

# ***GUARDIANS AND GUARDIANSHIP***

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## **WHAT**

### **IS A GUARDIANSHIP?**

A guardianship is a legal proceeding in the circuit courts of Florida in which a guardian is appointed to exercise the legal rights of an incapacitated person and is governed by Chapter 744, Florida Statutes. The procedure outlined below does not apply for appointment of a guardian advocate over a person with developmental disabilities.

A guardian is an individual or institution (such as a nonprofit corporation or bank trust department) appointed by the court to care for an incapacitated person -- called a "ward" or for the ward's assets.

## **WHO**

### **IS INCAPACITATED?**

An incapacitated person is an adult who has been judicially determined to lack the capacity to manage at least some of his or her property or to meet at least some of the essential health and safety requirements of the person.

## **HOW**

### **IS A PERSON DETERMINED TO BE INCAPACITATED?**

Any adult may file a petition with the court to determine another person's incapacity, setting forth the factual information upon which they base their belief that the person is incapacitated.

The court then appoints a committee of three members, usually two physicians, and another person who by knowledge, skill, training or education can form an expert opinion. One of the three members of the committee must have knowledge of the type of incapacity alleged in the petition and each member of the committee must submit a report of his/her findings to the court.

The examination of the incapacitated person normally includes 1) a physical examination, 2) a mental health examination and 3) a functional assessment.

The court also appoints an attorney to represent the person alleged to be incapacitated; however, the alleged incapacitated person may substitute his or her own attorney for the attorney appointed by the court. If the majority of the examining committee concludes that the alleged incapacitated person is not incapacitated in any respect, the judge is required to dismiss the petition. If the examining committee finds the person is unable to exercise certain rights, however, the court schedules a hearing to determine whether the person is totally or partially incapacitated. If a person is found to be incapacitated in any

respect, a guardian is appointed at the end of the incapacity hearing unless there are lesser restrictive alternatives to guardianship which adequately address the person's incapacity.

#### **MAY SERVE AS GUARDIAN?**

## **WHO**

Any adult resident, related or unrelated to the potential ward, of Florida can serve as a guardian. Certain relatives of the ward who do not live in Florida may also serve as guardian. Persons who have been convicted of a felony or who are incapable of carrying out the duties of a guardian cannot be appointed. Individuals who are professional or public guardians can also serve as guardian. Additionally, institutions such as a bank trust department or nonprofit corporation can be appointed guardian, but a bank trust department may only act as guardian of the property. The court gives consideration to the wishes expressed by the incapacitated person in a written declaration of pre-need guardian or at the hearing.

The court may not appoint a guardian in some circumstances in which a conflict of interest may occur.

#### **DOES A GUARDIAN DO?**

## **WHAT**

A guardian who is given authority over property of the ward is required to inventory the property, invest it prudently, use it for the ward's support, and account for it by filing detailed annual reports with the court. In addition, the guardian must obtain court approval for certain financial transactions.

The guardian of the ward's person may exercise those rights that have been removed from the ward and delegated to the guardian, such as providing medical, mental and personal care services and determining the place and kind of residential setting best suited for the ward. The guardian of the person must also present to the court every year a detailed plan for the ward's care along with a physician's report.

If the court finds the ward partially incapacitated, it will appoint a limited guardian to perform only those rights which the ward is incapable of exercising.

#### **IS THE GUARDIAN ACCOUNTABLE?**

## **ACCOUNTABLE**

Yes. A guardian must be represented by an attorney who will serve as "attorney of record." Guardians are usually required to furnish a bond (financial institutions and public guardians are not required to file a bond) and may be required to complete a court-approved training program.

The clerk of the court reviews all annual reports of guardians of the person and property and presents them to the court for approval. A guardian who does not properly carry out his or her responsibilities may be removed by the court.

# PERMANENT

## IS THE GUARDIANSHIP PERMANENT?

The guardianship does not have to be permanent. If a person recovers in whole or part from the condition that caused him or her to be incapacitated, a petition can be filed with the court to restore the ward's rights. In such a case the court will have the ward reexamined and can restore some or all of the ward's rights.

A guardian may be held accountable and removed as guardian if the guardian fails to carry out his or her duties or otherwise becomes ineligible to act as guardian. A guardian may also resign by providing notice to the court.

# OTHER OPTIONS

## IS GUARDIANSHIP THE ONLY MEANS OF HELPING AN INCAPACITATED PERSON?

No. Florida law requires the use of the least restrictive alternative to protect persons incapable of caring for themselves and managing their financial affairs whenever possible.

### HEALTH CARE DIRECTIVE, POWER OF ATTORNEY, OR TRUST

If a person creates an advance health care directive, a durable power of attorney or trust while competent, he or she may not require a guardian in the event of incapacity.

# MINORS

## WHAT ABOUT GUARDIANS FOR MINORS?

A child's parents are the child's natural guardians and in general may act for the child. In circumstances where the parents die or become incapacitated or if a child receives an inheritance or proceeds of a lawsuit or insurance policy exceeding \$15,000, the court must appoint a guardian. Both parents or a surviving parent may make and file with the clerk of the court a written declaration naming a guardian of the child's person or property to serve if both parents die or become incapacitated. A guardian may also be designated in a will.

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### FOR MORE INFORMATION ABOUT GUARDIANSHIP:

Contact your lawyer, your local bar association, or The Florida Bar Lawyer Referral Services, at (800) 342-8011. The material herein represents general legal advice. Since the law is continually changing, some provisions presented may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

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