

Alternatives to and Types of Guardianship

Introduction

Guardianship is a formal legal process in which a court finds that an individual (a “ward”) is incapable of making decisions for themselves (“incapacitated”) and delegates the individual’s civil and legal rights to another person (a “guardian”) to make decisions for them. Florida law recognizes that every individual has unique needs and differing abilities; however, the state’s goal is to allow incapacitated persons to participate as fully as possible in all decisions affecting them in the least restrictive form of guardianship. There are many alternatives to guardianship that provide decision-making assistance.

Options for Providing Decision-Making Assistance Other Than Guardianship

Financial

Most banks offer services that may be able to assist someone with managing their finances without the appointment of a guardian. This can include the direct deposit of income, automatic bill payments for ongoing expenses, and withdrawal limits to prevent exploitation or unwise spending. **Convenience Accounts** allow the account holder to designate agents who can make deposits and withdraw funds on their behalf, but the account holder retains ownership of the account. For more information on convenience accounts, please refer to section 655.80, of the Florida Statutes.

Powers of Attorney (POAs)

A power of attorney is a legal document in which someone (the “principal”) grants another person

(the “agent”) authority to make decisions on the principal’s behalf. Principals can grant their agent only limited powers to make specific decisions (a **Limited** or **Special Power of Attorney**), or they can grant their agent the power to do anything they could do for themselves (a **General Power of Attorney**). Usually, a power of attorney ends if the principal is incapacitated. But a durable power of attorney is not terminated by the subsequent incapacity of the principal. The use of a durable power of attorney may help avoid the need for a guardian to be appointed if a person becomes unable to make their own decisions. For information on durable power of attorney, refer to Chapter 709 and section 709.2104, of the Florida Statutes.

Trusts

Trusts aren’t only for the wealthy! A trust is a legal arrangement in which a trustee holds assets on behalf of a beneficiary or beneficiaries. Trusts can allow a trustee to manage a person’s income and property if they become incapacitated.

A **Revocable Trust**, also known as a **Living Trust**, is created to manage a person’s assets during their lifetime and distribute the remaining trust assets after their death. The person who creates the trust is the “settlor” and the person responsible for managing the trust’s property is the “trustee.” The settlor can, as long as they are alive and competent to make their own decisions, serve as their own trustee or they can appoint someone else to act as trustee. A living trust is revocable, which means that the settlor can change or end the trust during their lifetime. The settlor can withdraw money from the trust as long as they are not incapacitated. If the settlor becomes incapacitated, the trustee or a successor trustee can continue to manage the trust property and pay the settlor’s bills. This ability to manage an individual’s finances after they are no longer capable of making decisions for themselves may help avoid the need for a guardian to be appointed to manage a person’s property.

There are many other kinds of trusts, including a **Special Needs Trust**, which can preserve the beneficiary's eligibility for needs-based government benefits such as Medicaid and Supplemental Security Income. Trusts generally require the services of an attorney to prepare.

For information on trusts, please refer to Chapter 736, of the Florida Statutes.

Social Security Administration (SSA) Representative Payment Program

Representative Payees can be appointed for individuals receiving Social Security or Supplemental Security Income (SSI) who are incapable of managing their benefit payments. SSA will appoint a representative payee, usually a family member or friend, to communicate with SSA, receive payments on behalf of the beneficiary, and spend the money to pay for the beneficiary's needs. For more information visit SSA's website at ssa.gov/payee.

U.S. Department of Veterans Affairs (VA) Fiduciary Program

Veterans and other beneficiaries of VA programs who are unable to manage their financial affairs may be appointed a **Fiduciary**, who oversees financial management of VA benefit payments. The fiduciary is normally chosen by the beneficiary and is required to undergo background screening prior to being approved and appointed by the VA. For more information, visit the VA's website at benefits.va.gov/fiduciary.

Supported Decision-Making

Supported Decision-Making is an informal alternative to guardianship that allows people with disabilities to keep their rights and their decision-making capacity. Instead of having a guardian make choices for them, people with disabilities have supporters who help them make their own choices. A person using supported decision-making appoints trusted advisors, such as friends, family, or professionals, to serve as supporters. The supporters help the person with a disability

understand, make, and communicate his or her own choices. For more information about Supported Decision-Making, please visit Disability Rights Florida's website at disabilityrightsflorida.org and search for "supported decision making."

Elder-Focused Dispute Resolution Process

Florida has a relatively new **Eldercaring Coordination** process that recognizes that seniors are entitled to the dignity of having their voices heard, even if they are losing capacity to make their own decisions. Eldercaring coordination is an alternative dispute resolution process during which an impartial third person assists in the resolution of disputes concerning the care and safety of an elderly person. This avoids working out differences in the court which can be costly and traumatizing. For more information, please visit "Eldercaring Coordination" at flcourts.gov/Resources-Services/Alternative-Dispute-Resolution/Eldercaring-Coordination#:~:text=Eldercaring%20coordination%20utilizes%20eldercaring%20coordinators,and%20safety%20of%20an%20elder.

Health Care

ADVANCE DIRECTIVES. Health Care Advance Directives allow a person to give written instructions expressing their own wishes regarding future health care decisions. Advance directives can include the designation of a health care surrogate, a living will, and other documents that let a person say how they want to be treated if they get seriously ill. Chapter 765 of the Florida Statutes describes these advance directives and provides suggested forms.

- An adult who is still capable of making health care decisions for himself or herself can choose someone to make health care choices for them when they are no longer able to decide for themselves. In Florida, this person is called a **Health Care Surrogate**.
- Another kind of advance directive is one that describes what kinds of life-prolonging procedures a person wants administered

or withheld if they have a terminal or end-stage condition or are in a persistent vegetative state and are no longer able to communicate their wishes. A **Living Will** allows you to specify, in writing what you want done to keep you alive and under what conditions.

- Other advance directives a person can make in writing include **Anatomical Donations** and **Do Not Resuscitate Orders**.

HEALTH CARE PROXY. If someone becomes incapacitated and has not executed an advance directive and designated a health care surrogate, Florida law specifies who will be allowed to make medical decisions on the patient's behalf. These persons can serve as proxy in the following order of priority: a judicially appointed guardian or guardian advocate, a spouse, an adult child or a majority of the adult children, a parent, an adult sibling or a majority of the adult siblings, any other adult relative who has maintained regular contact with the patient, a close friend, or a licensed clinical social worker. For further information, please refer to section 765.401 of the Florida Statutes.

Guardian Advocacy and Guardianship

If less restrictive means of assistance do not enable a person to care for their own needs, then the appointment of a guardian may be necessary. There are several different types of guardianship.

Voluntary Guardianship

A person who is mentally competent but who is not capable of caring for themselves due to their age or physical disability can voluntarily petition the court for the appointment of a guardian. **Voluntary Guardians** are given control only over the property of the ward. The ward continues to make their own personal and medical decisions. A voluntary guardianship can be terminated by the ward.

Limited Guardianship

If a person has been determined by a court to be incapacitated and incapable of exercising some but not all of their rights, the court may place the person in a **Limited Guardianship**. The court will give a limited guardian specific powers and duties, while the ward retains all the rights that are not specifically taken away by the court's order.

Plenary Guardianship

The court will appoint a **Plenary Guardian** when it determines that a person is incapable of performing all the tasks necessary to care for him or herself. This is the most restrictive type of guardianship because the plenary guardian can make almost all decisions on behalf of the ward.

Guardian Advocates

Guardian Advocacy is a legal process through which parents, family members, or friends of adult individuals with a developmental disability can obtain the legal authority to act on the individual's behalf. Guardian Advocates can be appointed if the person with a developmental disability lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person, property, or estate, or if the person has voluntarily petitioned for the appointment of a guardian advocate. Only the specific rights that a person cannot manage themselves are delegated to the guardian advocate.

For additional information on guardianships, please visit Florida Courts, guardianships at flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Court-in-Florida/Guardianship.

Conclusion

For more information about guardianship and its alternatives, you should contact a lawyer. The Florida Senior Legal Helpline provides free civil legal advice and brief services over the telephone to eligible Florida residents 60 years and older and can be reached at 888-895-7873. You can also find your local legal services provider by visiting law.elderaffairs.org/legal-services/local-legal-services-partner-organizations.

Information obtained from Florida Statutes; Florida State Guardianship Association at www.floridaguardians.com; the National Institute on Aging found at nia.nih.gov/health/choosing-health-care-proxy; Disability Rights Florida found at disabilityrightsflorida.org/disability-topics/disability_topic_info/what_are_the_alternatives_to_guardianship; and the Florida Courts.



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