

# ***FLORIDA GUARDIANSHIP LAW AND INFORMATION***

***EIGHTEENTH JUDICIAL CIRCUIT  
SEMINOLE COUNTY, FLORIDA***

***Updated as of January, 2007***

Florida Guardianship Law and Information Updating Committee Members:

**Honorable Nancy Alley  
Circuit Judge, Eighteenth Judicial Circuit  
Juvenile Justice Center  
190 Bush Blvd  
Sanford, FL 32773  
Telephone: (407) 665-5342**

and

**Ian L. Gilden, Esquire  
Ian L. Gilden, P.A.  
Keewin Lexington Park  
151 Lookout Place, Suite 110  
Maitland, FL 32751  
Telephone: (407) 645-4446**

and

**Robert K. McIntosh, Esquire  
Stenstrom, McIntosh, Colbert,  
Whigham & Partlow, P.A.  
1001 Heathrow Park Lane  
Suite 4001  
Lake Mary, Florida 32746  
Telephone: (407) 322-2171**

and

**Silvia McLain, Esquire  
Seminole County Bar Association  
Legal Aid Society, Inc.  
101 West Palmetto Avenue  
Longwood, Florida 32750  
Telephone: (407) 834-1660**

*Special thanks to law students Anthony C. Sciré, Jr., Josh Frick, and Krista Rogers of Barry University, Dwayne O. Andreas School of Law for their assistance in*

*updating this informational packet.*

**This document does not constitute legal advice and is intended merely to serve as a resource.**

Please consult with your attorney for legal advice.  
Please be aware that the laws may change and you should consult with your attorney for assistance.

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## **I. INTRODUCTION**

A guardian is a surrogate decision-maker appointed by the court to make personal and/or financial decisions for a minor or for an adult with mental and/or physical disabilities. After adjudication, the subject of the guardianship is termed a "ward."

Florida law provides for the appointment of a guardian for a minor in circumstances such as where the parents die, are unable to care for a child, or if a child receives an inheritance or proceeds of a lawsuit or insurance policy exceeding the amount parents are allowed by statute to receive on behalf of their child.

Adult guardianship is the process by which the court finds an individual's ability to make decisions is impaired, therefore the court gives the right to make decisions to another person or entity. Guardianship is only warranted when no less restrictive alternatives, such as a durable power of attorney, a trust, a health care surrogate or proxy, or another form of pre-need directive, are found by the court to be appropriate and available. Legislative intent establishes that the least restrictive form of guardianship is desirable, if it is in the best interest of the ward.

Guardianship is an ethical as well as legal relationship with many court-mandated duties and responsibilities involving the very basic rights of another human being. It is of the utmost necessity that:

1. An attorney be consulted to represent and advise the guardian in all appropriate, technical procedural and fiduciary matters relating to the court; and
2. The guardian proceed with the utmost diligence to take care of the ward, safeguarding the ward's numerous rights while preserving the ward's dignity, and improving the quality of that ward's life.

### **A. Concepts in Florida's Guardianship Law**

Guardianship law is controlled primarily by Chapter 744 of the Florida Statutes though local rules may influence a particular statute's application. {28 Fla. Jur. 2d *Guardian and Ward* §5 (2004).} Procedures for all guardianship proceedings are governed by the Florida Probate Rules. {*Id.*; Fla. Prob. R. 5.010} Thus, a proper application of guardianship law requires adherence to the Florida Statutes, the applicable local court rules, Florida Probate Rules and applicable court decisions.

### ***Definition of guardian***

A guardian is a person who has been appointed by the court to act on behalf of a ward's person, property or both. {F.S. 744.102(9)} The guardian may exercise only those rights that have been removed from the ward and delegated to the guardian. {F.S. 744.361(1)}

### **Definition of Guardian Advocate**

A guardian advocate means a person appointed by a written order of the court to represent a person with developmental disabilities under Florida Statute section 393.12.

### ***Definition of Ward***

A Ward means the person for whom a guardian has been appointed {F.S. 744.102(22)}.

### ***Definition of Incapacity***

An incapacitated person means a person who has been judicially determined to lack capacity to manage at least some of the property or to meet at least some essential health and safety requirements of such person {F.S. 744.102(12)}.

### ***Limited Guardianships***

In situations where the court finds that the incapacitated person lacks some but not all of the capacity necessary to care for his or her person, property, or after the person voluntarily petitions the court for appointment of a limited guardianship, the court will appoint a guardian to exercise only those legal rights and powers specifically designated by the court order {F.S. 744.102(9) (a)}.

The concept of a limited guardianship recognizes that the incapacity of each person is different and permits a guardianship to be imposed only to the extent required by an individual's actual mental and functional limitations. The limited guardianship is designed to encourage the most self-reliance and independence possible, and to be the least restrictive alternative to a complete or plenary guardianship.

One manner to limit the extent of a guardianship is to use available community services in lieu of formal guardianship. Programs funded under the Older Americans Act provide services for individuals age 59 or older to help them remain in their own homes and live as independently as possible. For example, services include home delivered meals, congregate dining facilities, personal care services, and friendly visitors. The guardian should determine whether community services are appropriate and available for the ward.

### ***Plenary Guardianships***

In situations where the court finds the incapacitated person incapable of performing all of the tasks of caring for self or property, the court will grant to the guardian the authority to exercise all delegable legal rights and powers of the ward. {F.S. 744.102(9)(b)}.

### ***Voluntary Guardianships***

Under Florida law, a person who is mentally competent but who, by reason of age or physical infirmity, needs assistance in managing some or all of his or her property, may petition the court to establish a voluntary guardianship of the property. {F.S. 744.341(1)}. The petition must be accompanied by a certificate from a physician that he or she has examined the person and the person is competent to understand the nature of the guardianship and the delegation of authority to another. In a voluntary guardianship, a guardian will be appointed without a finding that the person requesting the guardianship is incapacitated {F.S. 744.341(1)}. A court may limit a voluntary guardian's duties and responsibilities by confining his or her authority to less than the ward's total property. Unless limited, however, the guardian appointed in a voluntary guardianship has the same duties and responsibilities as plenary guardians of the property, generally. {F.S. 744.341 (2), (3)} A voluntary guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward not more than ninety (90) days before the annual report is filed with the court. The certificate must certify that the ward is competent to understand the nature of the guardianship and of the ward's authority to delegate powers to the voluntary guardian. {F.S. 744.341(4)} A voluntary guardianship may be terminated by the ward by the filing of a notice with the court that the Voluntary Guardian is terminated. {F.S. 744.341(5)}

### ***Guardian as Fiduciary***

The guardian is the incapacitated person's fiduciary. The Guardian occupies a position of special trust and confidence for the incapacitated person. As a

fiduciary, the business the guardian transacts or the money or property which he or she handles, is not his or her own for his or her own benefit, but for the benefit of the incapacitated person. The guardian must be independent and impartial.

A guardian who is appointed to manage the incapacitated person's financial affairs must protect and preserve the incapacitated person's assets and manage the assets as a "prudent person" would in managing the financial affairs of another person.

### ***Prudent Person Rule***

The guardian shall observe the standards in dealing with the guardianship property that would be observed by a prudent person dealing with the property of another, and, if the guardian has special skills or is named guardian on the basis of representations of special skills or expertise, he or she is under a duty to use those skills. {F.S. 744.361(7)} {See also Fla. Stat. 518.11, known as the "Prudent Investor Rule," for specific standards regarding fiduciary investing.}

## **B. Who May be a Guardian**

### ***Who may serve as a guardian?***

Any resident of the State of Florida who is 18 years old and of sound mind is qualified to act as guardian. In addition, a non-resident may serve if he or she is related to the ward by blood, adoption or law. {F.S. 744.309(2)}. Also a Trust company, State Bank, National Bank, or a Federal Savings and Loan may be a guardian. {F.S. 744.309(4)} A non-profit corporation organized for religious or charitable purposes may be appointed a guardian. {F.S. 744.309(5)}

### ***Who may not serve as a guardian?***

Certain persons are precluded from acting as a guardian because of the nature of their relationship to the proposed ward. An example is any person who provides substantial professional or business services to the proposed ward (or an employee of that person, agency, government entity, or corporation), or who is a creditor of the ward, unless the court determines that no substantial conflict of interest exists and that it is in the ward's best interest to appoint such person. {F.S. 744.309(3)}

Also precluded from acting as guardian is a direct or indirect health care provider of the ward, unless the court specifically finds that there is no conflict with the best interests of the ward. {F.S. 744.309(3), (6)}

In addition, persons who have been convicted of a felony, persons who, because of any incapacity or illness, are incapable of discharging the duties of a guardian, or persons who are otherwise unsuitable may not serve as guardian. {F.S. 744.309(3)} Further, no person who has been judicially determined to have committed abuse or neglect against a child may be appointed as a guardian. {F.S. 744.309(3)} The suitability of a proposed guardian may be determined by the ward's needs, the nature or size of the guardianship estate, facts in the proposed guardian's background, or potential conflicts of interest between the proposed guardian and the ward.

### **C. Roles of Persons Involved in the Guardianship Process**

#### ***Attorney for the Petitioner***

The attorney for the petitioner represents the petitioner's interests regarding the determination of incapacity (Remember, the petitioner may or may not be the same person as the proposed guardian). Unless the petitioner is also the proposed guardian, once the court has concluded the adjudicatory phase, the attorney for the petitioner need not be further involved in the guardianship.

#### ***Attorney for the Guardian***

After the court has appointed the guardian, the attorney for the guardian will help the guardian prepare the initial guardianship report, including the inventory and initial guardianship plan. The attorney will also help the guardian prepare annual reports. When necessary, the attorney will advise the guardian about his or her duties and authority as guardian and will prepare any necessary documents for the guardian.

#### ***Attorney for the Alleged Incapacitated Person***

In the initial stages of guardianship, an alleged incapacitated person must be represented by an attorney. The court will appoint an attorney for the alleged incapacitated person. The alleged incapacitated may substitute his or her attorney for the attorney appointed by the court. {F.S. 744.331(2) (b)} The attorney for the alleged incapacitated person must represent the alleged incapacitated person's expressed wishes, unless they are contrary to the Florida Rules governing attorney's conduct. {F.S. 744.102(1)} When a court appoints an attorney for an alleged incapacitated person, the court must appoint an attorney who is included in the attorney registry compiled pursuant to Florida Statutes sections 27.40 and 27.42. Appointments must be made on a rotating basis taking into consideration

conflicts. {F.S. 744.331(2) (a)}

The ward retains the right to have his or her own attorney in various proceedings during the guardianship. {F.S. 744.331(2) (b)} For example, an attorney will be appointed for the ward in a hearing for extraordinary authority to be granted to the guardian, {F.S. 744.3725(1)} or in a hearing to determine whether all or some of the ward's rights should be restored. {F.S. 744.464(2) (e)}

### ***Court Monitor***

The court may appoint a monitor to investigate, examine documents, or interview the ward and report the findings to the court either on an interested person's request or the court's own motion. This provides another level of independent examination to satisfy the court of the allegations of incapacity, to assist the court in determining which rights should be removed from or retained by the alleged incapacitated person, or to investigate the conduct of an on-going relationship. {F.S. 744.107}

### ***Guardian ad litem***

The court may appoint a guardian ad litem to represent the ward's best interests in any action by the ward against his or her guardian, or vice versa, or in any circumstance in which the guardian's interest may conflict with that of the ward.  
{F.S. 744.102(10)}

### ***Emergency Temporary Guardian***

The court may appoint an emergency temporary guardian prior to appointment of a permanent guardian. The court must specifically find that there is an imminent danger that the alleged incapacitated person's physical, or mental, health or safety will be seriously impaired, or that his or her property is in danger of being wasted, unless an emergency temporary guardian is appointed. If the court appoints an emergency temporary guardian, the court order must specifically enumerate the guardian's powers and duties. {F.S. 744.3031} The authority of the emergency temporary guardian expires ninety (90) days after the date of appointment or when a guardian is appointed, whichever occurs first, but may be extended an additional ninety (90) days upon a showing that the emergency conditions still exist. {F.S. 744.3031(3)} An emergency temporary guardian shall file a final report no later than thirty (30) days after the expiration of the emergency temporary guardianship. {F.S. 744.3031(8) (a)}

If an emergency temporary guardian is a guardian for the property, the final

report must consist of a verified inventory of the property as of the date the letters of emergency temporary guardianship were issued, a final accounting, and a statement of the property of the ward on hand at the end of the emergency temporary guardianship. {F.S. 744.3031(8) (b)}

If an emergency temporary guardian is a guardian of the person, the final report must summarize the activities of the temporary guardian with regard to residential placement, medical condition, mental health and rehabilitative services, and the social condition of the ward to the extent of the authority granted in the letters of guardianship. (F.S. 744.3031(8) (c))

## **II. ESTABLISHING A GUARDIANSHIP**

### ***A. Considerations Regarding the Appointment of Guardians***

The court may appoint any person whom it considers fit, proper, and qualified to act as guardian whether or not related to the ward. However, the court gives preference to a person who:

1. Is related by blood or marriage to the incapacitated person;
2. Has relevant educational, professional or business experience;
3. Has the capacity to manage the finances involved; or
4. Has the ability to meet the requirements of the law and the unique needs of the individual. {F.S. 744.312(2)}

The court shall also consider the wishes expressed by an incapacitated person as to whom shall be appointed guardian. The court may also consider other individuals set forth in Florida Statute section 744.312(3) (a).

The court may also appoint a pre-need guardian, who is a person who has been named by a competent adult to serve as guardian in the event of his or her incapacity. {F.S. 744.3045} The court may additionally appoint a stand-by guardian, who is someone designated by the parents of an incapacitated person or by the currently serving guardian to temporarily serve as guardian in the event of death or incapacity. {F.S. 744.304}

### ***Preneed Guardian***

A preneed guardian is a person named in a written declaration to serve as a guardian in the event of the incapacity of the declarant as provided in Florida

Statute section 744.3045. {F.S. 744.102(16)}. Parents may also nominate a preneed guardian for their minor children to act in the event of their incapacity or demise. {F.S. 744.3046(1)}

The written declaration must reasonably identify the declarant and preneed guardian. Further, it must be signed by the declarant in the presence of at least two attesting witnesses who are present at the same time. {F.S. 3045(2); F.S. 744.3046(2)} For minors, the declaration must be executed by both parents if living, and must include: the full name of the minor child as it appears on the birth certificate or as ordered by the court, the date of birth, and the social security number, if any, for each minor child named in the declaration. {F.S. 744.3046(1), (2)}

The declaration naming a preneed guardian may be filed with the clerk of court. When a petition for incapacity is filed, the clerk shall produce the declaration which will constitute a rebuttable presumption that the preneed guardian named in the declaration is entitled to serve as guardian. The court is not bound to appoint the preneed guardian if the person is not qualified to serve as a guardian. {F.S.744.3045 (3) (4)}. For minors, the declaration must be filed with the clerk of court, and the clerk will produce the declaration when a petition for incapacity of the last surviving parent is filed or upon the death of the last surviving parent. {F.S. 744.3046(3)}

A preneed guardian shall assume the duties of guardian immediately upon the adjudication of incapacity and must petition the court within twenty (20) days for confirmation of the appointment. {F.S. 744.3045(5), (7)} For minors, the preneed guardian shall assume such duties upon the adjudication of incapacity or the death of the last surviving parent. {F.S. 744.3046(5), (7)}

### ***Standby Guardian***

Upon a petition, the court may appoint a standby guardian or alternate to assume the duties of guardianship upon the death or adjudication of incapacity of the last surviving natural or appointed guardian. {F.S. 744.102(19); F.S. 744.304} A petition for standby guardianship may be made by a currently serving guardian or by a minor child's parents. {F.S. 744.304(1), (2)} The standby guardian or alternate shall be empowered to assume the duties of guardianship immediately on the death, removal, or resignation of the guardian of a minor, the death or adjudication of incapacity of the last surviving natural guardian of a minor, or upon the death, removal, or resignation of the guardian for an adult. The guardian of the ward's property may not be empowered to deal with the ward's property, other than to safeguard it, before issuance of letters of guardianship. If the ward is over the age of 18 years, the court shall conduct a hearing before confirming the

appointment of the standby guardian. {F.S. 744.304(3)} Within twenty (20) days after assumption of duties, the standby guardian shall petition the court for confirmation of appointment. {F.S. 744.304(4)}

### **Surrogate Guardian**

A guardian may designate a surrogate guardian to exercise the powers of the guardian if the guardian is unavailable to act. A person designated as a surrogate guardian must be a professional guardian. A guardian must file a petition with the court requesting permission to designate a surrogate guardian. The duration of the appointment can not exceed thirty days but may be extended for good cause. (F.S. 744.442)

### ***Application and Petition for Appointment***

Every guardian must complete an application for appointment as guardian. This application must list the person's qualifications, as well as the names, court file number, and circuit court for all wards for whom the person is currently acting as guardian. {F.S. 744.3125} The application must also state whether the person is acting as the limited or plenary guardian of the person, property, or both. In addition, a petition for appointment must be filed. The petition for appointment must comply with the statutory requirements as provided in Florida Statute section 744.334.

### ***Credit and Criminal Investigations***

The court may require a nonprofessional guardian and shall require a professional guardian, to submit, at his or her own expense, to an investigation of the guardian's credit history and undergo level 2 background screening. At any time, the court may require a guardian or its employees to submit to an investigation of the person's credit history and complete a level 1 background screening as set forth in Florida Statute 434.03. The court shall consider the results of the investigation when reappointing a guardian. {F.S. 744.3135 (1)} A guardian may satisfy the requirement of the completion of the criminal history record by complying with one of the following methods:

1. An electronic fingerprint criminal history record check. A guardian may use any electronic fingerprinting equipment used for criminal history record checks of public employees. The guardian shall pay the actual costs incurred by the Federal Bureau of Investigation and the Department of Law Enforcement for the criminal history record

check. The agency that operates the equipment used by the guardian may charge the guardian an additional fee. {F.S. 744.3135 (2)(a)}

2. Criminal history records check using a finger print card. The clerk of the court shall obtain fingerprint cards from the Federal Bureau of Investigations and make them available to guardians. The results of the fingerprint card criminal history record checks shall be forwarded to the clerk of the court who shall maintain the results in the guardian's file and make the results available to the court and the Statewide Public Guardianship Office. The guardian shall pay the necessary fee to process the card. (F.S. 744.3135(2)(b))

### ***Guardian Education Requirements***

Within four months of appointment, each person appointed by the court must receive a minimum of eight hours of instruction and training through a course approved by the chief judge of the circuit court and taught by a court approved organization. Topics covered shall include:

1. Legal duties and responsibilities of the guardian;
2. Rights of the ward;
3. Availability of local resources to aid the ward; and
4. The preparation of habilitation plans, annual guardianship reports and financial accounting. {F.S. 744.3145}

NOTE: Expenses incurred by the guardian to satisfy this requirement may be paid for out of the ward's estate if approved by the court. The court may also, based on the skills of the guardian and needs of the ward, waive some or all of the education requirements or impose additional requirements. The provisions of this section do not apply to professional guardians.

### ***Educational Requirements of Professional Guardians***

A "Professional Guardian" is defined as any guardian who has at any time rendered services to three or more wards as their guardian. A person serving as a guardian for two or more relatives as defined in Florida Statute section 744.309(2) is not considered a professional guardian.

Each professional guardian defined in Florida Statute section 744.102(17), must receive a minimum of 40 hours of instruction and training within 1 year after becoming a professional guardian. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 calendar years after the year in which the initial 40-hour educational requirement is met. The instruction and education must be completed through a course approved or offered by the Statewide Public Guardianship Office. The expenses incurred to satisfy the educational requirements prescribed in this section may not be paid with the assets of any ward. This subsection does not apply to any attorney who is licensed to practice law in this state. {F.S. 744.1085(3)} Each professional guardian must register with the Statewide Public Guardianship Office. {F.S. 744.1083}

### ***Order of Appointment***

When a court order is entered which determines that a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights. {F.S. 744.331(6) (f)} The order appointing a guardian will state the nature of the guardianship as plenary or limited. If limited, the order will specify what rights have been removed from the incapacitated person and delegated to the guardian. The order appointing a guardian is issued at the same time as the order adjudicating the person incapacitated. This order must also stipulate the amount of bond to be given by the guardian and must state specifically the amount of personal assets of the ward that must be placed in a restricted account. {F.S. 744.344(3)}

### ***B. Implementation of Guardianship***

#### ***Oath***

Prior to exercising authority, every guardian must take an oath that he or she will faithfully perform his or her duties as guardian. {F.S. 744.347}

#### ***Bonding Requirement***

All guardians must give sufficient bond to cover the amount of cash on hand and other liquid assets, unless the court waives the bond. {F.S. 744.351(1)} The purpose of this bond is to obtain a financial guarantee that the guardian will perform his or her financial duties faithfully.

In executing this bond, although a cash deposit or individual sureties may be used, it is customary to utilize the services of a licensed surety company. Surety

bond policies can be obtained through local insurance agencies.

Each professional guardian who files a petition for appointment after October 1, 1997, shall post a blanket fiduciary bond with the clerk of the circuit court in the county in which the guardian's primary place of business is located. The guardian shall provide proof of the fiduciary bond to the clerks of each additional circuit court in which he or she is serving as a professional guardian. The bond shall be maintained by the guardian in an amount not less than \$50,000. The bond must cover all wards for whom the guardian has been appointed at any given time. The liability of the provider of the bond is limited to the face amount of the bond, regardless of the number of wards for whom the professional guardian has been appointed. The acts or omissions of each employee of a professional guardian, who has direct contact with the ward or access to the ward's assets, is covered by the terms of such bond. The bond must be payable to the Governor of the State of Florida and his or her successors in office and conditioned on the faithful performance of all duties by the guardian. In form, the bond must be joint and several. The bond is in addition to any bonds required under Florida Statute section 744.351. This subsection does not apply to any attorney who is licensed to practice law in this state and who is in good standing, to any financial institution as defined in Florida Statute 744.309(4), or a public guardian. The expenses incurred to satisfy the bonding requirements prescribed in this section may not be paid with the assets of any ward {744.1085(2)}.

### ***Depository Accounts***

In most guardianships, the court requires that all cash assets be deposited into a court designated depository pursuant to Florida Statute section 69.031 and that no withdrawals be made from this account without a court order.

These requirements must be strictly followed. Therefore, all cash of the ward, whether it be initial cash on hand or principal, income, social security or any other cash received later, must be deposited into the depository. {See F.S. 744.351(6); F.S. 69.031}

### ***The Depository***

The depository is a financial institution, which is acceptable to the court that agrees to act as depository. The guardian asks the court to designate a depository for guardianship. More than one type of account at that institution can have depository status. If cash assets of the guardianship are over \$100,000.00, the guardianship should have more than one depository institution designated, each to contain up to \$100,000.00.

The main feature of the depository is that no funds can be removed from the depository restriction without a court order. There are two ways for the guardian to use these funds for the ward's needs.

One way is for the guardian to prepare a monthly budget of the cash needs of the ward and to petition the court for a standing order directing the depository financial institution to allow the withdrawal of the sum necessary to cover the total budgetary needs on a monthly basis. The guardian can then open an unrestricted operating account in which to deposit those budgeted funds each month. (Some banks can do this by automatic transfer.) Then, the guardian uses these funds to pay the ward's recurring bills by check. The amount of monthly transfer can be changed by petitioning the court for an order from time to time as the ward's cash needs change.

The other primary way funds are released from the depository is by petition to the court for authority to pay specific bills as they arise. To safeguard the guardianship attorney's fees, this method should be only for non-recurring expenses.

There are other specialized depository arrangements for special guardianship needs, such as where investment powers are needed. The guardian should discuss any such special needs with the guardianship attorney to determine whether such arrangements would be useful.

### *Letters of Guardianship*

**§744.345 Letters of Guardianship.**--Letters of guardianship shall be issued to the guardian and shall specify whether the guardianship pertains to the person, or the property, or both, of the ward. The letters must state whether the guardianship is plenary or limited, and, if limited, the letters must state the powers and duties of the guardian. If the guardianship is limited, the letters shall state whether or not and to what extent the guardian is authorized to act on behalf of the ward with regard to any advance directive previously executed by the ward.

After the guardian has been appointed by the court and after the guardian's bond has been filed, the court will customarily issue Letters of Guardianship which consist of a document attesting to the guardian's appointment, qualifications, and specific authority.

It is the attorney's responsibility to prepare this document and ensure that it is issued by the court. Institutions such as commercial banks and insurance

companies customarily require certified copies of Letters of Guardianship as proof of a guardian's authority to act. Each letters of guardianship must specify the exact nature and authority of the guardianship, i.e. whether the guardianship pertains to the person or property or both. The letter must state whether the guardianship is plenary or limited, and if limited, the exact duties and powers of the guardian.

### ***Possession, Control and Management of Assets***

A guardian, if authorized by the court, must take possession of and maintain control over the assets (property, income, issues, profits and proceeds arising from the sale, lease, or mortgage of the property) of the ward. All of the property and its proceeds are assets to be applied as payments of debts, bills, taxes, claims, charges and expenses of the guardianship and for the care, support, maintenance and education of the ward or his or her dependents as specified in the guardianship plan. {F.S. 744.361(8)} Special care should be taken with certain assets such as those assets held jointly with or "in trust for" another individual. The guardian should consult with his or her attorney concerning assets titled in this fashion. This would also include accounts payables or transferable on death.

### ***Cash Accounts***

The guardian should safeguard any cash or bank deposits by immediately closing out any accounts in the ward's name or for his or her benefit, and establishing guardianship accounts in their place, except for possibly those titled as discussed above. It is prudent to determine early in the guardianship a rough estimate of monthly expenses so that the ward's income and assets can be appropriately distributed between accounts of varying liquidity. The remaining income and cash assets should generally be divided into as many accounts as necessary to obtain full benefit of Federal Deposit Insurance and Federal Savings & Loan insurance coverage. Good practice generally dictates that the majority of cash assets be placed in savings accounts or other interest bearing accounts that will earn the highest rate of return with the lowest amount of risk. The guardianship checking account should consist only of sufficient money to cover regular and periodic cash needs, possible contingencies, and other initial expenses of guardianship.

### ***Securities***

All stocks and bonds should normally be retitled to reflect the guardianship of the ward, except for possibly those titled as discussed previously. This can be done by presenting a certified copy of the Letters of Guardianship to the Brokerage Firm

managing the account. The Brokerage Firm will then retitle the securities held in the account. If these securities are in bearer form, the bond must be sufficient to cover their value as established by the inventory.

### ***Safe Deposit Box***

All securities, important papers, and assets should be maintained in a safe deposit box. The initial opening of the ward's safe deposit box must be conducted in the presence of an employee of the institution where the box is located, who verifies the contents of the box by signing a copy of the inventory. This inventory must be filed with the court within ten (10) days after the box is opened and signed by both the guardian and the witnessing bank employee. A copy of this inventory is to be given to the ward and nothing may be removed from the box without specific court approval. {F.S. 744.365 (4) (a), (b) & (c)}

### ***Real Estate***

When the estate contains real property, the guardian should investigate the status of insurance coverage, mortgage payments or any other covenants and restrictions, taxes, and judgments that may affect the property. The guardian should advise the mortgagee, insurance company, and any joint owners of the property of his or her appointment as guardian and request that any inquiries and related correspondence be sent to him or her. The guardian should assess whether or not retaining his or her interest in the property is beneficial for the ward. The guardian should consult with his or her attorney about any and all real property issues. No sale of real property can take place without following strict guidelines outlined in the statute.

### ***Business Property and Interests***

If the ward's assets include an on-going unincorporated business, the guardian must obtain court approval to continue the business. {F.S. 744.441(13)} Upon the filing of a verified petition by the guardian alleging sufficient facts to justify the continuance of an unincorporated business or venture, the court may authorize the continuance for a reasonable time under court supervision and may authorize the guardian to enter into necessary contracts, to incur debts and to pay out money in the proper operation of the business. Any net profits must be added to the assets of the ward's estate and the guardian must maintain complete and accurate accounts of all receipts and disbursements and report such activity as the court mandates. {Fla. Prob. R. 5.640}

### *Personal Effects*

Jewelry and other personal valuables should be placed in a safe deposit box and should be insured.

If use of an automobile is needed by the ward, the guardian should insure and maintain the automobile. If there is no need to utilize a vehicle, it should be sold pursuant to court order.

After appraisal and court order, furniture and other personal effects, if not needed, can be sold or given to charity. If appropriate, such goods can be placed in storage, provided such storage is cost effective and if it is reasonable to assume that the items will be utilized by the ward in the near future or are part of the ward's estate plan.

### *Appraisal*

If a reasonable doubt exists as to the fair market value of a ward's asset(s), the guardian, with permission of the court, may employ a qualified appraiser. {F.S. 744.381}

### *Verified Inventory*

In performing the initial investigation of the ward's personal property, a guardian may often come across sums of cash and securities hidden among the personal effects and clothing of the ward. It is therefore important that the guardian perform, as thorough as possible, an investigation of the ward's home. It is also strongly urged that the guardian, to maintain accountability and avoid the appearance of possible impropriety, perform this inventory in the presence of a disinterested third party.

As soon as the guardian has completed his or her investigation, is aware of the identity and location, and has assumed control and/or custody of the ward's assets, the guardian must file an inventory containing a listing of all the property of the ward, real and personal, including a statement of the location of the property as well as all encumbrances, liens, and other secured claims on any item, any claims against the property, any causes of action accruing to the ward, and any trusts of which the ward is a beneficiary. {F.S. 744.365}

### **III. THE RIGHTS OF THE WARD**

The guardian's role is to balance the protection and care provided to the

ward with genuine respect for and encouragement of the independence still exercisable by the ward.

**A. The Rights of the Incapacitated Ward that are Retained by the Ward:**  
{F.S. 744.3215(1)}

1. To have an annual review of the guardianship report and plan.
2. To have continuing review of the need for restriction of his or her rights.
3. To be restored to capacity at the earliest possible time.
4. To be treated humanely, with dignity and respect, and to be protected against abuse, neglect and exploitation.
5. To have a qualified guardian.
6. To remain as independent as possible, including having his or preference as to place and standard of living honored, either as he or she expressed or demonstrated his or her preference prior to the determination of his or her incapacity or as he or she currently expresses his or her preference, insofar as such request is reasonable.
7. To be properly educated.
8. To receive prudent financial management for his or her property and to be informed how his or her property is being managed, if he or she has lost the right to manage property.
9. To receive the necessary services and rehabilitation necessary to maximize the quality of life.
10. To be free from discrimination because of his or her incapacity.
11. To have access to the courts.
12. To be represented by counsel (an attorney).

13. To receive visitors and communicate with others.
14. To receive notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice.
15. To privacy.

**B. The Rights of the Incapacitated Ward that can be Removed by the Court, But May Not be Delegated to the Guardian {F.S. 744.3215(2)}**

1. To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.
2. To vote.
3. To personally apply for government benefits.
4. To have a driver's license.
5. To travel.
6. To seek or retain employment.

**C. The Rights of the Incapacitated Ward that can be Removed by the Court and may be Delegated to the Guardian {F.S. 744.3215(3)}**

1. To contract.
2. To sue and defend lawsuits.
3. To apply for government benefits.
4. To manage property or to make any gift or disposition of property.
5. To determine his or her residence.
6. To consent to medical treatment.
7. To make decisions about his or her social environment or other

social aspects of life.

#### **IV. THE POWERS AND AUTHORITY OF THE GUARDIAN**

The powers of the guardian give the guardian the authority to exercise certain rights on behalf of the ward when those rights have been removed in an incapacity hearing, given up by the ward in a voluntary proceeding, or granted by the court to an adult to act on behalf of a minor.

##### **A. Court Approved Powers**

The court may grant approval for certain acts. The first step is to consult an attorney for advice. In order to get approval, the guardian must show the court:

1. Necessity of action;
2. Description of the property;
3. Terms of action (price, contract, etc.); and
4. Benefit to the ward or the ward's estate.

Once court approval is obtained, the guardian may execute all necessary documents to carry out court orders without further court approval.

A guardian is required to obtain court approval for the following actions {F.S. 744.441(1)-(22)}:

- (1) Perform, compromise, or refuse performance of a ward's contracts that continue as obligations of the estate, as he or she may determine under the circumstances.
- (2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

(3) Make ordinary or extraordinary repairs or alterations in buildings or other structures; demolish any improvements; or raze existing, or erect new walls or buildings.

(4) Subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving consideration; or dedicate easements to public use without consideration.

(5) Enter into a lease as lessor or lessee for any purpose, with or without option to purchase or renew, for a term within, or extending beyond, the period of guardianship.

(6) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

(7) Abandon property when, in the opinion of the guardian, it is valueless or is so encumbered or in such condition that it is of no benefit to the estate.

(8) Pay calls, assessments, and other sums chargeable or accruing against, or on account of, securities.

(9) Borrow money, with or without security, to be repaid from the property or otherwise and advance money for the protection of the estate.

(10) Effect a fair and reasonable compromise with any debtor or obligor or extend, renew, or in any manner modify the terms of any obligation owing to the estate.

(11) (Effective Until July 1, 2007) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in Florida Statute section 737.2065, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in Florida Statute section 737.2065, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

(11) (Effective July 1, 2007) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in Florida Statute section 736.0207, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in Florida Statute Section 736.0207, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

(12) Sell, mortgage, or lease any real or personal property of the estate, including homestead property, or any interest therein for cash or credit, or for part cash and part credit, and with or without security for unpaid balances.

(13) Continue any unincorporated business or venture in which the ward was engaged.

(14) Purchase the entire fee simple title to real estate in this state in which the guardian has no interest, but the purchase may be made only for a home for the ward, to protect the home of the ward or the ward's interest, or as a home for the ward's dependent family. If the ward is a married person and the home of the ward or of the dependent family of the ward is owned by the ward and spouse as an estate by the entirety and the home is sold pursuant to the authority of subsection (12), the court may authorize the investment of any part or all of the proceeds from the sale toward the purchase of a fee simple title to real estate in this state for a home for the ward or the dependent family of the ward as an estate by the entirety owned by the ward and spouse. If the guardian is authorized to acquire title to real estate for the ward or dependent family of the ward as an estate by the entirety in accordance with the preceding provisions, the conveyance shall be in the name of the ward and spouse and shall be effective to create an estate by the entirety in the ward and spouse.

(15) Exercise any option contained in any policy of insurance payable to, or inuring to the benefit of, the ward.

(16) Pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to a maximum of \$6,000.

(17) Make gifts of the ward's property to members of the ward's family in estate and income tax planning procedures.

(18) (Effective Until July 1, 2007) When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in Florida Statute section 737.501) but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending said will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under such will.

(18) (Effective July 1, 2007) When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in Florida Statute Section 736.1201), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending said will to obtain the maximum charitable

deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under such will.

(19) Create or amend revocable trusts or create irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning. The court shall retain oversight of the assets transferred to a trust, unless otherwise ordered by the court.

(20) Renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer.

(21) Enter into contracts that are appropriate for, and in the best interest of, the ward.

(22) As to a minor ward, pay expenses of the ward's support, health, maintenance, and education, if the ward's parents, or either of them, are alive.

## **B. Extraordinary Powers**

There are extraordinary powers of the guardian which require special court approval {F.S. 744.3215(4); F.S. 744.3725}:

1. To commit the ward to an institution without formal placement proceedings.
2. To consent to any experimental procedure on the ward's person unless to preserve the life or prevent serious impairment or to develop or regain abilities.
3. To initiate a petition for dissolution of marriage.
4. To consent on behalf of the ward to terminate the ward's parental rights.
5. To consent to sterilization or abortion.
6. To terminate life support.

Before the court may grant extraordinary powers to the guardian to exercise any of the above enumerated rights, the court MUST {F.S. 744.3725}:

1. Appoint an independent attorney to act on the incapacitated

person's behalf, who must have the opportunity to meet with the incapacitated person and at full judicial hearing present evidence and cross examine witnesses on behalf of the incapacitated person;

2. Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluation;
3. Personally meet with the incapacitated person to obtain an impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue(s) before the court;
4. Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue(s) before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future;
5. Be persuaded by clear and convincing proof that the authority being requested is in the best interests of the incapacitated person; and
6. In the case of a dissolution of marriage, find that the ward's spouse has consented to the dissolution.

### **C. Investment Powers**

A guardian must invest the ward's property prudently. {F.S. 744.361(6) (a)} The guardian must:

1. Use any special skills that he or she has;
2. Not invest in speculative assets;
3. Preserve assets, but also consider the income of the ward; and
4. Consider the tax ramifications (income and estate) of investment actions.

The guardian may be held responsible if an investment goes bad, and the guardian could be surcharged. The guardian should always obtain the appropriate professional assistance, such as an attorney, a stock advisor, an accountant, etc.

#### **D. Settlement of Claims**

Court approval is required to settle any claim of the ward arising before or after the appointment of the guardian {F.S. 744.387(3) (a)}. The guardian may settle contract claims against the ward's estate and claims by the ward's estate with court approval. **Examples** include claims to extend or modify any mortgage or claims to enter into a fair compromise.

In reviewing and accepting structured settlements, the guardian must be cautious of the terms of the payments, who is responsible for making the payments, and the strength of the company making the payments. The guardian must:

1. Make sure the company has the financial strength to fulfill the settlement obligations;
2. Look closely at the insurance company's financial strength; and
3. Look at the tax effects of settlement options.

#### **E. Moving the Ward**

##### **§744.2025 Change of Ward's Residence.**

- (1) **PRIOR COURT APPROVAL REQUIRED.**--A guardian who has power pursuant to this chapter to determine the residence of the ward may not, without court approval, change the residence of the ward from this state to another, or from one county of this state to another county of this state, unless such county is adjacent to the county of the ward's current residence. Any guardian who wishes to remove the ward from the ward's current county of residence to another county which is not adjacent to the ward's current county of residence must obtain court approval prior to removal of the ward. In granting its approval, the court shall, at a minimum, consider the reason for such relocation and the longevity of such relocation.
- (2) **IMMEDIATE COURT NOTIFICATION REQUIRED.**--Any guardian who wishes to remove the ward from the ward's current county of residence to

another county adjacent to the ward's county of residence shall notify the court having jurisdiction of the guardianship within 15 days after relocation of the ward. Such notice shall state the compelling reasons for relocation of the ward and how long the guardian expects the ward to remain in such other county.

#### **F. Powers Without Court Approval**

The guardian also has the authority and flexibility to perform, without prior court approval, routine acts and pay items that are normal and necessary to protect, manage, and preserve the assets of the estate. However, in exercising his or her duties, the guardian should interpret the law very strictly, and if the action contemplated is not mentioned and approved specifically in the law, the guardian should seek advice of an attorney as to whether the approval of the court is necessary.

A plenary guardian may:

1. Retain assets owned by the ward.
2. Receive assets.
3. Vote on stocks or other securities.
4. Insure the property and assets of the ward and himself or herself against liability.
5. Execute and deliver any instrument necessary to implement the duties of Florida Statute section 744.444 in the orders of the court.
6. Pay taxes and assessments on the ward's property.
7. Pay valid encumbrances against the ward's property in accordance with their terms, but no prepayment may be made without prior court approval.
8. Pay reasonable living expenses of the ward, taking into consideration the accustomed standard of living, age, health, and financial condition of the ward. The guardian of a minor is not authorized to expend funds for the minor's living expenses if one or both of the ward's parents are alive. The guardian of a

minor should consult an attorney regarding this issue.

9. Elect whether to dissent from a will or assert any other right available to a surviving spouse.
10. Deposit funds in federally insured interest bearing accounts, money market mutual funds, or other prudent investments. The guardian may redeem such deposits or investments to pay reasonable living expenses of the ward.
11. Pay incidental expenses on the administration of the estate.
12. Sell or exercise stock subscription or conversion rights.
13. Employ attorneys, investment advisors, auditors, or agents to assist the guardian on the performance of his or her duty.
14. Hold a security in the name of a nominee or in other form without disclosure of the interest of the ward, but the guardian is liable for any act of the nominee in connection with the security so held.
15. Execute and deliver any instrument that is necessary or proper to carry out the orders of the court.
16. Provide confidential information about a ward that is related to an investigation arising under part I of chapter 400 to a local or state ombudsman council member conducting such an investigation.
17. Pay or reimburse costs incurred and reasonable fees or compensation to persons, including attorneys, employed by the guardian, subject to obtaining court approval of the annual accounting.

## **V. RESPONSIBILITIES OF THE GUARDIAN**

### **A. General Responsibilities**

#### ***Personal Contact***

Guardians should visit and have meaningful contact with their ward at least

once a month or more frequently as required. A meaningful visit can encompass activities such as:

### **Communication with the Ward**

Though sometimes difficult, the guardian has a responsibility to make every effort to build and maintain a good, working, kind, professional and trusting relationship with the ward. This type of human, helping contact will enable the guardian to better understand and attend to the needs and wishes of the ward and hopefully give to the ward a respite from loneliness together with the feeling of trust and security that comes from knowing one has a friend who is interested, listens and cares.

### ***Conferences with Service Providers and Caregivers***

The guardian has a responsibility to communicate with service providers and caregivers such as doctors, nurses, social workers, therapists, residence operators, etc. This will add to the guardian's knowledge about his or her ward and the appropriate options for the ward.

### **Examination and Review of any Charts or Notes**

The guardian has a responsibility to examine and review any charts or notes kept regarding the ward. This will be helpful in the guardian's assessment of the social, health, psychological, personal care, and residential needs of the ward.

### ***Examination and Evaluation of the Services Provided to the Ward***

The guardian has a responsibility to examine and evaluate the appropriateness, cleanliness, safety, and over all services provided in the ward's living situation.

In evaluating the appropriateness and quality of care offered by a ward's living situation, factors that can be considered include the ward's wishes with respect to his or her living situation; the location and physical condition of the living situation including cleanliness, repair, and safety; the quantity and quality of services provided (e.g. physical therapy, occupational therapy, counseling, recreation, vocational activities, nursing care, social services, etc.); the quality and quantity of food; peer group appropriateness; general atmosphere and "ambiance;" staff attentiveness, warmth, cooperation and professionalism; compliance with state and federal laws pertaining to residents' rights and care; ability of residence to provide least restrictive, most normalized setting available

and appropriate; etc.

### ***Record Keeping***

Each guardian should maintain a system of files and case management services documentation which allows quick and easy access to all available client information in an orderly manner. The guardian should meet with the ward as soon as possible after being appointed as guardian as is feasible, but no later than two weeks thereafter. At this first meeting, the guardian should as much as possible:

1. Communicate to the ward the role of guardian.
2. Outline the rights retained by the ward. In appropriate cases, it is advisable to present to the ward and to other parties designated by the ward, a written explanation of these rights.
3. Assess the physical and social situation of the ward, including the educational, vocational, medical, social, and recreational needs and preferences of the ward, as well as living conditions and support systems available to the ward.

***It is a good practice, as soon after the appointment as feasible, to develop a client record/file which contains:***

1. Client information:

Demographic face sheet containing reference information such as name, Date of Birth, Social Security #, Medicare #, Medicaid #, physician, names and addresses of nearest relatives and friends, religion, etc.

2. Medical Information:

Section containing any and all physicians' evaluations outlining ward's physical and mental condition, diagnosis, prognosis, treatment, medications (dosage, frequency, purpose, side effects, and ward's ability to self medicate), allergies, and major functional abilities/disabilities.

3. Psycho-social History:

A short narrative form outlining the client history, functional status, living situation, client's present performance level outlining client's mental and emotional

capabilities as well as ability to function in terms of daily living, and self care skills.

4. Treatment Care Plan:

An individual client plan which outlines specific goals and target dates for completion. Plan topics may include daily living and self care, medical, psychological, educational/vocational, social, recreational, financial and other areas of potential client development or maintenance. A possible outline for the plan might include:

- a. Present performance levels
- b. Specific problems and needs of client
- c. Specific goals addressing specific needs and/or problems, the services necessary and/or means to be employed to meet the identified goal.
- d. Caregiver responsible for providing or obtaining these services
- e. Monthly documentation of progress or lack of progress toward meeting those goals
- f. Likely areas for legal restoration of capacity if any

5. Progress Notes:

Guardians should document in the case notes all contacts with clients and caregivers; fiscal, medical and court personnel changes in status of the client; and any other significant events. Case notes should be dated and signed by the guardian. It is also advisable to mention the date, time and length of contact, nature of contact, and outcome/results of the contact.

6. Financial Section (could possibly contain):

- a. Initial Inventory performed by the guardian, i.e., the amount and type of benefits received, existence and condition of assets, income, pensions and other financial resources and their location
- b. All copies of inventory and annual accountings filed with court

as well as copies of petition and orders relating to financial matters

- c. Copies of applications for financial assistance
- d. All correspondence relating to client's financial status
- e. Copies of all checks received by the ward and disbursed on behalf of the ward in chronological order
- f. All bank statements and other financial statements where applicable with a monthly reconciliation of the bank statement
- g. Projected client budget (where possible, designed with the help and input of the client)

7. Legal Section:

The legal section should contain all court orders, petitions and other court related issues, and documentation. It is wise to include such legal documents as were executed by the ward prior to adjudication of incapacity such as wills, codicils, powers of attorney, trust documents, and living wills. Also include client's written intentions, etc. Such statements of intent by the client would include power of attorney, living wills, organ donation statements, funeral preferences, etc.

8. Correspondence:

A chronological record of all correspondence should be kept as part of the case file.

9. Medical Issues:

A guardian having appropriate authority to make medical decisions on behalf of the ward has the responsibility to actively promote the maintenance of the ward's best health. This includes not only the duty to react to any medical situations which demand attention, securing, and authorizing necessary medical treatment, but also, the duty to ensure the ward receives regular preventive medical and dental services. Accordingly, a guardian should ensure that the ward undergoes regular dental and medical exams. If the ward is a resident of an ACLF or nursing home, it is good practice to periodically examine the medical records of the ward and speak with attending physician(s) and other caregivers to ensure that the ward is receiving proper and necessary medical care.

## **B. GUARDIAN OF THE PROPERTY**

The guardian of an incapacitated person may exercise only those rights that have been removed from the ward and delegated to the guardian. {F.S. 744.361(1)} It is the duty of the guardian of the property to manage the ward's property and estate to the extent authorized by the court.

### ***General Duties and Responsibilities***

1. To locate and marshall the ward's assets
2. To take possession of the ward's property under guardianship
3. To determine if there is a cause of action
4. To try to increase the value of the ward's assets
5. To keep the ward's property in good repair
6. To use any special skills for the benefit of the ward
7. To maintain an accurate record of income and expenses
8. To file an initial inventory of the ward's assets within sixty (60) days of his or her appointment
9. To file an annual accounting of the ward's estate on a yearly basis as required by Florida Statute or local Administrative Rule
10. To petition the court for instructions to act or approval for actions
11. To hand over the ward's assets to the person lawfully entitled to them upon termination of the guardianship

### ***Marshalling the Ward's Assets***

In the guardian's attempt to determine the ward's assets, the guardian will virtually become a detective, seeking any clues or evidence that will help him or

her locate the ward's possessions. Sometimes, if the ward is able (and agreeable), he or she can provide some of this information. Usually, however, it is not that easy. The guardian will have to sort through all of the ward's personal papers and thoroughly search the residence to find evidence of bank accounts, stocks, certificates of deposit, or any other asset of value. The ward's family and neighbors may be of assistance in locating the ward's "hiding places." Although the guardian may be anxious to uncover any assets, the guardian must keep in mind the ward's privacy. The guardian should gather information from others, not give it.

### ***Inventory of the Ward's Residence***

When the guardian takes an inventory of the ward's residence, the guardian should always take a witness, preferably someone experienced who can assist the guardian in searching for valuables. This witness should be someone who is not related to the ward or the guardian. As the guardian discovers items that may be of value, the guardian should set them aside for the appraiser to evaluate.

The guardian should make a list of the large items, any art work, antiques or collectibles (or have the appraiser do this) but not every piece of cookware, towels, etc. These can be listed as "general linens," "assorted household utensils," or "usual garden tools," etc. In addition, it is very helpful to take photographs or a video of the contents of the residence. There are companies now that specialize in providing this type of service at a nominal cost.

Individuals, especially those who are confused and/or paranoid, hide their treasures in some very peculiar places. Diamond rings have been found in cold cream jars. Gold coins and stock certificates have been located behind the air conditioner air return filter. Jewelry has been found in the linings of coats. Every possible area needs to be searched including under the corners of carpets, loose floor boards, crawl space in attics, jars in the refrigerator or in cupboards. Other places to look are in between linens, under mattresses, clothing pockets, inside books, underneath drawers or wrapped up in tissue paper. Once the guardian finds one hidden item, the guardian will probably need to search for others. Sometimes there is a pattern (every 7th page in a book, etc). The witness can verify what was found during this inventory by dating and signing the list of assets.

**Note: The following is intended to serve as a guide and not intended to be relied upon for its accuracy. Check with Medicare for the current covered benefits since they are subject to change.**

### ***Medicare***

Medicare, a federal health insurance program for those over 65 or disabled, is administered by the local Social Security office and managed through the Health Care Financing Administration (HCFA). There are two types of insurance: Part A, provided without charge to those eligible, covers hospital expenses; and Part B, optional insurance covering outpatient medical care. Premiums for Part B are automatically deducted from the monthly Social Security check or paid separately by those individuals who do not receive a Social Security or Disability check. To be eligible for Medicare a person must be:

1. At least 65 years old and eligible for Social Security or Railroad Retirement benefits;
2. At least 65 and enrolled in Part B and elect to enroll in Part A; or
3. Younger than 65 but qualified by Social Security as disabled for at least 24 months.

### ***Medicare Benefits***

#### **Part A covers** (after deductible is met):

Hospital care received in participating hospitals

Post-hospital skilled nursing facility care for twenty (20) days (under certain conditions)

Related expenses incurred during hospitalization, labs, x-rays, drugs, medical supplies, appliances (wheelchairs, etc.), and occupational and physical therapy Hospice Care

#### **Part B covers** 80 % of "approved charges" (after a yearly deductible is met):

Medical and surgical services

Outpatient hospital services

Diagnostic tests, lab services, and x-rays

Services of doctor's nurse

Drugs and biologicals which cannot be self administered

Physical therapy and speech pathology

Blood transfusions (except first three pints of blood)

Outpatient treatment for mental illness (limited)

Medically-necessary ambulance transport

Prosthetic devices and durable medical equipment

Emergency Room services

**Medicare does not cover:**

Routine physical exams and related tests

Dental, eye, or hearing exams (except for aphakia)

Eyeglasses and hearing aids

Most routine foot care (except medically necessary treatment of injuries or disease))

Immunizations (except those specified, such as flu shots)

Cosmetic surgery (except if injury or malformation)

Custodial care in a nursing facility

Nursing Home Care

Prescription drugs

Physicians and health care providers must accept assignment of Medicare benefits. This means that they will file a claim to Medicare for their payment and Medicare will pay 80% of the approved charges directly to the physician or health care provider. The patient pays the remaining 20 % of the fee and any charges for services that Medicare did not cover.

Medicare supplement insurance is available that will pay some or all of

Medicare deductibles and co-insurance payments and may cover other charges if medically necessary.

### ***Federal and State Programs: Medicaid***

The Medicaid Program, federally and state funded, provides free or low-cost medical care to the aged, blind and disabled, and families with dependent children, who are financially unable to pay for their medical care. Individuals who have qualified for Supplemental Security Income (SSI) are automatically eligible.

Information regarding eligibility requirements may be obtained from Department of Children and Families (DCF) offices. Screening for eligibility can be taken over the telephone. If the Medicaid worker believes that the individual may qualify for assistance, an appointment will be set up and an application form will be mailed out to the individual or responsible party.

Generally, Medicaid will cover the following services (Check with Medicaid to determine current covered benefits since these are subject to change.):

Physician services

Early and periodic screening, diagnosis and treatment

Limited dental services (limited to emergency procedures in adults)

Vision, hearing and dental screening

Inpatient hospital care, drugs and equipment

Outpatient hospital care, labs and x-rays

Nursing Home care

Emergency room services

Medically necessary transportation by prior authorization

Mental health services

Medicare premiums, deductibles and co-insurance

Note: Certain circumstances may implicate the need for a Special Needs Trust. Consult an attorney to determine whether a Special Needs Trust may be warranted.

### ***Medically Needy Program***

The Medically Needy Program is designed to assist those individuals who are financially unable to pay for medical care but do not meet the criteria set by the Medicaid Program. Income and asset limits are higher for the Medically Needy Program. The application process is similar to that for the Medicaid Program.

### ***Veteran's Benefits***

An individual, on his or her own service or through a spouse, may be eligible for benefits from the Veteran's Administration (pension, burial allowance, headstone, health care, medications or rehabilitation). Contact the local Office of Veteran's Affairs for eligibility information and assistance in obtaining benefits. To obtain current benefits and eligibility requirements call 1-800-827-1000.

**Sanford:** Seminole County Veterans Service Office  
400 West Airport Blvd  
Sanford, FL 32773  
(407) 665-3377

**Casselberry:** Seminole County Veterans Service Office  
132 Sausalito Blvd  
Casselberry, FL 32707  
(407) 665-3425

### ***Optional State Supplement***

Residents of certain adult assisted living facilities who have qualified to receive SSI payments and who meet certain DCF medical and social criteria may be entitled to receive financial assistance in the form of an Optional State Supplement (OSS) to help pay for their room and board at the ACLF. Contact local Aging and Adult Services Unit of DCF for information on application procedures and benefits.

### ***Further Banking Procedures***

Once the guardian has located evidence of any bank accounts (checking, savings, money market, certificates of deposit) he or she needs to determine what

to do with them. Do accounts need to be consolidated? Is the guardian going to use a different bank? Does the guardian need to liquidate accounts to have funds for the ward's current living expenses?

Before taking any action regarding changing banks or accounts, the guardian should determine what the ward's liabilities are and what is needed for regular living expenses. Also the guardian will need to determine if the accounts were set up by the ward with the some type of estate planning in mind. These accounts would include joint accounts and ITF (in trust for) accounts, for example. Based on this information, the guardian can make decisions on how to proceed with the assistance of the guardian's attorney.

### ***Closing Accounts***

To close out a bank account, the guardian will need certified Letters of Guardianship and proof of identification. Usually a driver's license is sufficient. Before the account is closed, however, the past banking statements should be checked to determine if there are any items directly deposited to the account such as Social Security, pensions, annuities, etc. or any automatic withdrawals (insurance, other payments). It is also important to ascertain if there are other signers on the account. If the account is a joint account, not to be closed, it must be determined how best to protect the funds from being withdrawn by the other party .

If the previous banking statements cannot be found and there is concern that exploitation of the ward may have occurred or the information is needed to prepare income tax returns, the guardian should request copies of back statements (or copies of cancelled checks).

### ***Opening Accounts***

The guardian should open interest-bearing accounts in the name of the ward and the guardian. For example: The Guardianship of Mary Smith, John Doe, guardian.

The guardian will need certified Letters of Guardianship and identification to open the account. Some banks have established a policy of not returning the cancelled checks. This service may be important as the checks may be needed as proof of payments made on the guardianship account. The guardian should be careful not to exceed the FDIC limit of \$100,000.00 in total funds deposited in one ward's name in the same banking institution (this is including checking, savings and certificates of deposit combined).

### ***Safe Deposit Boxes***

If the ward has a safe deposit box, the guardian must inventory the contents of the box with a bank employee (who must sign a copy of the inventory) and file such inventory with the clerk of court within ten (10) days of completion of the inventory. Contents of the box may not be removed without a court order. However, if there are items that must be appraised, an appraiser can look at the items in the box as long as they are not removed from the bank.

Any certificates of deposit, stocks, or bonds should be photocopied, or, if that is not possible, all pertinent information should be copied, including: date of purchase; certificate number; face value; name of company; common or preferred; interest rate; etc.

### ***Locating Other Assets***

The guardian should review the deposits and disbursements in the checkbooks and savings accounts to determine recurring income and expenses. If there are old checkbook registers, the guardian should go through them also. The guardian should look for estimated tax payments, real estate payments, large sums paid to individuals (possible exploitation?), once-a-year income, expenses such as insurance premiums, and sudden stops in payments (possible repossession).

The guardian should search the public records for titles to property in the ward's or the ward's spouse's name and for any judgments or liens against the ward's property.

If the guardian cannot find previous income tax filings, the guardian should contact the Internal Revenue Service for the appropriate address to request copies of the last 3 years' filings. The guardian will need to send a copy of the Letters of Guardianship along with the request to the IRS.

The guardian should contact the local Bureau of Motor Vehicles to determine if there are any automobiles or mobile homes registered in the ward's name. The guardian will need to show the Letters of Guardianship and proper identification.

The guardian should look for any lawsuits that have been filed against the ward and for any cause for an action against another party. For example, if the ward has sustained an injury prior to the guardianship, was there negligence on the

part of any caregiver or facility? Was the ward involved in an automobile or pedestrian accident? Has someone defaulted on rent or other payments due?

### ***Important Papers and Assets to Look For***

- Social Security card
- Medicare card
- Medicaid card
- SSI statements
- Marriage License(s), Divorce Decree(s)
- Birth Certificate, Passport, Naturalization Papers
- Title to automobile, mobile home, boat, or other vehicle
- Deeds to property, mortgage information
- Green card for "Aliens"
- Driver's License, Voter Identification Card
- Stock Certificates, purchase record
- Savings Bonds, Bearer Bonds
- Condominium documents, monthly maintenance data
- Certificates of Deposit, Bond coupons
- Checkbooks, bank statements (at least 3 years)
- Savings Account passbooks and statements
- Armed Forces Discharge papers, identification card
- Income Tax, Intangible Tax Returns (at least last years)
- Any information to file current income tax return
- Title to cemetery plot, receipts, market information
- Pre-paid funeral arrangements, obituary information
- Outstanding debts, current household bills
- Credit cards, statements
- Bank cards, automatic teller cards
- Homestead Exemption receipt or notice
- Property Tax Notice, receipt or payment
- Insurance Policies, Premium notices, identification cards
- Will, Trust information, Living Will
- Designation of Healthcare Surrogate
- Family Tree date, Address books, consistent correspondence
- Name of professionals (physicians, attorney, stock broker, tax preparer, podiatrist, dentist, nursing service, etc.)
- Photographs, slides, videos
- Safe deposit box key

Other Assets to Look For

- Cash
- Uncashed checks
- Money Orders
- Bond Coupons
- Stamp Collections
- Art Collections
- Jewelry, Furs
- Gold, Silver
- Antiques/collectibles

### ***Procedure for Selling the Ward's Assets***

When it becomes necessary to sell any of the ward's assets, the following steps should be taken:

1. Determine how the asset is titled. If it is owned as an estate by the entirety, the spouse who is not incapacitated must also join in the sale, transfer, or conveyance. If both spouses are incapacitated, then the sale must be accomplished by the guardians {F.S. 744.457}
2. Determine if the asset is specifically identified in the ward's will and what, if any, are the ward's wishes with regards to the disposition of the asset.
3. Obtain an appraisal of the asset, using a qualified individual or firm. The appraisal must be current (within the last 6 months) and must be made in writing.
4. Obtain a physician's statement regarding the ward's ability to use the asset and the possibility of the ward's use of the asset in the future.
5. Check to see if the asset is listed in the inventory. Sometimes, especially if the asset is in the ward's possession or in the case of a successor guardianship, an asset may have been inadvertently left off the inventory. If this is the case, prepare an amended inventory and have the attorney file it with the court before submitting petition.
6. Have the attorney prepare a Petition For Authority to Sell Ward's

Asset and attach the original appraisal and physician's statement.

The Petition should contain the following information:

- A brief statement of the reason for the sale
  - A brief description of the asset
  - The appraised value of the asset
  - The correct name and address of the purchaser
  - Any relationship or association between the purchaser and the guardian
  - The sale price
  - A statement regarding subsequent transfer or exchange contemplated by the purchaser if known
7. Notice should be sent by the attorney to all interested parties who have filed notice with the court and to any other person that may be interested in the disposition of the ward's property. This allows interested parties time to file an objection to the sale or to place a bid on the asset themselves.
  8. A hearing may be set by the court to determine if the asset should be sold. If the decision is favorable, the court will sign an Order Authorizing Sale of Ward's Asset. The guardian should obtain a certified copy of this Order.

When completing the sale, it is advisable to require payment in the form of a cashier's or bank check, money order, or cash.

### ***Selling the Ward's Automobile, Boat, Mobile Home or Other Vehicle***

If the ward owns an automobile, boat, mobile home, or other vehicle (i.e., motorcycle), the guardian should locate the title and determine the following:

1. Who is the owner? Does the ward own it individually or is it held jointly with a spouse or other individual?
2. Is there an outstanding loan balance on the vehicle? If so, are the payments current or have repossession proceedings been initiated?

3. Is there insurance coverage? Are the premiums current?
4. If the ward is to remain at home, will the auto be used by the caregiver?

### ***To Complete Transfer of Ownership***

Go in person (with the buyer) to the Bureau of Motor Vehicles and take the following papers:

1. Certified Letters of Guardianship;
2. Certified copy of Order for Authority to Sell Ward's Asset: and
3. Title and auto registration form

NOTE: Automobiles, mobile homes, boats and other vehicles remain titled in the ward's name. The guardian does not add his or her name to the title.

### ***Procedure for Selling Real Estate***

When it becomes necessary to sell the ward's residence or other real estate, the guardian with the appropriate authority should follow the general procedures listed above for selling the ward's assets. In addition, the following steps should be taken:

1. Obtain a certified appraisal (At the time of the sale the appraisal should not be older than 6 months. Note: this time frame may change due to the nature of the real estate market at time of the proposed sale).
2. Make sure that any property listed through a licensed realtor is on multiple listing (Consider a ninety (90) day only listing. However, this time frame may also be affected by the nature of the real estate market at the time of the proposed sale).
3. Decide on the disposition of the contents of the residence, i.e. place in storage, petition court to sell, give to ward.
4. Consult with an attorney before signing any contract (must be sold with "Guardian's Deed")

5. Insert clause "Subject to Court Approval" in contract.
6. Petition court for "Authority to Sell Ward's Residence" (or real property as applicable)
7. Obtain death certificate for predeceased spouse if property was in joint names.
8. Obtain a recent certified and updated Letter of Guardianship. The closing agent will require current Letters of Guardianship.
9. Allow sufficient time before closing date to allow for cleaning out residence, selling contents, etc.
10. Review amount of bond. The guardian may need to increase bond or place proceeds in a restricted depository
11. Cancel any utilities and homeowner's insurance after sale is completed

### ***Checklist for Guardian of the Property***

#### ***Immediately***

- Obtain sufficient certified Letters of Guardianship
- Redirect mail to guardian
- Change locks, secure property
- Notify relatives, Guardian of the Person, placement of appointment
- Notify physicians, other professionals
- Close any charge accounts. The request should be in writing that the credit report should note that the request was made by the guardian so as not to damage the ward's credit rating.
- Check with Motor Vehicle Bureau for ownership of any vehicles
- Check with County Official Records for ownership of any property
- Take possession/secure any automobiles, boats, recreational vehicles

#### ***As Soon as Possible***

- Determine assets, sources of income, liabilities

- Locate last 3 years' income tax returns
- Locate last 2 years' bank statements, check register, checks
- Apply for Social Security, any pensions
- Apply for any other benefits ward may be eligible for
- Review Stock Portfolio, determine any need for change
- Develop financial plan
- Obtain copy of will (distribution of assets)
- Determine if insurance coverage is adequate

### ***Inventory Residence***

- Inventory residence with witness (photograph, videotape)
- List articles of value and have witness sign list
- Have valuables appraised
- Remove any valuables for safekeeping
- Gather all important papers, review
- Fumigate, clean residence if necessary
- Determine if any repairs are needed (obtain 3 written bids)
- Determine if property taxes, any assessments paid
- Obtain appraisal of residence

### ***Banking Procedures***

- Locate ward's banking institutions
- Determine if accounts to be renamed, closed, consolidated
- Inventory safe deposit box with bank employee
- File safe deposit box inventory within ten (10) days

## **C. GUARDIAN OF THE PERSON**

It is the duty of the guardian of the person to take care of the person of the ward, to treat him or her humanely, to coordinate appropriate services, and if he or she is a minor, to see that he or she is properly educated and that he or she has the opportunity to learn a trade, occupation or profession.

In the case of an adult ward, or a minor over the age of 14, the guardian shall honor the ward's preferences as to living environment and standard of living, and, to the extent reasonable, consider the ward's financial resources and needs in doing so. {F.S. 744.363(3)}

### ***Duties and Responsibilities***

1. To attend the hearing to determine capacity
2. To prepare a Guardian Plan and file with the court within sixty (60) days after his or her appointment as guardian
3. To have the ward evaluated regarding appropriate placement or medical/social needs
4. To have the ward examined annually by a physician and obtain a written report of the physician's findings for the required annual physician's report to the court
5. To prepare the Annual Guardian Plan due within ninety (90) days after the last day of the anniversary month of the guardian's appointment
6. To decide appropriate living environment
7. To consent or refuse medical treatments
8. To procure adequate clothing and personal needs
9. To access and release confidential records
10. To consent or refuse to allow the ward to travel
11. To make other decisions concerning the ward's social environment or other social aspects of the ward's life, including education, counseling, therapy, etc.
12. To visit the ward often enough to ensure that the ward's needs are being met and that he or she is being properly cared for
13. To petition for restoration of ward's rights when and if appropriate
14. To make pre-arrangements for burial if such arrangements have not already been made by the ward or the family. (Note: The guardian may pay reasonable funeral, internment, and grave marker expenses from the ward's estate with court approval up to \$6000. {F.S. 744.441(16)})

## **Professional Guardian Responsibilities and Duties**

A professional guardian, who has been appointed as Guardian of the Person, must ensure that each of the guardian's wards is personally visited by the guardian or one of the guardian's professional staff at least once each calendar quarter. {F.S. 744.361(9)} During the personal visit, the guardian or the guardian's professional staff must assess:

- (a) The ward's physical appearance and condition;
- (b) The appropriateness of the ward's current living situation; and
- (c) The need for any additional services and the necessity for continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct service, health, and personal care needs.

### ***Placement Considerations***

The guardian must determine what the appropriate living environment for the ward will be. The guardian should have the ward professionally evaluated either by a physician, psychiatrist, consultant, agency, nurse practitioner, or other professional to determine where the ward should live and what level of care and services the ward will require. The examining committee may have made some recommendations in their report as to placement. Be sure to review their report carefully for any relevant comments or observations.

In addition to that information, the guardian should evaluate the following before making a decision:

1. The level of care the ward needs (skilled nursing, intermediate, custodial care)
2. The least restrictive, most appropriate alternative
3. The physician's (or other professional's) recommendation
4. The ward's financial resources (and former standard of living)
5. The ward's wishes
6. The effect a change in residence will have on the ward

7. The availability of social, rehabilitative, or supportive services
8. The proximity of the new location to the guardian, the ward's family, or to any regular visitors
9. The family's preference

In many cases, placement will depend primarily on the type of care that the ward requires and the extent of their financial resources to provide that care. Although most individuals want to remain in their own homes no matter what, it may not be financially possible to provide the level of care they require. The ward may need 24 hour care and supervision, which is very costly. Remaining in the home is probably not an option if the ward has little, or no, assets to pay for such care. In this instance, perhaps the only alternative to provide the needed care is placement in a nursing home funded through the Medicaid program.

### ***Placement Alternatives***

#### **Ward's Own Home**

##### Advantages:

- Security of familiar surroundings
- Close proximity of neighbors and friends
- Maintenance of personal belongings (and often memories)
- Retention of control over some daily activities

##### Disadvantages:

- Costly to maintain residence (taxes, insurance, upkeep)
- If no supervision or assistance there is an increased chance of accidents, mismanagement of medications, etc.
- Live-in help is expensive

#### **Adult Congregate Living Facility (ACLF)**

##### Advantages:

- Meals and laundry provided
- Possible transportation to physician or other services
- Socialization with others
- Companionship
- Supervision of medications
- Assistance with daily living activities--bathing, dressing, etc.

Disadvantages:

- Expensive
- Loss of privacy
- Loss of personal belongings
- Changes in personnel
- Loss of control over daily routine
- Security may be lax (wards may "wander")

**Extended Care Facility (Nursing Home)**

Advantages:

- Meals and laundry provided
- Administration of medications
- Skilled nursing services available
- Social Services available
- Rehabilitation and therapy available
- Planned activities

- Physicians visit on regular schedule
- Companionship
- Other physicians visit (podiatrist, dentist)
- May accept Medicaid or Veteran's payments

Disadvantages:

- Institutional setting
- Loss of privacy
- Loss of belongings
- Expensive
- Turnover in personnel
- Loss of control over daily routine

The local office of Licensing and Regulation for ACLF's and Nursing Facilities can provide a list of licensed facilities in the area. Contact DCF for information on how to obtain list.

***Criteria for Choosing a Nursing Home or ACLF***

When the guardian is faced with selecting a nursing home or adult congregate living facility, he or she should consult with other guardians or other professionals in the area regarding which homes they prefer and what kinds of problems they have encountered with specific homes. Other sources for referrals are Nursing Home Hotlines, and the Long Term Care Ombudsman.

The guardian should ask:

1. Does the facility have a current state license?
2. What is their rating? (superior, standard)
3. Will they take Medicare, Medicaid, Veterans, OSS (Optional

State Supplement for ACLF's)?

4. Are special services available (therapy, dietician, religious services)?
5. Is it convenient to the ward's physician?
6. Is it near a hospital?
7. Are the rooms clean, attractive, and large enough?
8. Is the facility free of unpleasant odors?
9. Are the dining room and lounge clean and inviting?
10. Is the food attractively served? Hot? Tasty?
11. Is there help for those unable to feed themselves?
12. Are there recreational and social activities?
13. Are there support bars in the shower and bathroom?
14. Are other medical services available, i.e. dentist, podiatrist, and optometrist?
15. Is there adequate number of trained staff on duty?
16. Is a schedule of activities posted?
17. Are residents encouraged (but not forced) to participate in activities?
18. Are barber and beautician services available?
19. Is laundry service available? At an extra charge? Is clothing marked?
20. Are patient's clothing and personal belongings protected?
21. Can patient decorate own room? Have own furnishings?

22. Does staff respond to patient needs quickly and courteously?
23. Do residents appear comfortable and happy?
24. Do visiting hours accommodate residents, relatives, and the guardian?
25. Is there a deposit required? What are the financial arrangements? Contract terms? Extra charges?
26. What is the refund policy? Bed-hold policy?
27. Are there any complaints against the facility registered with DCF? The long-term care Ombudsman?
28. Are the deficiency reports displayed? Have they been corrected?

Before placing a ward in a facility, a guardian should take a tour (unguided if possible). The guardian should take a good look at the residents (How are they treated by staff? Are they up and dressed at a reasonable time? Are they clean? Are their nails and hair in groomed condition? Are their meal trays sitting around untouched? Are call bells answered in a reasonable time? Are their questions answered?). These are some good indications of the quality of care that is provided. And of course, the guardian should ask himself or herself, would the guardian place a family member there?

### ***Considerations in Surrogate Medical Decision Making***

#### ***Criteria***

In making medical decisions for the ward, the guardian should weigh the following criteria:

1. The specific wishes of the ward expressed prior to the guardian's appointment including preferences expressed in an advance directive, a living will, a durable power of attorney, or any other written or oral declaration of intent.
2. If no specific declaration of preference or intent exists, the guardian should use whatever general knowledge he or she has of the ward to make a decision based upon the substituted

judgment standard. This should include consideration of the ward's current wishes. In obtaining the ward's current wishes, the guardian should clearly explain the nature of the diagnosed illness and details of the treatment options available.

3. Where reliable evidence of either the ward's prior specific or general wishes does not exist, the guardian should make a decision based on his or her perceived best interests of the ward, taking into account the current wishes of the ward.
4. The guardian should also consider information arising out of contact with family and close friends of the ward as well as information and opinions of attending physicians and other relevant professionals.

Prior to withholding or granting consent for medical treatment, a guardian should obtain and thoroughly document:

1. The reason for, and nature of, the treatment.
2. The benefit/necessity of the treatment.
3. The possible risks and side effects of the treatment.
4. Alternative treatments or measures that are available and their respective risks, side effects, and benefits.

### ***Second Opinions***

It is a general rule of thumb that a guardian should seek a second medical opinion in contemplating any treatment or medical intervention which would cause a reasonable person to seek a second opinion. Such treatments might include any medical intervention involving general or major anesthesia; a moderate or significant risk to the ward; extensive use of x-rays; interventions which would severely effect the appearance or functioning of the ward, such as eye surgery, amputation, etc.; any treatment necessitating mechanical or chemical restraints; etc.

### ***Emergency Medical Treatment***

A guardian having proper authority should grant or deny authorization of medical treatment based on a reasonable assessment of the factors within the

time frame allotted by the emergency. In all emergency situations the guardian shall speak with the treating or attending physician before authorizing or denying any medical treatment.

### ***Extraordinary Medical Procedures Requiring Prior Court Approval***

As enumerated in Florida Statute section 744.3215(4), consent to commitment to a facility or institution without formal placement proceedings, participation in experimental procedures, dissolution of marriage, consent to termination of parental rights, sterilization or abortion procedures, or termination of life support systems MAY NOT be given by the guardian without prior court approval.

It is also recommended that, in the absence of a clear legal directive from the ward (i.e. living will or durable power of attorney), in the above listed medical situations, the guardian may elicit the written opinion of the hospital or nursing home ethics committee, if one exists, before bringing the matter before the court.

Note: Organ transplants, do not resuscitate orders, and medical treatments prohibited by the ward's religious beliefs are not specifically mentioned in section 744.3215. However, it is STRONGLY urged that court approval also be obtained before initiating these activities on behalf of the ward.

## **VI. REPORTING REQUIREMENTS**

### **A. Initial Guardianship Report**

Each guardian shall file with the court an initial guardianship report within sixty (60) days after appointment as guardian. The initial report shall consist of a verified inventory and the initial Guardianship Plan. This initial report shall be served on the ward, except in certain circumstances, and on the attorney for the ward. {F.S. 744.362(1)}

### ***Initial Guardianship Plan***

This plan is to be based on the examining committee's findings and shall include:

1. The provision of mental health, medical, social, and personal care services for the best welfare of the ward. Any personal goals for the ward should be included as well.

2. The place and kind of residential setting best suited for the needs of the ward. The plan should designate whether or not such setting (or type of setting) is permanent, or if, upon certain contingencies occurring, a less restrictive alternative may be appropriate.
3. The application for health, homeowners, and auto insurance, as applicable, and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of services provided for the ward.
4. Any physical or mental exams deemed necessary.
5. A statement confirming to the extent possible the ward's participation and agreement with the plan.

NOTE: This plan is not effective beyond twelve (12) months and must be renewed and updated every twelve months thereafter.

### ***Verified Inventory***

This shall include:

1. All property of the ward, real and personal, including a statement of all encumbrances, liens, and other secured claims, as well as any cause of action accruing to the ward and any trusts of which the ward is a beneficiary.
2. The location of the real and personal property in sufficient detail such that it is able to be clearly identified and located.
3. A description of all sources of periodic income. Along with the inventory, a copy of the most current statement of all the ward's cash assets and the institutions where they are on deposit must be filed.
4. In the event that the guardian discovers or acquires property belonging to the ward after the initial inventory or which has not been included in any return, the guardian is obligated to amend the latest inventory and file such report within thirty (30) days after discovery or acquisition. {F.S. 744.384(1)}

5. A guardian shall pay from the ward's property to the clerk of the circuit court an audit fee.

## **B. Annual Reports**

In addition to the initial plan, annual guardianship reports must be filed within ninety (90) days after the last day of the anniversary month of the guardian's appointment. This report must include the annual guardianship plan and the annual financial return. All guardianship reports must be filed in a timely manner with the probate division of the circuit court. The ward, except in certain circumstances, and his or her attorney, if any, must be served with a copy as well. Failure to file annual reports may result in sanctions against the guardian. {F.S. 744.367} Written objections to any portion of the annual report may be filed by any interested person, including the ward, within thirty (30) days after the annual report has been filed. If such an objection has been filed, the court must set the matter for hearing and conduct the hearing within thirty (30) days of the date that the objection was filed. {F.S. 744.367(4), (7)}

### ***Court Review***

Upon examination of the report, the court shall enter an order either approving or disapproving the report. {F.S. 744.369(5)} If necessary, the court shall amend the plan or enter any other order necessary to protect the ward if it appears from the annual report that:

1. The condition of the ward requires further examination;
2. A change in the proposed care, maintenance or treatment is needed;
3. The ward is qualified for restoration of some or all rights;
4. There is a need to do something beyond what is indicated in the plan;
5. There is any other matter necessary to protect the interests of the ward. {F.S. 744.371}

Moreover, if there is any question as to the correctness of a guardian's activities pursuant to the authority vested to him or her and his or her compliance

with any and all guardianship plans, any interested party may seek an interim judicial review. {F.S. 744.3715}

### ***Annual Accountings***

The starting point of all first annual accountings is the initial inventory. Each subsequent accounting has as its starting point the assets remaining at the end of the previous accounting.

The financial return must contain a full and correct account of receipts and disbursements of all the ward's property under the guardian's control and a statement of the ward's assets. A copy of the annual or year's end statement of all of the ward's cash accounts from each of the institutions where cash is deposited must be attached to the return. {F.S. 744.3678}

The guardian must obtain a receipt, canceled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward. The guardian must preserve all evidence of payment, along with other substantiating papers, for a period of three years after his or her discharge. (F.S. 744.3678(3))

Substantiating papers and documentation such as cancelled checks and receipts are not to be filed with the accounting. However, this backup must be made available to the court, its designee, or creditor and must be maintained for three (3) years after discharge. {F.S. 744.373}

NOTE: There is a required graduated filing fee that is determined by the value of the ward's assets that must accompany the filing of the annual accounting for a guardianship of the property. To determine the specific amount of the filing fee for a particular guardianship, call the probate clerk at (407) 665-4376. Any guardian unable to pay the auditing fee may petition the court for a waiver of the fee. The court may waive the fee, especially if the ward is indigent. {744.3678(4)}

### ***Simplified Accounting***

In a guardianship of property, when all assets of the estate are in a restricted depository (as designated under F.S. 69.031), and the only transactions that occur in that account are interest accrual, deposits from a settlement, or financial institution service charges and taxes, the guardian may elect to file a "Simplified Accounting." A guardian need not be represented by an attorney in order to file a Simplified Accounting and there is no audit fee. {F.S. 744.3679}

### *Annual Guardianship Plan*

This plan should outline the ward's progress over the past year with documentation of the ward's condition and status, enumeration of his or her projected needs and outline of steps needed to meet these identified needs.

Each plan for an adult ward must set forth, if applicable, information including {F.S. 744.3675}:

1. The name and address of each place where the ward resided during the preceding year
2. The length of stay of the ward at each place
3. A statement of whether the present residential setting, and type of setting is best suited for the current needs of the ward
4. Plans for ensuring, during the coming year, that the ward is in the least restrictive and most appropriate residential setting to meet his or her needs
5. Information concerning the medical and mental health condition and treatment and rehabilitation needs of the ward, including:
  - a. A resume if any professional medical treatment given to the ward during the preceding year;
  - b. The report of a physician who performed an examination upon the ward no more than ninety (90) days before the beginning of the applicable reporting period. The report must contain an evaluation of the ward's condition and a statement of the current level of capacity of the ward; and
  - c. The plan for providing medical, mental health, and rehabilitative services in the coming year.
6. Information concerning the social condition of the ward, including:

- a. The social and personal services currently used by the ward;
  - b. The social skills of the ward, including a statement of how well the ward communicates and maintains interpersonal relationships with others; and
  - c. The social needs of the ward.
7. An assessment of the restoration of rights to the ward, including:
- a. A summary of activities during the preceding year which were designed to enhance the capacity of the ward;
  - b. A statement of whether the ward can have any rights restored; and
  - c. A statement whether restoration of any rights will be sought. {F.S. 744.3675}

Each plan filed by the legal guardian of a minor must include {F.S. 744.3675}:

- (a) Information concerning the residence of the minor, including:
  - 1. The minor's address at the time of filing the plan; and
  - 2. The name and address of each place where the minor lived during the preceding year.
- (b) Information concerning the medical and mental health condition and treatment and rehabilitation needs of the minor, including:
  - 1. A resume of any professional medical treatment given to the minor during the preceding year;
  - 2. A report from the physician who examined the minor no more than 180 days before the beginning of the applicable reporting period which contains an evaluation of the minor's physical and mental conditions; and
  - 3. The plan for providing medical services in the coming year.

(c) Information concerning the education of the minor, including:

1. A summary of the school progress report;
2. The social development of the minor, including a statement of how well the minor communicates and maintains interpersonal relationships with others; and
3. The social needs of the minor.

## **VII. CONFLICTS OF INTEREST**

### ***General***

It is essential to the proper conduct and management of a guardianship that the guardian be independent and impartial. The fiduciary relationship that exists between the guardian and the ward may not be used for the private gain of the guardian, other than the payment of fees and expenses reimbursable to the guardian as provided by law. The guardian may not incur any obligation on behalf of the guardianship that conflicts with the proper discharge of guardian's duties. {F.S. 744.446}

### ***Restrictions***

Unless the guardian first obtained approval from the court, or unless the guardian was previously engaged in a relationship with the ward described below which was disclosed to the court in the petition for appointment as guardian, the guardian MAY NOT:

1. Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;
2. Acquire an ownership or other interest of any kind adverse to the interests of the ward;
3. Be designated as a beneficiary on any life insurance policy, pension, or benefit plan of the ward unless such designation was validly made by the ward prior to his or her adjudication of incapacity; or
4. Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity of which the guardian or the

guardian's spouse or lineal descendants, or collateral kindred, is an officer, partner, director, shareholder, or proprietor, or has any financial interest. {F.S. 744.446(2)}

If the guardian engages in any prohibited activity without first obtaining a court order authorizing the guardian to do so, the activity is voidable by the court and the guardian may be removed. The guardian may also be liable for a surcharge or subject to other sanctions available under the law. If the guardian is not sure about the appropriateness of a particular action or about the guardian's relationship to the ward, the guardian should consult an attorney. {F. S. 744.446(3)}

### ***Common Problem Areas***

#### The ward's car.

A guardian should not buy or use the ward's car UNLESS he or she is a spouse, parent, child, brother or sister of the ward or co-owner. {F.S. 744.454}

#### The ward's home.

Unless the guardian is the ward's spouse or one who is dependent upon the ward, the guardian should not use the home without court approval. The guardian should not charge a minor rent if the guardian is the minor ward's parent unless directed or authorized to do so by court order. {F.S. 744.397}

## **VIII. GUARDIANSHIPS OF MINORS**

### ***Natural Guardian***

The mother and father jointly are natural guardians of their own children and of their adopted children, during minority. If one parent dies, the surviving parent remains the sole natural guardian even if he or she remarries. If the marriage between the parents is dissolved, the natural guardianship belongs to the parent to whom custody of the child is awarded. If the parents are given joint custody, then both continue as natural guardians. If the marriage is dissolved and neither the father, nor the mother is given custody of the child, neither shall act as natural guardian of the child. The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless a court of competent jurisdiction enters an order stating otherwise. {F.S. 744.301(1)}

If the mother and father of a minor are both deceased, upon petition by a relative or interested person, a guardian may be appointed by the court. {F.S. 744.3021} A guardian appointed for a minor, whether of the person or property, has the authority of a plenary guardian.

### ***When a Guardianship for a Minor is Necessary***

A natural guardian is authorized to settle a claim and to collect, receive, manage and dispose of funds for the benefit of a minor child up to \$15,000. {F.S. 744.301(2)} However, a guardianship must be established when a minor is to receive more than \$15,000.00 resulting from:

1. Any claim or cause of action for damages to the person or property of said minor;
2. Real or personal property distributed from an estate or trust;
3. Proceeds from a life insurance policy; or
4. Income otherwise accruing to the benefit of the child.

The natural guardian may not, without a court order, use the property of the ward for the guardian's benefit or to satisfy the guardian's support obligation to the ward. (F. S. 744.301(3)).

### ***Guardian Ad Litem***

The court may appoint a guardian ad litem to represent the minor's interest, before approving a settlement of the minor's portion of the claim, in any case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the gross settlement of the claim exceeds \$15,000. The court is required to appoint a guardian ad litem if the minor's claim exceeds \$50,000. The court shall award reasonable fees and costs to the guardian ad litem to be paid out of the gross proceeds of the settlement. (F.S. 744.3025)

### ***Attorneys***

Every guardian for a minor must be represented by an attorney. Once an attorney becomes the attorney of record for a guardianship, the attorney remains

so unless the guardian is served with a notice of the attorney's intent to withdraw and the court grants this motion to withdraw. All court costs incurred for the services of the attorney may be taken from the assets of the guardianship, but only after approval of the court. {Fla. Prob. R. 5.030}

It is the responsibility of the guardian to keep the attorney advised of the guardian's current address and to respond to correspondence from the attorney.

### ***Initial Guardianship Report/Plan***

If the ward is under the age of 14, the initial guardianship plan does not need to contain the statement that the guardian has consulted with the ward and to the extent reasonable, has honored the ward's wishes consistent with the rights retained by the ward under the plan. If the ward is 14 years old, or older, this must apply and, to the maximum extent reasonable, the plan must be in accordance with the wishes of the ward.

### ***Actions Requiring Court Approval***

1. If the ward has been involved in a personal injury action and the guardianship is to bring suit.
2. If the ward's parents, or either of them, are alive, and the guardian wishes to pay expenses of the ward's support health, maintenance, or education.
3. If the ward's assets are in a depository, and the guardian wishes to withdraw funds for ANY reason, including income tax payments, intangible tax payments, health payments, or the annual accounting fee.
4. If the ward's assets are to be used to purchase a home for the family to live in. The ward must purchase the entire fee simple title to real estate, and the purchase may be made ONLY for a home for the ward. {F.S. 744.441}

### ***Conflicts of Interest***

The guardian must be independent and impartial. {F.S. 744.446(1)} Even though the guardian may be the parent of the ward, the fiduciary relationship of a guardian of the property still exists, and the guardian may not use the ward's assets for the private gain of the guardian. The guardian may not incur any obligation on

behalf of the guardianship which conflicts with the proper discharge of the guardian's duties. The guardian, if the parent of the ward, may not use the ward's funds to discharge the guardian's personal duty of supporting the ward.

### *Fees*

If the guardian is a parent of the ward, it is most likely that fees will not be awarded to the parent. However, if the parent possesses special knowledge of investing, accounting, legal abilities, etc., it is possible the guardian may be reimbursed for those types of activities on a reasonable hourly basis. It is always important to keep a time log of the number of hours worked, and the activities performed if fees are to be requested.

### *Termination of Guardianship*

When the ward reaches majority, or when the property subject to the guardianship has been exhausted, the guardian shall file a final report and receive his or her order of discharge. {F.S. 744.531} Without a discharge, the liability of the guardian will continue and the court will look to the guardian for yearly accountings.

It is the responsibility of the guardian, through an attorney, to petition the court for a final distribution of the assets and the discharge of the guardian. It is this Order of Distribution and Discharge which instructs the institution to release the funds, discharges the guardian, and closes the file.

### *When a Guardianship for a Minor May Not Be Necessary*

Depending upon the circumstances, guardianship for a minor may not become necessary if a natural guardian's authority is adequate; a ward becomes emancipated through marriage {F.S. 743.01}; a petition for temporary custody is filed by an extended family member pursuant to Florida Statute section 751.01; or, in some limited circumstances, when it is appropriate to appoint a custodian under the Uniform Transfers to Minors Act. {Donna-Lee M. Roden, *Guardianship for Minors*, in *Florida Guardianship Practice*, §22 22-16 (4th ed., *The Florida Bar* 2002).} It is crucial to obtain competent legal advice when determining whether any of these situations are applicable to a given case.

## **IX. GUARDIANSHIPS OF TERMINALLY ILL WARDS**

### **A. Right to Refuse Treatment**

Every person has a fundamental right to control his or her person and the right to make choices pertaining to his or her health, including the right to refuse unwanted, medical treatment. An incompetent person retains the same constitutional right to choose to refuse medical treatment as does a competent person. *{In Re: Guardianship of Browning, 568 So. 2d 4 (Fla. 1990).}*

## **B. Guardian's General Authority to Refuse Treatment to the Ward**

The first consideration in determining what authority a guardian has to consent to withdrawing or withholding life prolonging medical treatment from a terminally ill ward is to determine whether or not the ward has made an advance health care directive pursuant to Chapter 765 Florida Statutes. General types of health care directives include the nomination of a health care surrogate, the execution of a living will, and the execution of a do-not-resuscitate order.

### ***Designation of a Health Care Surrogate***

Florida Statutes sections 765.202 through 765.205 constitute the Health Care Surrogate Act. {F.S. 765.201} A competent person, by way of a written document, may designate another person to act as his or her surrogate for the purpose of making health care decisions. If a ward has validly appointed a health care surrogate, the surrogate's authority to make health care decisions continues after the ward has been declared incapacitated, unless the court has modified or revoked the authority or the surrogate pursuant to Florida Statute section 744.3115. {F.S. 765.205(3)}

Section 744.3115 provides that, when the guardian is appointed under this chapter, the court shall determine whether the ward, prior to incapacity, has executed any valid advance directive under chapter 765. If any advance directive exists, the court shall specify in its order and Letter of Guardianship what authority, if any, the guardian shall exercise over the surrogate. Pursuant to the grounds listed in section 765.105, the court, upon its own motion may, with notice to the surrogate and any other appropriate parties, modify or revoke the authority of the surrogate to make health care decisions for the ward. For purposes of this section the term "health care decision" has the same meaning as in section 765.101.

### ***Powers Without a Health Care Surrogate***

If the ward has made no designation of a health care surrogate, a plenary guardian or a limited guardian holding authority to consent to medical treatment

on behalf of the ward, is authorized to make health care decisions for the ward. {F.S. 765.401(1) (a)}

### **C. Withholding or Withdrawal of Life Prolonging Procedures for a Terminally Ill Ward**

#### ***If the Ward Has Signed a Living Will***

If the ward has signed a living will but has not named another person to carry out the terms of the living will and if the ward had not named a health care surrogate under the Health Care Surrogate Act, then a guardian having authority to consent to medical treatment on behalf of the ward may see that the terms of the living will are fulfilled. {F.S. 765.401(1) (a)}

Before proceeding in accordance with the terms of the ward's living will the guardian must be satisfied that:

1. The ward does not have a reasonable probability of recovering competency.
2. The ward's physical condition is terminal, an end-stage condition, or a persistent vegetative state.
3. Any limitations expressed orally or in the written declaration have been carefully considered and satisfied. {F.S. 765.304(2)}

In determining whether the ward may recover capacity or has a terminal condition, end-stage condition, or is in a persistent vegetative state, the ward's attending physician and at least one other consulting physician must separately examine the ward. They must both find that the ward has no reasonable chance of recovering capacity and that the ward's condition is terminal, end stage, or a persistent vegetative state. The findings of the doctors must be documented in the ward's medical record, and the record must then be signed by each examining physician. {F.S. 765.306}

#### ***Procedure In The Absence Of A Living Will***

If the ward has not previously signed a valid living will, the decision to withhold or withdraw life prolonging procedures from a patient may be made by a

health care surrogate named by the ward pursuant to Florida Statutes sections 765.201 through 765.205.

If the ward has neither executed a living will, nor named a health care surrogate, a guardian with authority to consent to the ward's medical treatment may proceed as the ward's proxy under Florida Statutes section 765.401. When acting as the ward's proxy, the guardian's decisions must be based on informed consent, and the decisions must be made as he or she reasonably believes the ward would have made under similar circumstances. {F.S. 765.401(2)} However, if the guardian is making a decision to withhold or withdraw life prolonging procedures, the decision must be supported by clear and convincing evidence that the guardian's decision would have been the decision chosen by the ward had he or she been competent. {F.S. 765.401(3)}

Before exercising the ward's right to select or decline health care, the guardian, when acting as the proxy under Florida Statute section 765.401, must comply with the provisions applying to surrogates under Chapter 765. If the guardian, as proxy, is deciding whether or not to consent to withholding or withdrawing life support, he or she must first be satisfied that:

1. The patient does not have a reasonable medical probability of recovering capacity so that the right could be exercised by the patient; and
2. The patient is both mentally and physically incapacitated with no reasonable medical probability of recovery, the patient has an end-stage condition, the patient is in a persistent vegetative state, or the patient's physical condition is terminal. {F.S. 765-305(2)}

As in the case where the ward has executed a living will in determining whether the ward may recover capacity or has a terminal condition, end-stage condition, or persistent vegetative state, the ward's attending physician and at least one other consulting physician must separately examine the ward. They must both find that the ward has no reasonable chance of recovering capacity and that the ward's condition is terminal, an end-stage condition, or persistent vegetative state. The findings of the doctors must be documented in the ward's medical record, and the record must then be signed by both examining physicians. {F.S. 765.306}

## **X. GUARDIAN ADVOCATE**

A probate court may appoint a guardian advocate, without adjudication of incapacity, for a person with developmental disabilities, if the person 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 a person voluntarily petitions for the appointment of a guardian advocate. {F.S. 393.12(2) (a); F.S. 744.3085} Such an appointment is generally encouraged since it is a less restrictive form of guardianship. {F.S. 744.3085} Any person with disabilities who is the subject of a petition for a guardian advocate must be represented by counsel and has the right to the representation of his or her choice. {F.S. 393.12(2) (d)}

### ***Developmental Disability***

Developmental disability means a disorder or syndrome which is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. {F.S. 393.063}

### ***Appointment of a Guardian Advocate***

The process for appointing a guardian advocate begins with the filing of a petition. {F.S. 393.12 (2) (a), (b)} Requisite notice of such filing should be given to the individual and his or her parent(s). {F.S. 393.12(2) (c)} Upon filing, a hearing will be set to consider the petition where all applicable professional reports documenting the individual's condition will be presented. {F.S. 393.12(2) (e)} If the court determines that the appointment of a guardian advocate is necessary, it shall enter a written order that contains the relevant findings of facts and conclusions of law upon which the decision was based.

### ***Responsibilities***

A guardian advocate has the same powers, duties and responsibilities required of a guardian pursuant to Chapter 744 or those defined by court order pursuant to Florida Statutes section 393.12. {F.S. 393.12(2) (h)} The person for whom the guardian advocate has been appointed retains all other legal rights that have not been specifically designated to the guardian advocate. {F.S. 393.12(2) (g)}

## **XI. THE GUARDIAN AND THE GUARDIAN'S ATTORNEY**

### ***General***

The guardianship attorney is the guardian's connection with the legal system.

The attorney should keep the guardian properly advised and make sure to that compliance with the statutory and court directed regulations is maintained. The attorney can suggest alternative ways to achieve goals and can suggest benefits and programs available to the ward.

Maintaining a continuing relationship with the attorney is vital in keeping the guardian free of problems with the court. Often simple acts may require court permission or must be done in a certain manner to stay in compliance with the guardianship laws. Therefore, frequent consultation with the attorney may be necessary.

### ***Choosing the Guardianship Attorney***

There are three main questions that should be considered when choosing a guardianship attorney:

1. Does the attorney have adequate knowledge about guardianship law? How many guardianships has the attorney administered? Does the attorney appear to be charging the guardian to learn how to do a guardianship?
2. Does the attorney have the adequate time to devote to the case? Does paperwork take an unreasonable time to be generated by the attorney? Is the attorney available when the guardian needs to consult?
3. How is the guardian treated personally by the attorney and the attorney's office staff? Do they give the guardian the time and advice needed? Does it seem as though it is a bother for them to attend to needs of the guardian?

### ***Keeping Costs Down***

Most attorneys handling guardianship matters are paid by the time extended in matters regarding the guardianship. This not only includes court appearances and drafting pleadings, but also usually includes such items as correspondence, telephone calls and conferences with the guardian and others regarding guardianship matters, preparation for meetings and court appearances, review and analysis of information and papers furnished to the attorney and travel. These items can add up rather swiftly. The following suggestions can help the guardian keep costs down:

1. The guardian should organize his or her thoughts and suggestions before calling or visiting the attorney. When the guardian does call or visit with the attorney, the guardian should stick to the point in the discussions.
2. The guardian should keep complete records of the time expended on guardianship matters and should keep complete and detailed financial records. The less time the attorney has to spend in calling the guardian for missing information and in preparing annual reports and fee petitions, the lower the guardian's bill will be and the quicker the job will be done.
3. The guardian should not call the attorney just to vent frustrations over a situation the attorney cannot change.
4. The guardian should make sure that he or she clearly understands his or her authority as guardian and understands how to do something before acting. It is much less expensive for the guardian to ask for legal advice and do the act correctly than it is for the attorney to straighten out a problem created by an improper act on the guardian's part.
5. The guardian should ask the attorney if there are jobs that the guardian can do that the attorney might otherwise do. Sometimes the guardian may be just as able as the attorney to do mechanical or repetitive things such as writing letters seeking information about assets, preparing accounting information, visiting banks or sorting through old bank statements and records.

***Specific Examples of When the Guardianship Attorney Should be Consulted***

1. In general, the guardian should consult with the attorney any time there is any doubt about the authority of the guardian to do something, or how to do it.
2. Any time out of the ordinary expenditures are necessary.
3. Any time any sum of money is to be paid to the guardian from guardianship funds.
4. Whenever the ward is moved from his or her existing care setting or major health care decisions must be made.

5. Any time a court order is needed for authority to act (as discussed elsewhere in this manual).
6. Any time reports or any other pleading must be filed with the court.
7. When the guardian is about to perform any major act on behalf of the guardianship.

## **XII. RECOVERING FEES AND THE COSTS OF GUARDIANSHIP**

### **A. Recovering Fees**

A guardian is entitled to reasonable and fair compensation for his or her services if there are sufficient funds in the ward's estate.

#### ***Criteria***

The court will consider the following criteria when determining a reasonable fee {F.S. 744.108}:

1. Time and labor required
2. Difficulty of the services involved and the skill required to perform these services properly
3. The fee customarily charged in the locality for similar services
4. The likelihood that acceptance of the particular employment will preclude other employment
5. The nature and value of the assets, the amount of income earned by the estate, the responsibilities and potential liabilities imposed by the responsibility
6. The results obtained
7. Time limits imposed by the situation
8. The nature and length of the relationship with the

incapacitated person

9. The experience, reputation, diligence and ability of the person performing the services

All petitions for guardian's fees and expenses must be accompanied with a DETAILED description of the services performed for the fees sought and such petitions cannot be approved without prior notice to the ward, guardian, and attorney. To ensure the accuracy and accountability, all billed activities should be thoroughly documented in the case note section of the client's file.

## **B. Possible Costs of a Guardianship**

### *Filing Fees*

Filing fees are required to be paid to the Clerk of Court when initiating a guardianship proceeding and may vary slightly from circuit to circuit. To determine the precise amount of filing fees required, contact the local courthouse.

### **Bond**

**§744.1085 Regulation of professional guardians; application; bond required; educational requirements; audits.--**

- (2) Each professional guardian who files a petition for appointment after October 1, 1997, shall post a blanket fiduciary bond with the clerk of the circuit court in the county in which the guardian's primary place of business is located. The guardian shall provide proof of the fiduciary bond to the clerks of each additional circuit court in which he or she is serving as a professional guardian. The bond shall be maintained by the guardian in an amount not less than \$50,000. The bond must cover all wards for whom the guardian has been appointed at any given time. The liability of the provider of the bond is limited to the face amount of the bond, regardless of the number of wards for whom the professional guardian has been appointed. The act or omissions of each employee of a professional guardian who has direct contact with the ward or access to the ward's assets is covered by the terms of such bond. The bond must be payable to the Governor of the State of Florida and his or her successors in office and conditioned on the faithful performance of all duties by the guardian. In form, the bond

must be joint and several. The bond is in addition to any bonds required under section 744.351. This subsection does not apply to any attorney who is licensed to practice law in this state and who is in good standing, to any financial institution as defined in section 744.309(4), or a public guardian. The expenses incurred to satisfy the bonding requirements prescribed in this section may not be paid with the assets of any ward.

The cost of the guardian's bond will vary depending upon the size and nature of the estate. The guardian's bond is fixed by the court, and it must be in an amount not less than the full amount of the cash on hand and on deposit belonging to the ward, plus the value of the notes and bonds owned by the ward that are payable to the bearer. The court may increase or reduce the amount of the bond. {F.S. 744.351}

In some cases the court may order, in lieu of a bond, or in addition to a lesser bond, that the guardian place all or part of the personal assets of the ward in a designated financial institution under Florida Statute section 69.031.

### ***Audit Fees***

Upon the filing of the verified inventory, the guardian must pay a fee to cover the Clerk's cost of auditing the inventory. The amount of the fee is set by the Clerk. If a guardian is unable to pay the auditing fee, he or she may petition the court for a waiver of the fee. The court may waive the fee after it has reviewed the documentation filed by the guardian in support of the waiver. {F.S. 744.365(6)}

A guardian must also pay, from the ward's estate to the Clerk of the Court, a fee for the Clerk's audit of the annual accounting. This fee, too, is set by the Clerk. If a guardian is unable to pay the fee, he or she may petition the court for a waiver of the fee. The court may waive the fee after it has reviewed the documentation filed by the guardian in support of the waiver. {F.S. 744.3678(4)}

### ***Examining Committee and Appointed Attorney Fees***

Members of the examining committee and any appointed attorney are entitled to reasonable fees to be determined by the court. These fees are paid by the state, if the incapacitated person is indigent. If not, they will be paid by the guardian from the funds of the ward. {F.S. 744.331(7)}

### ***Court Monitor***

A court monitor may be allowed a reasonable fee as determined by the court and paid from the ward's assets. Court monitors are those persons the court may, upon inquiry from any interested person or upon its own motion, appoint to investigate, seek information, examine documents, or interview the ward and report the findings to the court. {F.S. 744.107}

### ***Other Expenses***

The guardian may employ persons such as auditors, investment advisors or agents when reasonably necessary to advise or assist the guardian in the performance of his or her duties. These will be expenses of the ward's estate. {F.S. 744.444(13)}

## **XIII. TERMINATION OF GUARDIANSHIP**

### ***Restoration of Capacity***

Anyone, including the ward, may file before the court a suggestion of capacity stating that the ward is capable of exercising some or all of his or her rights. Notice to all interested persons of the filing must be by personal service of process. A physician appointed by the court is required to examine the ward and file a report within twenty (20) days of appointment.

If an objection to the suggestion is filed within twenty (20) days after service of the notice, or if the medical exam suggests restoration is inappropriate, the court will schedule a hearing and appoint an attorney to represent the ward, at which hearing a decision will be made as to the ward's capacity to have some or all of his or her rights restored. If there are no objections filed and the medical exam indicates restoration of some or all rights, the court will so order. If only some rights are restored, the guardian must file a revised guardianship plan with the court within sixty (60) days. {F.S. 744.464}

### ***Resignation***

A guardian may request to be relieved of his or her guardianship responsibilities by filing a resignation and petition for discharge. {Fla. Prob. R. 5.650(a)} In such cases, the court will direct the guardian to file a true and correct accounting and to deliver to the successor guardian all property, funds, and records. The guardian is not exonerated from any liability previously incurred. {F.S. 744.467}

A successor must be appointed and qualified before a guardian can be

relieved of his or her duties and liabilities. Even if not requested by the guardian, a successor may be appointed if the guardian becomes incapacitated or dies. {F.S. 744.471}

### ***Death of the Ward***

When the ward dies, the guardian's authority ceases. He or she does not have the authority to conduct further business on behalf of the ward without court approval. If there is no one else to coordinate the final arrangements, the guardian will have this responsibility, and must obtain court approval, to pay the final expenses for burial or cremation. The guardian may have the task of disposing of the ward's personal items, such as asking the next-of-kin for instructions regarding clothing.

At the death of the ward, the guardian should:

1. Notify the attorney who shall notify the court or other appropriate authority either as designated by State law or by submitting a certified copy of the deceased ward's death certificate
2. Notify any agency providing benefits to the ward or beneficiary including the Social Security Administration, the Veterans Administration, and other state or federal benefit administrations
3. Make arrangements with a funeral home, utilizing any prepaid funeral agreement, if no friends or family are available to make such agreements
4. Apply for burial funds if necessary
5. Pay guardianship debts and expenses of guardianship administration from guardianship assets. Turn the ward's remaining net assets over to the individual or agency designated by the court to receive such assets such as the personal representative of the ward's probate estate. {*Midland Nat'l Bank v. Comerica Trust Co.*, 616 So. 2d 1081, 1084 (Fla. 4th DCA 1993).}

6. If the ward's property cannot be distributed because no estate proceeding has been initiated, the guardian may initiate such a proceeding after a reasonable time. {F.S. 744. 534(1)}
7. Submit a final accounting of the ward's estate to the court or other authorizing agency. If the guardian is also named as the personal representative, a copy of the final report and petition for discharge must also be served upon any beneficiaries affected by the report wherein they will have thirty (30) days to file any objections. {F.S. 744.528(1) (2)}
8. Submit the order of discharge

### ***Minor Ward Reaches 18***

Unless the minor is incapacitated, at the age of 18 he or she is no longer a minor and is deemed to be legally old enough to manage his or her own finances or property. The guardianship is terminated and the assets are distributed to the minor.

### ***Change of Domicile of the Ward***

Florida guardianship law defines a resident ward's domicile as the county in which the ward resides. {F.S. 744.201} As guardian, the guardian may not move the ward from the State of Florida or from one county within Florida to another without a court order approving the change. {F.S. 744.2025} When a domicile of a resident ward is moved outside of Florida and a guardianship is established at the ward's new residence, a Florida guardian may be discharged from his or her guardian duties. The guardian may not file the final accounting and petition for discharge of guardianship duties, however, before the foreign court having jurisdiction over the ward has appointed a new guardian who has qualified and paid a guardianship bond as required by the foreign court.

The Florida guardian must publish notice in a newspaper that he or she has filed the final accounting and will apply for discharge. If an objection to the termination of the guardianship is filed in the Florida court, the court will hear the objection and decide whether the guardianship may be discharged. Upon the disposition of the objections and proof that the assets have been received by the foreign guardian, the court will discharge the Florida guardian. The entry of the order terminating the Florida guardianship will not exonerate the guardian or his or her surety from any liability previously incurred. {F.S. 744.524}

## *Removal of the Guardian*

All guardians occupy a fiduciary relationship with their ward and as a result are subject to certain liabilities that apply to any fiduciary. Removal shall be in addition to any other penalties that may be prescribed by law. A guardian may be removed for any of the following reasons:

**§744.474 Reasons for removal of guardian.**--A guardian may be removed for any of the following reasons, and the removal shall be in addition to any other penalties prescribed by law:

- (1) Fraud in obtaining her or his appointment.
- (2) Failure to discharge her or his duties.
- (3) Abuse of her or his powers.
- (4) An incapacity or illness, including substance abuse, which renders the guardian incapable of discharging her or his duties.
- (5) Failure to comply with any order of the court.
- (6) Failure to return schedules of property sold or accounts of sales of property or to produce and exhibit the ward's assets when so required.
- (7) The wasting, embezzlement, or other mismanagement of the ward's property.
- (8) Failure to give bond or security for any purpose when required by the court or failure to file with the annual guardianship plan the evidence required by Florida Statute section 744.351 that the sureties on her or his bond are alive and solvent.
- (9) Conviction of a felony.
- (10) Appointment of a receiver, trustee in bankruptcy, or liquidator for any corporate guardian.
- (11) Development of a conflict of interest between the ward and the guardian.

- (12) Having been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under Florida Statute section 435.03 or under any similar statute of another jurisdiction.
- (13) A material failure to comply with the guardianship report by the guardian.
- (14) A failure to comply with the rules for timely filing the initial and annual guardianship reports.
- (15) A failure to fulfill the guardianship education requirements.
- (16) The improper management of the ward's assets.
- (17) A material change in the ward's financial circumstances such that the guardian is no longer qualified to manage the finances of the ward, or the previous degree of management is no longer required.
- (18) After appointment, the guardian becomes a disqualified person as set forth in Florida Statute section 744.309(3).
- (19) Upon a showing by a person who did not receive notice of the petition for adjudication of incapacity, when such notice is required, or who is related to the ward within the relationships specified for nonresident relatives in Florida Statute sections 744.309(2) and 744.312(2) and who has not previously been rejected by the court as a guardian and that the current guardian is not a family member and subsection (20) applies, in which case the court may remove the current guardian and appoint the petitioner, or such person as the court deems in the best interest of the ward, as guardian of the person or of the property, or both.
- (20) Upon a showing that removal of the current guardian is in the best interest of the ward. In determining whether a guardian who is related by blood or marriage to the ward is to be removed, there shall be a rebuttable presumption that the guardian is acting in the best interest of the ward.

If grounds for removal exist, proceedings may be instituted by the court, by

any surety, or by any other interested person. Reasonable notice must be given to the guardian. {F.S. 744.477}

If a removed guardian fails to file a true, complete, and final account of his or her guardianship or to turn over to his or her successor or the ward all of the property of the ward and all records under the guardian's control, or to pay to any successor guardian or ward any money due the ward by the guardian, the removed guardian may be held in contempt. Those contempt proceedings may be instituted by the court, the ward, or any interested party or the successor guardian.

### ***Final Reports and Application for Discharge Hearing***

When the court terminates the guardianship, the guardian must promptly file his or her final report. If no objections are filed and if it appears that the guardian has made a full and complete distribution to the person entitled and has otherwise faithfully discharged his or her duties, the court shall approve the final report. If objections are filed, the court shall conduct a hearing in the same manner as provided for a hearing on objections to annual guardianship reports. {F.S. 744.531}

## **XIV. CHECKLIST OF THE GUARDIAN'S ACTIONS AND RESPONSIBILITIES**

1. **Visit the ward**
2. **Secure an attorney**
3. **Attend incapacity hearing**
4. **Once appointed:**
  - a. Attend the ward's immediate needs, appropriate housing, medical treatment if necessary, etc.
  - b. Investigate: gather the ward's assets and conduct a personal inventory
  - c. Secure a bond or designation of depository from the court
  - d. Obtain Letters of Guardianship
  - e. Set up depository account with standing order of withdrawal for standard and recurring expenses

- f. Transfer title on accounts and set up guardianship accounts taking into proper consideration accounts showing evidence of prior estate planning
- g. Notify sources of income of guardianship
- h. Obtain appraiser if necessary to establish value of inventory
- i. Obtain services of financial planner, if appropriate
- j. Submit petition to court to perform acts requiring prior court approval
- k. Submit to court required reports (Initial Guardianship Plan)
- l. Visit the ward as needed based on the particular circumstances of the ward and minimum requirements

5. **Stabilization of Ward**

- a. Determine if placement is appropriate
- b. Gather assets
- c. Apply, if necessary, for financial assistance benefits
- d. Submit request for guardianship fees to court as required
- e. Submit annual report

## **XV. COMMUNITY RESOURCES**

<b>Abuse Hotline</b> <i>Number to report abuse, neglect or exploitation of elderly or disabled persons.</i>	(800) 96-ABUSE
<b>Aging and Adult Services, Department of Children and Family</b>	(407) 245-0410
<b>Children and Family Economic Self-Sufficiency Center</b>	(407) 330-6909
<b>Community Resource and Elder Hotline</b>	2-1-1
<b>Long-Term Care Ombudsman Council</b> <i>Receives and investigates complaints against nursing homes and other long-term care facilities.</i>	(407) 228-7752
<b>Meals on Wheels, Etc.</b>	(407) 333-8877
<b>State Attorney's Office</b> <i>Receives and investigates criminal complaints, including fraud.</i>	(407) 665-6000

### **LAWYER REFERRAL SERVICES:**

<b>Lawyer Referral Service (Statewide)</b>	(800) 342-8011
<b>Orange County Lawyer Referral Service (Local)</b> <i>Schedules a one-half hour appointment for individuals to see an attorney based upon their particular type of problem. There is a small fee for the service.</i>	(407)422-4537

### **LEGAL SERVICES FOR LOW INCOME RESIDENTS OF SEMINOLE COUNTY:**

<b>Seminole County Bar Association Legal Aid Society, Inc.</b>	(407) 834-1660
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