

# FLORIDA GUARDIANSHIP: A RESOURCE FOR FAMILIES DEALING WITH ALZHEIMER'S DISEASE

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## I. GUARDIANSHIP AND ALZHEIMER'S DISEASE

- a. Alzheimer's Disease can have a devastating impact on the person with the disease and their families. The disease can cause a host of problems affecting every aspect of life. When Alzheimer's Disease impairs judgment and memory, a person's ability to manage his or her own affairs and carry out the activities of daily life is compromised. Unless planning is done before the onset of the disease or at the early stages of the disease, guardianship may be a necessary avenue for safeguarding the interests and managing the affairs of a person with Alzheimer's Disease.
- b. Guardianship can assist a person with Alzheimer's Disease by appointing a surrogate decision-maker to manage the affairs of the person. At critical stages of the disease, the Alzheimer's patient may have problems, speaking, understanding, reading or writing. In those instances, it is virtually impossible for the person to manage property, make appropriate residential choices, and give informed consent for medical treatment.
- c. Florida law provides for the court appointment of an individual or organization to act on behalf of a person who has been judicially determined incapable of managing his or her own affairs. The incapacitated person is called a ward and the person appointed to manage the ward's affairs is the guardian. A guardian is made responsible for managing a ward's assets, subject to audit, and plans for the ward's health care and personal well-being.

## II. TYPES OF GUARDIANSHIP

- a. There are three broad categories of guardians: family, professional and public.
  - i. Family Guardians – A preference exists in the law for the appointment of a guardian related to a ward by blood or marriage. Sec. 744.312(2), F.S.
  - ii. A Professional Guardian is any guardian who receives compensation for services to more than two wards, unless the wards are relatives of the guardian. Sec. 744.102(15), F.S.

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- iii. A public guardian is a person or organization appointed by the Statewide Public Guardianship Office to serve as guardian for indigent, incapacitated persons who have no family or friends available to serve as guardian. Secs. 744.701 – 744.709, F.S.
- b. Minors
- i. Parents are the natural guardians of their minor children. However, they cannot accept a tort settlement, insurance proceeds or a bequest from an estate for more than \$15,000 on behalf of a minor child, without a formal guardianship. Sec. 744.301, F.S.
  - ii. Guardianship over a minor ends when the ward becomes *sui juris* (Section 744.521, F.S.), i.e., the ward reaches age 18, marries or is judicially emancipated.
- c. Voluntary Guardians
- i. Sometimes an elder recognizes that help is needed to manage finances. In that case a “voluntary” guardianship may be appropriate. Sec. 744.341(3), F.S.
  - ii. A voluntary guardianship covers property only (not guardianship of person).
  - iii. A voluntary guardianship can be terminated by the elder.
  - iv. There is no finding of incapacity, except that a doctor’s certificate must be filed stating that the elder understands the nature of guardianship and the delegation of authority.
- d. Emergency Guardians
- i. While a petition for appointment of guardian is pending, the court may appoint an emergency temporary guardian (ETG) if “there appears to be imminent danger that the physical or mental health 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.” The immediate danger must be apparent to the court, since the ETG may be granted without notice to the alleged incapacitated person or other family members. Sec. 744.3031, F.S.
  - ii. The authority of the emergency temporary guardian expires sixty (60) days after appointment, or if earlier, when a permanent guardian is appointed; it can be extended upon petition for an additional 60 days, although some judges are willing to extend it indefinitely, until the final guardianship hearing is held.

- iii. A Durable Power of Attorney is suspended while incapacity proceedings are pending.
- e. Plenary and Limited Guardians
  - i. An Involuntary Guardianship is implemented after judicial hearing if the ward is found to “lack the capacity to manage some or all of his property or to meet at least some of the essential health and safety requirements of such person.” Sec. 744.102(10), F.S.
  - ii. In a **plenary** guardianship, all delegable rights have been delegated to the guardian; no rights have been reserved to the Ward. Sec. 744.102(8)(b)(18), F.S.
  - iii. A “plenary” guardianship is the most common type of guardianship.
  - iv. Although there are statutory procedures for restoring rights to the ward, a 1998 study commissioned by the Claude Pepper Foundation found that rights were restored in only 2.63% of cases.
  - v. A **limited** guardian is appointed to exercise some, but not all, of the tasks needed to care for the Ward. Sec. 744.102(8)(a), F.S.
  - vi. The order appointing a limited guardian must clearly state the scope of the guardian’s rights and duties.
- f. Standby – Once a guardian is appointed, a “standby” guardian may be appointed by the Court. The standby guardian has no immediate duties or powers, but he or she assumes the duties of a guardian within twenty (20) days after the death or resignation of the prior guardian. Sec. 744.304, F.S.
- g. Preneed
  - i. A designation of preneed guardian occurs in two instances: A person designates who shall serve as his or her own guardian in the event the person becomes incapacitated and needs a guardian or,
  - ii. A parent selects the person(s) who will serve as guardian of the minor children in case the parent dies or becomes incapacitated during the children’s minority.
  - iii. Both documents eliminate the need for protracted litigation to select a guardian. The court must appoint the designated guardian if that person is otherwise qualified (meets the residency requirements, is not a creditor or felon, etc.) Sec. 744.3046(8), Sec. 744.312(4), F.S.
- h. Foreign Guardian

- i. There are statutory procedures for managing the Florida property of :
  1. a nonresident ward with a resident guardian (Sec. 744.308, F.S.)
  2. a nonresident guardian and a nonresident ward (Sec. 744.307, F.S.), and
  3. procedures for domesticating a non-Florida adjudication when the ward moves to Florida having been adjudicated in another state (Sec. 744.306, F.S.)

**III. GUARDIANSHIP PROCEDURES** – The process of seeking incapacity is strictly controlled. The relevant statutes are found in Chapter 744, Florida Statutes, and there are Guardianship Rules within the Florida Probate Rules.

a. Pleadings

- i. A petition to determine incapacity must be filed in the county where the alleged incapacitated person resides or is found. It must be signed as a “verified petition” (under penalties of perjury).
  - ii. The incapacity petition must be filed simultaneously with a Petition for Appointment of a Guardian. Sec. 744.3201(3), F.S.
  - iii. If the petition for incapacity is dismissed for lack of finding of incapacity, and the court finds that the petition to determine incapacity was filed in bad faith, costs may be taxed against the petitioner. Sec. 744.331(7)(c), F.S.
  - iv. These are the various rights that a person may be declared unable to exercise: marry; contract; sue and defend lawsuits; determine his or her residency; consent to medical treatment; personally apply for government benefits; manage property or make any gift or disposition of property; decisions about his or her social environment or other social aspects of his or her life; vote, travel, have a driver’s license, seek or retain employment.
- b. Once the petition has been filed and the filing fee paid, the court appoints an attorney to represent the Alleged Incapacitated Person (AIP), and also appoints an “examining committee”. In some counties, the examining committee is automatically selected by the mental health clerks and appointed by the court. In other counties, the attorney for the proposed guardian must select and contact potential members of the examining committee from a local list.
- c. The court must appoint an attorney to represent the AIP. Sec. 744.102, F.S. Such attorney shall represent the expressed wishes of the alleged incapacitated person consistent with the rules regulating The Florida Bar.

- d. Once any level of incapacity is found, the court must appoint a guardian. If the incapacity is partial, then a limited guardian is appointed; if the incapacity is total, then a plenary (full) guardian is appointed.

#### **IV. LEGAL ALTERNATIVES TO GUARDIANSHIP**

- a. Durable Power of Attorney. If a person has the requisite capacity to execute a Durable Power of Attorney, a guardianship might be avoided. This document, however, only gives another person the right to do certain things outlined in the document. So, an attorney-in-fact under such a document cannot force the maker of the document to do anything the maker does not want to do.
- b. Designation of Health Care Surrogate. If a health care surrogate has been designated in writing, he or she has the authority to make medical decisions (and some mental health treatment decisions if the document so provides).
- c. Jointly Held Assets. If a person's predicament relates solely to assets and those assets are jointly owned, one joint owner can act (generally) without the consent of the other, depending entirely on what sort of asset it is.
- d. Guardian Advocate for Developmentally Disabled. Under Florida Statute 393.12, a Guardian Advocate can be appointed for a developmentally disabled individual without the necessity of an incapacity determination. The Advocate may make medical and residential decisions.
- e. Guardian Advocate for Mental Health Decisions. Under Florida Statute 394.4598, a Guardian Advocate can be appointed for a patient in a mental health facility who has been found to be incompetent to consent to treatment.

#### **V. COURT OVERSIGHT**

- a. Accountings.
  - i. A guardian of the property is required to file a verified inventory and initial accounting of all the ward's property within 60 days of appointment as guardian.
  - ii. Annual Accounting. Each year after appointment, the guardian is required to file an accounting which provides a full and correct account of receipts and disbursements for all the ward's property that the guardian has responsibility to manage.
  - iii. The accounting requirements provide safeguards to ensure the ward's assets are properly managed.
  - iv. The clerk of the court is responsible for auditing guardian accountings. The clerk reviews the accountings to make sure the beginning balances reconcile with ending balances of previous accountings; that

disbursements were made pursuant to court order or authorized by statute; and all calculations are correct.

- v. The court must approve or disapprove each accounting and a guardian can be made subject to sanctions for malfeasance. A guardian has a fiduciary responsibility to a ward.
- b. Guardianship Plans
- i. A guardian of the person is required to file within 60 days of appointment an initial guardianship plan based on the recommendations of the examining committee. The plan must include a provision for medical, mental and personal care services for the ward.
  - ii. Thereafter, the guardian must file an annual guardianship plan that reports on the provision for medical, residential, mental and personal care services for the ward.
- c. Restricted Depository – If the amount of the ward’s cash resources is significant, the court may order the guardian to place a majority of the cash assets in a financial institution that will not allow withdrawals without a court order. In such a case, the guardian can only withdraw cash from the depository upon court approval.
- d. Bonding – Unless exempted by a court, all guardians of the property must post a sufficient bond to cover the amount of cash and liquid assets under the guardian’s control. In addition, professional guardians are required to post a \$50,000 bond.
- e. Court Monitors are sometimes known as the “eyes and ears” of the court. Any interested person or the court itself can appoint a court monitor to investigate a guardian, examine the appropriateness of a guardian’s actions; and even interview the ward. The monitor reports his or her findings directly to the court.