Florida Guardianship Quick Reference Guide

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Introduction

The commencement of a Florida guardianship is typically used in two situations – either when a person may be incapacitated or when a minor receives assets in excess of $15,000. If a guardianship is sought because someone may be incapacitated, then typically the court sets two hearings. At the first hearing the court determines whether the person is incapacitated; at the second, the court appoints a guardian if the person is determined to be incapacitated. Often, these hearings are combined. The court has the option of appointing a limited or a plenary guardian.

A. Incapacity

A person is legally incapacitated if he or she is 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 such person. F.S. 744.102(12). The court will appoint an examining committee composed of three professionals, usually a psychiatrist, psychologist, and a third professional to interview the person and file a report with the court. See F.S. 744.331(3). The court will also appoint an attorney to represent the person alleged to be incapacitated. Partial or total incapacity must be established by clear and convincing evidence. F.S. 744.331.

B. Appointment of Guardian

Any adult resident of Florida can serve as a guardian. A non-resident of the state may serve if he or she is a close family member. See F.S. 744.309. The court gives consideration to the wishes expressed by the incapacitated person in a written declaration of pre-need guardian or at the hearing. Institutions, such as a public guardian may be appointed, but a bank trust department can only be appointed as guardian of the property and not guardian of the person.

C. Declaration of Pre-Need Guardian

The statutory requirements for execution of a Declaration of Pre-Need Guardian are similar in some ways to the execution of a Florida will. The declaration must be signed by the declarant in the presence of two attesting witnesses who are present at the same time. In a proceeding for incapacity, production of a Declaration of Pre-Need Guardian constitutes a rebuttable presumption that the person named as pre-need guardian or alternative is qualified to serve. However, the court is not bound to appoint the person named if they are found to be unqualified or if the court determines that appointing the preneed guardian would not be in the best interests of the ward. F.S. 744.3045(4),(6), 744.312(4).

D. Guardianships for Minors

A "minor" is a person under 18 years of age whose disabilities of age have not been removed by marriage or otherwise. F.S. 744.102(13). During minority, the mother and father are the natural guardians of their own children, either natural or adopted. F.S. 744.301(1)

E. Minor's Claims

The settlement of claims on behalf of minors is governed by F.S. 744.301, 744.3025 and 744.387. The statutes make a distinction between settlement of claims under or above a $15,000 threshold. (Note: Prior to April 29, 2002, the threshold was $5,000.) Court approval is not required for settlements of $15,000 or less – the natural guardian is authorized to settle such claims. However, court approval is required for settlements over $15,000. A legal guardianship will also be required. F.S. 744.387(2). Appointment of a guardian ad litem to represent the minor's interest is required if the gross settlement amount is $50,000 or more. If the amount is between $15-50,000, a guardian ad litem may need to be appointed.

Note: Failure to obtain court approval under F.S. 744.387(3)(a) of a pre-suit structured settlement exceeding $15,000 could result in the settlement being disaffirmed by the minor on reaching majority or within a reasonable time thereafter.

F. Is Guardianship the Only Means of Helping an Incapacitated Person?

No. Certainly there are better alternatives to a guardianship. As stated in the Florida Bar publication on guardianship, "Florida law requires the use of less restrictive alternatives to protect persons incapable of caring for themselves and managing their financial affairs whenever possible." Therefore, if a person appoints a health care surrogate, creates a durable power of attorney, and a revocable living trust while competent, he or she may not require a guardian in the event of incapacity.

G. Conclusion

The attorneys at **Rarick & Beskin** provide planning to help avoid guardianship for loved ones; if guardianship is necessary we will assist your family in establishing the guardianship as fast as possible. Our guardianship services are limited to southeast Florida. For more information or a good faith estimate of the legal fees and costs, please contact Phil Rarick, Miami Probate Attorney, at **(305) 556-5209, (954) 861-1426** or e-mail prarick@raricklaw.com.

Disclaimer

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