

LEGAL WAYS OF PROTECTING RIGHTS

Sometimes guardianship may be the only way to protect a family member's rights and insure his health and safety. However, there may be alternative ways that can avoid this more drastic action if adequate training and supervision are given to the person in need of protection. These alternatives may be more troublesome to the substitute decision-maker but could be well worth the effort if they allow an individual to make his own decisions and achieve a greater degree of independence. Just as the "least restrictive" place to live is best, likewise the least restrictive way to protect rights is also best.

Usually whether a person can give consent to a decision is relative to the complexity and the seriousness of the decision to be made. In some cases, help with evaluating options is all that is needed. With this guidance, the person may be able to reach his own decision. Those who can recognize their own need for help with decision-making may not require guardianship, but only advice, information and assurance.

Alternatives to Guardianship

Remember that guardianship takes away the right to decide. The least stringent options are always better. Some alternatives to guardianship that could be considered are:

- **Family and Friends:** Sometimes attentive support from family and friends can be enough to allow the person to manage his own personal and financial affairs.
- **Power of Attorney:** Legally competent adults who are disabled but who are capable of informed consent may give power of attorney to another adult. This legal document confers the legal authority to make decisions on specific matters for the person who is disabled. A *DURABLE* power of attorney can be exercised until the death of the person who gave it.
- **Client Advocate:** Section 393.0651, F.S., allows the Support Planning Committee to appoint a family member or friend to become an official client advocate when the need for this is recognized. Client advocates may assume a variety of roles depending on the needs and wishes of the individuals. They may serve as guides and advisors in developing the support plan, identifying appropriate services, considering the costs of those services, or help with any decisions related to services to be provided through the Developmental Disabilities Program.
- **Co-signer of Bank Accounts:** This is a way to exercise some degree of control over decision-making in expenditures by requiring more than one signature on withdrawals/checks. It is an effective way to prevent financial exploitation. Provisions should be made for the money in the account to be accessed if any of the signatories were to die.
- **Representative Payee:** An individual may be given authority by the Social Security Administration to receive and manage federal benefits for another person found unable to manage his own money. The representative payee receives the benefit payment and is required to account for its expenditure on behalf of the person for whom it is intended.

If none of these alternatives are adequate for your family member, then you may need to consider guardianship. Remember that you should take away only the rights that the person cannot handle. When a person is given a "guardian," he is then called a "ward."

Four areas in which persons with developmental disabilities are most likely to have difficulty are:

- Consenting to medical, dental and surgical procedures
- Managing money or property
- Applying for governmental benefits and entitlements, and
- Deciding on residential choices.

Laws in Florida Which Address Guardianship

Chapter 393, F.S., (Developmental Disabilities) is specifically designed for the unique needs of persons with developmental disabilities. The type of guardianship addressed in Section 393.12, F.S. is a Guardian Advocate.

Without requiring an adjudication of incapacity, the Circuit Court may appoint a guardian advocate if the person has a developmental disability and lacks the capacity to do some, but not all, of the tasks necessary to care for his person, property or estate. The person may voluntarily petition for the appointment of a guardian advocate or join others as petitioner. Only those rights the person cannot manage are removed.

This is the least restrictive, less costly and much preferred type of guardianship for persons with developmental disabilities. It offers procedural advantages: the use of appropriate experts and the already existing support plan, individual education plan, or habilitation plan as proof of the level of disability and potential of the individual. People who know the person and the field of disability write these plans. It also takes less legal time as well as fewer fees.

Other than the specific requirements and procedures stated in Section 393.12, F.S., those in Chapter 744 are also followed for the guardian advocate process. Section 393.12, F.S., specifically denies the requirements for an adjudication of incompetence. It dictates that the hearing must be conducted in a manner consistent with due process.

Although it is not required by statute, it is advisable to have a *standby* guardian advocate appointed at the time of the guardian advocate appointment.

Chapter 744, F.S., (Guardianship) covers all persons who might need guardianship for any reason (e.g. dementia, head trauma, mental illness, or any disability). It is an expensive procedure and requires costly evaluations by professionals who may not be experienced or appropriate to evaluate persons with developmental disabilities—e.g., retardation is not a medical entity, although it may have accompanying medical problems; yet the statutes demand that there must be either a psychiatrist or other physician on the examining committee.

The types of guardianship found in Section 744.102(8)(b), F.S. are:

- **Full (Plenary) Guardianship (Section 744.102(8)(b), F.S.).** A person is appointed by the court to exercise all delegable legal rights and powers of the person who has a disability. Full (plenary) guardianship is necessary for very few people. It removes all rights relating to both person and property. It requires that there first be an adjudication of the person as totally incapable of

handling any personal decisions, money or property. After this adjudication of incapacity a guardian is appointed to make all decisions for the ward.

- **Limited Guardianship (Section 744.102(8)(a), F.S.).** The court adjudicates the individual incapacitated in specific areas due to the fact that she lacks the capacity to do some but not all of the tasks necessary to care for her person or property. A guardian is then authorized to handle only those rights and powers that the court finds the person incapable of handling.
- **Emergency Temporary Guardianship (Section 744.3031, F.S.)** In emergency situations a guardian may be appointed for the person and/or property of an alleged incapacitated person prior to the appointment of a full guardian. This is done after a petition for incapacity has been filed when there appears to be imminent danger to the person. (e.g. there is no one to make a critical medical decision that must be made immediately.)
- **Voluntary Guardianship (Section 744.341, F.S.).** If the court determines that the individual is not incapacitated, but the individual files a voluntary petition for guardianship, the court may appoint a guardian or co-guardians of the *property* of a person who, though otherwise mentally competent, is unable to manage property. A voluntary guardianship may be terminated by the ward.
- **Standby Guardianship (Section 744.304, F.S.).** Parents /family ordinarily wish to have a hand in deciding who shall take over when they die rather than have the court choose. Standbys may operate as guardian for 20 days after the death or incapacity of the guardian, at which time they must have the court confirm their appointment. The court may appoint a standby guardian with the same petitioning procedures and at the same hearing as required for the basic guardianship. It is helpful to also have this information included in the guardian's will.
- **Foreign Guardian (Section 744.306, F.S.).** Florida recognizes guardianships from other states, territories and countries. The guardian must file an authenticated order of the appointment with the Clerk of the Court where the ward resides.

A Few Words About the Process

Any Florida resident over the age of eighteen, who is of sound mind and who has not been convicted of a felony, is eligible to serve as a guardian, as is a non-profit corporation organized for religious or charitable purposes. (For exceptions refer to ARC Florida Guardianship Handbook or Chapter 744, F.S.)

Each guardian is required to:

- Receive basic training in how to function as a guardian. This training is provided at various sites. Training may be waived with sufficient evidence that the guardian already has this knowledge.
- File a guardianship report annually to include the guardianship plan and an accounting of assets (unless this accounting is waived by the court).

- Develop and implement the annual guardianship plan, which must include details on the current condition and needs of the ward and how the guardian proposes to meet those needs.
- Account annually to the court (unless waived when the ward has no estate) on all receipts, disbursements, cash deposited in any institution, and property on hand at the end of the accounting period. When income is solely from governmental benefits or the person's own earned income, the annual accounting may be waived unless the ward's financial situation changes.

You will need an attorney if guardianship is required. It is all right to shop for an attorney, both for fee per hour and in the area of experience in this very specialized field. Costs will vary across the state, and sometimes you can find an attorney who will provide the services pro bono (without charge). Your local bar association may be able to help you find one. It is important if you wish to use the Guardian Advocate process (Section 393.12, F.S.) to have an attorney familiar with this particular statute and procedure. Most attorneys with general practices have done guardianships for elderly people and children as well as total incompetency procedures for people with other disabilities. Fewer attorneys have done limited guardianships under the Guardian Advocate procedures.

The potential ward, if she is capable of understanding the need for someone to make or help make decisions for her, may be the petitioner or one of the petitioners, thus from the start being represented by an attorney presumably acting in her best interest, and avoiding the need for two attorneys.

The guardian has no personal financial responsibility for the care and maintenance of the ward. A guardian may resign and be relieved of guardianship duties with the approval of the court.

Public Guardian

Some counties in Florida have an Office of the Public Guardian. The public guardian can become the guardian for persons who have no family, friend, or any other person, bank or corporation willing to serve as guardian for an incapacitated person and the person has no means to compensate a private guardian. To be eligible to have a public guardian appointed, the potential ward must meet the asset criteria for Medicaid eligibility.



A public guardian would never be appointed unless all less restrictive or intrusive methods were not sufficient for meeting the incapacitated individual's needs.

Any decision rights that are removed by the court and transferred to the guardian can no longer be made by the consumer. The guardian should always consider the wishes of the person with the disability as well as what he perceives to be in the ward's best interest when making these decision.