynch*, App. 4 Dist., 821 So. 2d 1197 (2002).

Types of Disabilities Warranting a Guardianship

There are three basic types of disabilities that may warrant a Guardianship – developmental disabilities, age-related disabilities and acquired disabilities.

Developmental Disabilities

In Florida, the laws regarding developmental disabilities are found in Chapter 393 of the Florida Statutes. A developmental disability is defined as a “disorder or Syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; and that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely” *Fl. St. §*

393.063(9). A **Guardian Advocate** would be appointed once the child reaches the age of eighteen. This is discussed later in this memo, under **Guardian of a Minor**.

Age-Related Disabilities

An age-related disability can occur as a natural process of aging and may affect capacity in adults. Dementia, the most well-known, is a medical condition characterized by loss of memory and functioning. It usually occurs as a result of an unhealthy lifestyle or vascular problems such as a stroke. Alzheimer's disease is a specific form of dementia caused by progressive brain disease involving protein deposits in the brain that disrupt neurotransmitter systems. Symptoms include short term memory loss followed by problems with language and communication, orientation as to time and place, everyday problem solving, and eventually not being able to recognize people and everyday objects.

Acquired Disabilities

An acquired disability may occur at any age. The causes include disease, oxygen deprivation, head and spinal injuries, alcoholism or drug abuse, and various forms of mental illness.

Lighting the Way to Guardianship and Other Decision-Making Alternatives – A Manual for Attorneys and Judges, Florida Developmental Disabilities Council, Inc. (2010), p. 3-8.

How is a Guardian Appointed?

A Petition to Determine Incapacity is filed with the court to determine if a person lacks the capacity to take care of his or her self and property (assets). A Petition for Appointment of Plenary Guardian (or Limited Guardian), along with an Application for Appointment as Guardian, is usually filed at the same time. The court appoints an attorney to represent the alleged incapacitated person (the AIP). The petitions must be served upon the AIP, the AIP's attorney, and the AIP's next-of-kin. The AIP can substitute an attorney of his or her own choice. The attorney meets with the AIP, makes an assessment in that person's best interests, and files a report with the court.

Within 5 days after the petition to determine incapacity is filed, the court must appoint a committee of three members to conduct independent evaluations and file reports with the court. This committee consists of one physician, one psychiatrist, and either another physician or psychiatrist, a nurse, a social worker, or a lay person qualified to make such an evaluation. The examination consists of a physical examination, a mental health examination, and a functional assessment. These reports must be filed within

15 days after appointment by the court. A copy of the reports must be served on the petitioner and on the attorney for the AIP within 3 days of filing and at least 5 days prior to the court hearing.

Proposed Orders are generally mailed to the clerk of the court or the judge's judicial assistant. You should always check the judge's instructions, if any, on the judicial circuit's website. It's also a good idea to speak to the judicial assistant regarding the judge's policies.

The court holds a hearing to review all relevant evidence, including the reports of the examining committee. This hearing must be set within 14 days after the examining committee reports are filed with the court. It is imperative that the attorneys representing the parties have a thorough understanding of the Rules of Evidence. The committee reports are considered to be hearsay in that the non-appearance of the examining members means you are unable to cross-examine them. The introduction of their reports into evidence can be objected to on that basis. See *Shen v. Parkes*, 100 S0. 3d 1189 (Fla. 4th DCA 2012). Therefore, it is advisable prior to the hearing to get the written consent of the adverse attorneys to the admission of the reports. If there is an objection to their admission, the committee members must be subpoenaed to testify at the hearing. Additional witnesses can testify on behalf of the AIP, or in support of or against facts alleged by the petitioner. The AIP must attend the hearing unless the judge waives the appearance, or good cause is shown for his or her absence.

The partial or total incapacity of the AIP must be established by clear and convincing evidence. If after making findings of fact based on clear and convincing evidence, the court finds that the AIP is incapacitated with respect to some or all personal and property rights, the court must determine if there is a less restrictive alternative to guardianship. Any interested person may file a Verified Statement stating that he or she has a good faith belief that the AIP's trust, trust amendment, or durable power of attorney is invalid, and give a reasonable factual basis for that belief. If the court determines that there is no alternative to guardianship, the court signs a detailed Order delineating the reasons for the court's decision, appointing a guardian for the ward, and stating which personal and property rights are to be taken away and exercised by the guardian. An individual, a financial institution authorized and qualified to exercise fiduciary powers, or a non-profit corporation can be appointed by the court to manage some or all of the personal and property affairs of a person. In a contested guardianship, it is not uncommon for family members to file competing petitions for appointment as guardian. When this happens, the court often appoints a Professional Guardian in order to facilitate the best interests of the ward.

What is a Professional Guardian?

A Professional Guardian completes a course approved by the Statewide Public Guardianship Office (SPGO) and must pass an exam. Non-attorney Guardians must also post a bond and be represented by an attorney. Professional Guardians register each year with the SPGO and must take a minimum of 16 hours of continuing education every two calendar years. They are appointed by the court when no family members or friends are available or willing to serve.

Emergency Temporary Guardianship

Along with the aforesaid petitions, a separate Petition for Appointment of Emergency Temporary Guardian (ETG) may be filed if the petitioner feels that the AIP's health or property is in imminent danger. The court may also appoint an ETG on its own motion after a finding of incapacity. "The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken". *Fl. St.* §744.3031(1). The court appoints an attorney to represent the AIP during the summary proceedings. Notice of the filing of the Petition for Appointment of Emergency Temporary Guardian, and of the hearing, must be served on the AIP and the AIP's attorney at least 24 hours prior to the commencement of the hearing. *Fl. St.* § 744.3031, as amended effective July 1, 2015. The Authority of the emergency temporary guardian (ETG) expires after 90 days, or when a guardian is appointed, unless extended. *Fl. St.* §744.3031(3). The ETG must file a final report with the court within 30 days after the emergency temporary guardianship ends. *Fl. St.* §744.3031(8)(a). Note that pursuant to an amendment to *Fl. St.* § 744.312, effective July 1, 2015, the court is prohibited from giving the ETG preference in the appointment of a permanent guardian.

Dismissal of Petition to Determine Incapacity

"If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition." *Fl. St.* § 744.331(4).

Procedures for Filing, Orders, Notices

File a Petition for Incapacity (\$400.00 filing fee) and a Petition to Appoint a Guardian (\$231.00 filing fee) as separate cases in the e-Portal as they get separate case numbers. The Application for Appointment as Guardian gets filed with the Petition to Appoint Guardian. There may be additional processing fees

depending upon the method of payment. If filing a Petition for Emergency Temporary Guardian, that would be filed along with the Petition to Appoint Guardian.

After Petitions are accepted and have a case number, call the Probate clerk to get the name and address of the court appointed attorney for the AIP. In some counties, you are required to provide the court clerk with copies of the Petitions and stamped addressed envelopes for the AIP's attorney and the next of kin for purposes of service. In many counties, the court prepares the Notice, Order Appointing Attorney and Order Appointing Examining Committee. The court may arrange for the sheriff's office to serve the AIP and each member of the examining committee. The clerk of the court prepares a Certificate of Service. Check with your clerk and judicial assistant to see how it is done in that county.

If there is a separate (earlier) date for the hearing on the ETG, you will have to prepare the Notice of Hearing, e-file it, serve it on the AIP's attorney through the e-Portal, and serve it on the AIP via certified mail. Very often, hearings are not concluded within the initial time set aside. When there is a new date to continue the hearing, the judicial assistant will set a date and you will be required to draft a Notice of Hearing, e-file it and serve it on all counsel through the e-Portal, and via regular mail on all next of kin and the petitioner if petitioner is not a next of kin. The Notice of Hearing should include your certification of service. Again, check with the probate clerk and the judicial assistant to confirm their procedures.

A Verified Statement gets e-filed and served on all counsel via the e-Portal. So do Subpoena Duces Tecum (for a hospital record, for example) and Subpoenas for Trial.

In some counties, the judicial assistant wants to be sent copies of everything you file.

Prepare Letters of Guardianship, Order Appointing Guardian, and Oath of Guardian Designation of Agent and Acceptance. Mail to the judicial assistant. Depending upon the issues involved in your case, the judge may amend the proposed Order, or draft his or her own Order.

E-file your Petition Authorizing Payment of Petitioner's Attorney Fees and Costs and the Notice of Hearing; and serve on other counsel via e-Portal. Mail proposed Order to the judicial assistant, as well as a copy of the Petition and Notice of Hearing if that is the custom in that county. Note that all counsel, next of kin, and the petitioner if not a next of kin should receive copies of all proposed Orders either via regular mail or e-mail.

Discovery

In a contested Guardianship, you may want to do discovery, such as Interrogatories, a Request for Production of Documents, and a Request for Admissions. This can be difficult since the hearing is usually conducted about 45 days after the petitions are filed. However, in a contested matter, there can be many hearing dates (continuances) since the judge usually does not set aside more than an hour at a time, and the next date may be two weeks later, and two weeks later again. An alternative to discovery is to ask the court appointed attorney to get copies of medical and financial information since the AIP's attorney has a right to that information, pursuant to the terms of the order appointing counsel.

Effect of Petition to Determine Incapacity on Advance Directives

Note that prior to the amendment of *Fl. St.* 709.2109, effective July 1, 2015, the filing of a Petition to Determine Incapacity suspended the agent's authority under a durable power of attorney until the petition was dismissed or withdrawn, or the court entered an order authorizing the agent to act. *Fl. St.* 709.2109(3). The amendment provides that the power of the agent is not automatically suspended if the agent is a parent, spouse, child or grandchild of the principal. The agent's power may only be suspended upon the filing of a verified motion setting forth the reason for suspension. The motion procedure to suspend the authority of an agent who is a relative is contained in newly created *Fl. St.* § 744.3202.

A proceeding to determine incapacity does not affect the authority of an agent to make health care decisions for the principal, unless otherwise ordered by the court. *Fl. St.* § 709.2109(3)(b).

Examining Committee and Court Appointed Attorney Fees and Costs

The members of the examining committee, and the court appointed attorney, are entitled to reasonable fees and costs to be determined by the court. These fees are paid by the guardian of the property of the ward or, if the ward is indigent, by the state. *Fl. St.* § 744.331(7)(b). If the court finds that the petition was brought in "bad faith", the fees are payable by the petitioner. *Fl. St.* 744.331(7)(c). If the petition to determine incapacity is dismissed or denied, the fees of the examining committee members are paid upon court order as an "expert witness" fee under *Fl. St.* § 29.004(6). *Fl. St.* § 744.331(7)(c), as amended effective July 1, 2015.

Guardian and Attorney's Fees and Expenses

"A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs

incurred on behalf of the ward.” *Fl. St.* §744.108(1). “All petitions for guardian’s and attorney’s fees and expenses must be accompanied by an itemized description of the services performed for the fees and the expenses sought to be recovered.” *Fl. St.* §744.108(5).

The attorney for the petitioner may also petition for reimbursement of reasonable fees and expenses, paid to that attorney by his client, for the services performed when the attorney’s services benefited the AIP (Ward). *Butler v. Peacock*, 898 So. 2d 1139, 1141 (Fla. 5th DCA 2005); *Price v. Austin*, 43 So. 3d 789 (Fla. 1st DCA 2010). The proposed Order should state that the petitioner is being reimbursed the fees and costs that were paid.

Note that it is good practice to have a fully executed retainer agreement with your client, the petitioner, and a retainer sufficient to cover your estimated time and costs in pursuing a guardianship proceeding.

Guardianship Reports

Initial Guardianship Report – Pursuant to *Fl. St.* § 744.362, a guardian must file with the court an initial guardianship report or plan within 60 days after the Letters of Guardianship are signed by the judge. This report is e-filed and then served on the ward, unless the ward is under the age of 14 years or is totally incapacitated. The plan covers the medical, mental and personal care services that will be provided for the ward, the residential setting, social and personal services, health and accident insurance, government benefits to which the ward may be entitled to meet costs of services, and any physical and mental examinations necessary to access the ward’s needs. *Fl. St.* § 744.363

Verified Inventory – Pursuant to *Fl. St.* § 744.365, a guardian of the property must file a verified inventory of the ward’s property, real and personal, and it must identify the location. The report must include a statement of all encumbrances, liens and other secured claims on any item. The report must also detail all sources of income, including social security and pensions.

Annual Guardianship Report – Pursuant to *Fl. St.* § 744.367, amended effective July 1, 2015, the guardian must file an annual guardianship report or plan between September 1 and December 1 of the previous year when a calendar year filing is required. Otherwise, it must be filed between 60 and 90 days before the last day of the anniversary month that the Letters of Guardianship were signed. The plan must cover the coming fiscal

year. This report is e-filed and then served on the ward, unless the ward is under the age of 14 years or is totally incapacitated.

Annual Accounting – Pursuant to *Fl. St.* § 744.3678, a guardian of the property must file an annual accounting that includes a full and correct account of the receipts and disbursements of the ward’s property, and a statement of the property on hand at the end of the accounting period. A copy of annual or end of year statements of all cash accounts must be attached.

Note: Guardians are required by law to be represented by an attorney. R.5.030(a) If you choose to represent a guardian, there should be a new retainer agreement which lists the services that you will provide and the fees and costs that will be charged.

Restoration to Capacity

A ward has the right to be restored to capacity at the earliest possible time. *Fl. St.* §733.6175(4). See *Fl. St.* §744.464 for the legal procedure to restore capacity.

Veterans Guardianship Law

Procedures for petitioning for a guardianship for a veteran or other person who is entitled to receive benefits from the Department of Veterans Affairs are governed by Florida Statutes sections 744.602 thru 744.653. The procedures are similar to the guardianship of a non-veteran, except for two main factors: 1/ the Department of Veterans Affairs must receive notice of all petitions and hearings and, 2/ the petitioner’s attorney’s fee is limited by *Fl. St.* §744.639.

Guardian Advocate

Guardian Advocacy is only available to individuals with one of the five developmental disabilities discussed earlier. In addition, the individual must lack the decision-making ability to perform some, but not all, of the tasks necessary to care for his or her person, property, or estate. This petition is usually filed by the parents when the child reaches the age of eighteen years.

The statutes do not require a finding of incapacity. There is no team of experts appointed by the court to do an examination. The judge can use educational evaluations,

individual education plans, and support and habitation plans to determine whether the individual needs a guardian advocate to exercise certain rights on his or her behalf.

Guardian of a Minor

It may become necessary to appoint a guardian when the natural or adoptive parents are either deceased, incarcerated, or where they have abandoned the minor. For example, a grandparent may take in a grandchild who has been abandoned by both parents. In order to consent to medical treatment for that child, or register that child in school, it is necessary to be named the legal guardian by the court. A proceeding to name a guardian for a minor (child under the age of 18) does not require a finding of incapacity. A guardian appointed for a minor, whether of the person or property, is a plenary guardian. The minor is not required to attend the hearing. The court may appoint an attorney to represent the minor if the judge feels it is appropriate under the circumstances.

Note that a guardian of a minor is also required in order to settle or complete a settlement of any claim for property or personal damages when the amount of the net settlement for the minor exceeds \$15,000.00. *Fl. St.* § 744.301.

Guardian ad Litem

The court may appoint a guardian ad litem to represent the interests of a minor before approving a settlement where the claim exceeds \$15,000.00 “if the court believes a guardian ad litem is necessary to protect the minor’s interest.” *Fl. St.* § 744.3025(a). The court shall appoint a guardian ad litem where the claim equals or exceeds \$50,000.00, unless a guardian has already been appointed and has no adverse interest to the minor. *Fl. St.* § 744.3025(b),(e).

Fiduciary Duties of a Guardian

The relationship between a guardian and his or her ward is a classic fiduciary relationship. *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990). A guardian has a duty to protect and preserve the property of the ward and must personally visit the ward on a periodic basis to assess the ward’s physical and social health. *Fl. St.* § 744.362. The court may appoint a court monitor to investigate allegations of wrongdoing. *Fl. St.* § 744.446,

744.107 & 744.1075. See *Fl. St.* § 744.361, as amended effective July 1, 2015, which imposes additional statutory duties upon a guardian as fiduciary. Newly enacted *Fl. St.* § 744.359 provides that a guardian may not abuse, neglect, or exploit a ward under his or her care. Any person who believes that a guardian is acting in that manner must report the incident to the central abuse hotline at the Department of Children and Families. The court is directed to interpret this statute in conformance with *Fl. St.* § 825.103, which creates criminal penalties for exploitation of an elderly person or a disabled person for breaching certain fiduciary duties, including fraudulently obtaining an appointment as guardian, abuse of guardianship powers, wasting or embezzling, or intentionally mismanaging the assets of the ward.