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GUARDIANSHIP'S MOST FREQUENTLY ASKED QUESTIONS

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 and have not made plans to address this possibility. This legal process allows the “guardian” the ability to exercise the legal rights of the incapacitated person.

What is a Guardian?

A guardian may be an individual or corporation that is appointed by the court to manage some or all of the affairs of another. Prior to the establishment of a guardianship, it must be determined that a person lacks the capacity required to make decisions concerning his/her personal and/or financial matters and that no less-restrictive alternative exists, such as durable powers of attorney and health care surrogates.

How is a person determined to be incapacitated?

Any adult may file with the court a petition to determine another person's capacity. The court then appoints an examining committee consisting of three members, usually two physicians and another person who, by knowledge, skill, training or education, can provide an expert opinion on the capacity issue.

The examination of the incapacitated person must include 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. If the examining committee concludes that the alleged incapacitated person is not incapacitated in any way, the court will dismiss the petition. If the examining committee finds the person to be incapable of exercising certain rights, a hearing is held to determine whether the person is totally or partially incapacitated, and a guardian is appointed.

WHO MAY SERVE AS GUARDIAN?

Any adult resident of Florida can serve as a guardian. A close relative of the ward who does not live in Florida may also serve as a guardian. Persons who have been convicted of a felony or who are incapable of carrying out the duties of a guardian cannot be appointed. Institutions such as a bank trust department, a nonprofit religious or charitable corporation, or a public guardian 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 a pre-need guardian or at the hearing.

The Court may not appoint a guardian in any circumstance in which a conflict of interest may occur.

Do you have to have an attorney to represent you as the Guardian?

Yes, Florida law requires that the guardian be represented by an attorney.

WHAT DOES A GUARDIAN DO?

A guardian who is given authority over any property of the ward shall 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. Frequently, 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 consenting to medical, mental, and personal care services and determining the residential setting best suited for the ward every year. The guardian of the person must also present to the court a detailed plan for the ward's care.

IS A GUARDIAN ACCOUNTABLE?

Yes. Guardians 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 are 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.

IS GUARDIANSHIP PERMANENT?

Not necessarily. If a person recovers in whole or part from the condition that caused him or her to be incapacitated, the court will have the ward reexamined and can restore some or all of the person's rights.

A guardian may resign by providing notice to the court with the court accepting the resignation.

However, a court approved guardian is not relieved of their duties until a “successor” has been appointed to serve.

IS GUARDIANSHIP THE ONLY MEANS OF HELPING AN INCAPACITATED PERSON?

No. Florida law requires the use of less restrictive alternatives to protect persons incapable of caring for themselves and managing their financial affairs whenever possible. If a person creates an advance health care directive and a durable power of attorney or revocable living trust while competent, he or she may not require a guardian in the event of incapacity.

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 of the property.” 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 in which the child is a beneficiary.

FOR MORE INFORMATION REGARDING GUARDIANSHIPS, please call our office at 407-645-4833.

(general information obtained from the What is Guardianship public information pamphlet from the Florida Bar)