

GUARDIANSHIP: A FAMILY'S GUIDE TO WEIGHING THE OPTIONS

1. What is a Guardianship?

- ❖ A Guardianship is a legal process, utilized to safeguard a person who cannot make or communicate safe decisions about his or her person and/or property, or who has become susceptible to fraud or undue influence.
 - http://www.guardianship.org/what_is_guardianship.htm
- ❖ A Guardianship is a legal proceeding where a guardian is appointed to exercise the legal rights of a person who has been deemed incapacitated
 - <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9e8fd739d221b11c085256b2f006c5a4e>
- ❖ A Guardianship may take away the individual's right:
 - To marry
 - To vote
 - To personally apply for government benefits
 - To have a driver's license
 - To travel
 - To seek or retain employment
 - To sue and defend lawsuits
 - To apply for government benefits
 - To manage property or to make any gift or disposition of property
 - To determine his or her residence
 - To consent to medical and mental health treatment
 - To make decisions about his or her social environment or other social aspects of his or her life
 - **Source:** http://www.guardianship.org/what_is_guardianship.htm

2. Who or What is a Guardian?

- ❖ A Guardian is individual OR an institution (such as a professional or public guardian) who has been appointed by the court to care for the incapacitated person ("ward") and/or for their assets by exercising the rights specifically delegated to the guardian
 - <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9e8fd739d221b11c085256b2f006c5a4e>

3. Who May Benefit From A Guardianship?

- ❖ A person with a diagnosis of a developmental disability.
- ❖ A person that receives SSI (Social Security Income) because of a developmental disability.
- ❖ A person that receives a full or mini-waiver for APD (Agency for Persons with Disabilities) services.
- ❖ A person that receives CMS (Children's Medical Services) level Medicaid or in a MFC (Medical Foster Care) placement for a serious medical condition that impairs functioning.

4. What does the law say?

- ❖ The Florida Legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary.
- ❖ The Legislature further finds that it is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs.
- ❖ Guardianship should provide “the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.”

5. What Are My Choices?

- ❖ Joint Bank Accounts
 - <https://wallethub.com/edu/joint-bank-account/14303/>
- ❖ ABLE Act accounts
 - <http://www.disabilityrightswi.org/wp-content/uploads/2015/08/ABLE-Accounts-FAQ.pdf>
- ❖ Durable Power of Attorney
 - <http://www.nolo.com/legal-encyclopedia/durable-power-of-attorney-health-finances-29579.html>
- ❖ Living Trust
 - http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/wills/chapter_5.authcheckdam.pdf
- ❖ Health Care Surrogate
 - http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0765/0765.html
- ❖ Voluntary Guardianship
 - <http://www.upchurchlaw.com/blog/2014/02/04/voluntary-guardianship-in-florida-139904>
 - http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0744/Sections/0744.341.html
- ❖ Preneed Guardian
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0744/Sections/0744.3046.html
 - <http://www.flprobatelitigation.com/2010/09/articles/new-probate-cases/contested-guardianship-proceedings/3d-dca-when-can-a-judge-ignore-your-declaration-naming-preneed-guardian/>
- ❖ Standby Guardian
 - <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/guardianship/>
- ❖ Guardian Advocate
 - <http://newrightlaw.com/practice-areas/practice-areasdisability-benefits>
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0393/Sections/0393.12.html
- ❖ Limited Guardianship
 - <http://definitions.uslegal.com/l/limited-guardianship/>
- ❖ Plenary Guardianship
 - <https://www.flsenate.gov/Laws/Statutes/2012/744.102>
 - <http://definitions.uslegal.com/p/plenary-guardian/>

6. Dangers of Guardianships

- ❖ Guardianship may involve removal of considerable rights from an individual
- ❖ Number of adults under guardianship has tripled since 1995
- ❖ When unnecessary, finding people with disabilities incompetent and taking away their right to make choices “for their own good,” may actually harm them and worsen the symptoms or behaviors that first led to the guardianship proceedings.

7. What is Incapacity?

- ❖ **Florida Law “Incapacitated person”** means a person who has been judicially determined to lack the capacity to manage at least some of the property, or to meet at least some of the essential health and safety requirements of the person.
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0744/Sections/0744.102.html
- ❖ A guardianship must be the **least restrictive appropriate alternative** and must reserve to the incapacitated person the right to make decisions in all matters in which the person is able to do so.
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0744/Sections/0744.1012.html

8. How is a Person Determined to be incapacitated?

- ❖ A Petition for Guardianship must be filed in the Circuit Court. After the petition is filed, the court appoints an examining committee of 3 members (usually physicians, mental health MDs or PhDs) and an attorney for the alleged incapacitated person (AIP).
- ❖ The members of the examining committee visit the AIP, and submit their findings to the Court at least 5 days prior to the hearing.
- ❖ Examination will include a physical exam, a mental health exam, and a functional assessment.
 - <http://ohalllaw.com/2011/09/florida-guardianship-how-does-the-state-determine-incapacitation/>
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0744/Sections/0744.331.html

9. When Should These Decisions be made?

- ❖ A youth potentially in need for a guardianship should be identified as early as possible!
- ❖ When they are 16.5 years of age, start preparing all the documents required!

10. How Do I Get a Guardianship for Someone I Believe to be incapacitated?

- ❖ A detailed petition will have to be filed in the circuit court of Florida alleging a person is incapacitated.
- ❖ Any competent adult may file a petition to determine another person’s capacity.
- ❖ Certain persons are excluded (ex. Convicted felons or those with financial conflicts).
- ❖ Must be filed in county where alleged incapacitated person (AIP) resides.
 - http://www.guardianship.org/pdf/Question_Answers.pdf
 - <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/e8fd739d221b11c085256b2f006c5a4e>

- http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0744/Sections/0744.331.html

11. Guardianship Proceedings

- ❖ The Court will appoint an attorney to represent the AIP.
- ❖ Prior to the hearing the judge will review the examining committee's reports and at the hearing listen to arguments of counsel for the Petitioner and counsel for the AIP.
- ❖ The Hearing is considered an adversarial proceeding.
- ❖ If the committee finds the AIP is not incapacitated, the petition will be dismissed. Judges follow the majority of the examining committee.
- ❖ If a judge finds the AIP can exercise some but not all rights, a limited guardianship will be found. If the person can exercise no rights, the guardianship is called plenary.
- ❖ The guardian is usually appointed at the end of the hearing. Letters and orders of guardianship will be issued.
 - <https://www.floridaguardians.com/guardianship-faq/guardianship-statutes/>
 - <https://www.law.cornell.edu/wex/guardian>
 - <http://www.lawhelp.org/dc/resource/guardianship-and-conservatorship-frequently-a?ref=wUkZQ>

12. Who Can Serve as a Guardian?

- ❖ Any adult resident of Florida.
- ❖ A close relative of ward who does not live in Florida MAY serve.
- ❖ Persons convicted of a felony or who are incapable of carrying out guardian duties MAY NOT be a guardian.
- ❖ Persons arrested without conviction for certain crimes (ex. Elderly abuse) MAY NOT be a guardian.
- ❖ Court may not appoint a guardian when there is a conflict of interest (ex. ALF owner).
 - <https://www.floridaestateplanninglawyerblog.com/2015/08/who-can-be-a-guardian-in-florida.html>
 - <http://corporate.findlaw.com/law-library/what-is-guardianship.html>

13. What do Guardians do?

- ❖ Exercise those rights that have been removed from the ward and delegated to them.
- ❖ Determining where the ward lives, managing his or her finances, and making medical decisions.
- ❖ Visit the ward at least once personally each calendar quarter
 - <http://corporate.findlaw.com/law-library/what-is-guardianship.html>
 - <https://www.manateeclerk.com/GeneralInfo/FAQs.aspx?categoryId=13>
 - <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/e8fd739d221b11c085256b2f006c5a4e#WHAT%20DOES%20A%20GUARDIAN%20DO%3F>

14. Is a Guardian Accountable?

- ❖ YES! Guardians are held accountable and while they are represented by an attorney who serves as the “attorney of record” throughout the guardianship all guardians must complete a course approved by the Court that outlines their responsibilities.
- ❖ Private and professional guardians, including the Public Guardian, may sometimes have to post a bond.
- ❖ If a guardian does not carry out their responsibilities properly they may be removed or even charged with a crime (ex. Exploitation)
 - <http://corporate.findlaw.com/law-library/what-is-guardianship.html>
 - <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/e8fd739d221b11c085256b2f006c5a4e#WHAT%20DOES%20A%20GUARDIAN%20DO%3F>

15. How Long Does a Guardianship Last?

- ❖ Depends! If a person recovers in whole or in part from the condition that caused them to be incapacitated, they may be reexamined and may have all or some of their rights restored (ex. A stroke or severe accident). Many are lifelong, however.
- ❖ Any interested person (including the ward) can file a Petition for Restoration. This involves re-examination by a court appointed doctor.
- ❖ A guardianship may be terminated if the guardian fails to carry out their duties or becomes ineligible (ex. Becomes incapacitated). A successor guardian must be identified and appointed as soon as possible.
- ❖ A guardian may be discharged if unable to continue serving as guardian or if the ward is totally restored, by providing notice to the court with the court accepting the notice.
- ❖ If the guardian is discharged and the ward is NOT fully restored, the Court must appoint a successor guardian.
- ❖ When a ward dies, the guardian is discharged with appropriate pleadings including filing the ward’s death certificate.
 - <http://corporate.findlaw.com/law-library/what-is-guardianship.html>
 - http://www.flcourts18.org/PDF/gurardianship_rev1-07.pdf

16. What Items are Needed to Apply for a Guardianship?

- ❖ Proof of identity, including state ID, social security card, and birth certificate.
- ❖ Immigration card or naturalization papers, if applicable.
- ❖ Medicaid card or other proof of medical, or if not available, copy of Medicaid eligibility documentation.
 - <http://www.livestrong.com/article/215455-how-to-obtain-legal-guardianship-of-a-child/>

17. What Additional Items are needed to Apply for a Guardianship?

- ❖ A *recent* psychological and or physical evaluation, complete with diagnoses and full scale IQ (if there is an intellectual disability).
- ❖ If applicable, a copy of the Termination of Parental Rights Final Judgment to both parents (if not applicable, the Shelter Order), death certificates, or current contact information as to the parents.
- ❖ Information pertaining to their assets (SSI trust fund, SSA, or other benefits due to a deceased parent)

- http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/guardianshipliability.html

18. Guardian Advocates: A Less Restrictive Alternative

- ❖ [Florida Statute §393.12](#) offers a less restrictive alternative for persons with specific disabilities. No finding of incapacity.
- ❖ Usually no attorney required, but there are pleadings, an examination, and a hearing.
- ❖ Limited to those with only intellectual disability, autism, spina bifida or Prader-Willi Syndrome manifesting before age 18.
- ❖ Guardian Advocate must meet [Chapter 744](#) requirements outlined above.
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0744/0744ContentsIndex.html&StatuteYear=2015&Title=-%3E2015-%3EChapter%20744
- ❖ Major difference: No finding of incapacity, no annual accountings, no attorney of record.
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0393/Sections/0393.12.html

19. Alternative: No Guardianship

- ❖ Transition Meetings - Before the transition planning meeting, the student should assess his or her own strengths, abilities and needs and develop goals for employment, education and independent living.
- ❖ At the meeting, the student should ask the transition planning team to identify services and supports that will help her or her achieve those goals. The team should identify education and training opportunities and other appropriate services and match the student with providers.
 - a) Vocational Rehabilitation
 - b) Agency for Persons with Disabilities
 - c) Center for Independent Living
- <http://www.council-for-learning-disabilities.org/transition-planning-for-individuals-with-learning-disabilites>
- <https://www.answers4families.org/book/export/html/1146>

20. Decision Making

- ❖ Facilitated decision making assists in determining a person's will and assists that person in making a decision according to that person's intentions.
- ❖ Supported decision-making, or "representative" decision-making where an adult appoints a power of attorney or other legal representative to act for them under certain circumstances.
- ❖ Durable power of attorney for certain circumstances
 - <http://legaldictionary.net/durable-power-of-attorney/>
- ❖ Health care surrogate
- ❖ Supporter or Support Network to assist in making decisions
 - http://www.dhs.vic.gov.au/_data/assets/pdf_file/0011/690680/dsd_cis_supporting_decision_making_0212.pdf