

Guardianship Process in Florida

Having a guardian appointed takes two separate court ordered determinations. The first (Incapacity proceeding), is where the court enters an order determining whether the person is incapacitated as defined by Florida law. The second (Guardianship proceeding), is where the court actually determines who will serve as guardian.

Note: All Guardians are required to be represented by legal counsel in Florida (See Florida Probate Rule 5.030(a), submit to a criminal background check and credit history report, and complete an 8 hour course in Guardianship duties within 4 months of being appointed.

Step 1: THE INCAPACITY PROCEEDING

Florida's Guardianship Statutes have been written to protect our freedom and independence. Therefore, the courts presume a person has capacity until adjudicated by the courts to not have capacity. (See Florida Probate Rules 5.550 and [Florida Statute 744.3201](#) for what must be contained in the Petition to Determine Capacity).

Petition filed: A Petition to Determine the Persons Capacity is filed in the County where the person resides in the Probate Court – Mental Health Division.

This petition can be filed by a family member, concerned third party, or the Counties Adult protective Services. The petitioner has the burden to prove that the person being alleged incapacitated is incapacitated in the court's eyes. Evidence and witnesses will be required to prove the incapacity.

Court Appoints Attorney: Within five (5) days of filing the petition, the courts will appoint an attorney to represent the person alleged to be incapacitated in the Incapacity proceeding and the Guardianship proceedings. In the alternative, the person's own attorney can be substituted for the court appointed attorney. See [Florida Statute 744.331\(2\)](#).

Examining Committee Appointed: Within 5 days of filing the Petition to Determine Capacity, the courts will appoint a three (3) person panel to review the persons level of capacity and need for appointing a Guardian.

This examining committee typically includes a physician (MD or DO), a psychiatrist and/or a psychologist, and a social worker. The committee members will individually meet with the person whose capacity is being determined, they may also talk with family members, neighbors, and healthcare providers.

A Mental exam, physical exam, and functional assessment are included in this determination process.

The examining committee members will submit to the court a recommendation. Reports of examining committee are due to the courts within 15 days of being appointed. (See [Florida Statute 744.3215](#))

The Incapacity Hearing:

The adjudicatory hearing must be conducted at least 10 days, but no more than 30 days, after the filing of the last filed report of the examining committee members, unless good cause is shown. (See [Florida Statute 744.331\(5\)\(a\)](#)). Depending on the county in which the proceeding is filed, the incapacity hearing will be before the Judge or a General Magistrate. The person is entitled to be at the hearing, the examining committee reports are reviewed by the Judge or General Magistrate. Evidence and testimony is allowed to be presented at the proceeding. The Judge or General Magistrate then decide, based upon the evidence on whether to adjudicate the person incapacitated or not. If the General Magistrate presides over the hearing, his/her recommendation of capacity is sent to the Judge who then enters an order after review, as he/she deems appropriate given the General Magistrate's recommendation and findings.

STEP 2: THE GUARDIANSHIP PROCEEDING

This portion of the proceedings only continue if the person has been adjudicated incapable of handling some or all of his/her own affairs.

Type/Extent of Guardianship: The next step is for the court to determine whether to limit the Guardianship to defined responsibilities or make the Guardianship a full/Plenary Guardianship (*Authority of Guardian over all decisions for the person*).

Who can serve as Guardian: A Florida resident eighteen (18) or older, a Non-Florida resident over age 18 can be appointed provided the proposed Guardian is over eighteen (18) so long as he/she is a lineal descendant of the proposed incapacitated. No person who has been convicted of a felony, abuse, or is incapacitated may serve as a Guardian. See [Florida Statute 744.309](#)

Guardians Ability Reviewed: The courts also review the Guardians ability to serve in a fiduciary capacity. This means the Guardian should appear to be able to be trusted in a position of responsibility over another person's health care and financial management and decisions.

Competing Guardians Petition to be appointed: In some cases, two or more parties may want to be appointed as the Guardian. This is typical in family situations and also when the State files a petition. The immediate family can also file what is termed a "Competing Petition for Guardianship". The proceedings are then considered adversarial. The courts then will listen to evidence from both parties and based upon the testimony and evidence presented will enter an order appointing the Guardian it believes best suited to serve in such a trusted/Fiduciary capacity. See [Florida Statute 744.312](#) for what evidence is considered in determining who is best suited to serve as guardian. The court may also appoint a Professional Guardian if that is in the best interest of the incapacitated person.

If there are competing Guardianship petitions filed, it is recommended an attorney well versed in Incapacity and Guardianship law be retained to assist in the proceedings. This would be a specialist dedicated to Elder law and such proceedings.

Guardian Appointed: If the courts feel the Guardian is trustworthy and qualified to serve as a Guardian, the court will issue Letters of Guardianship and an Order Appointing the Guardian outlining what powers the Guardian will have over the incapacitated person's affairs.

Bond Required : The Court will then determine what amount of Bond will be required of the Guardian of the Property. A Bond is a security measure protecting the incapacitated persons financial matters from misappropriation or misuse by the Guardian. The amount of the Bond is left to the discretion of the court and based upon the amount of the assets involved. Some Courts require placement of funds in restricted bank accounts and requiring court orders before any assets are liquidated, sold, or expended.

Guardian Reporting Requirements: Once a Guardian is appointed by the courts, the Guardian must develop 1) an **Initial Guardianship Plan** as to what type of care will be provided to the incapacitated, and; 2) File an **Initial Guardianship Inventory** within 60 days of Letters of Guardianship being issued. Such inventory must reflect balances of assets on the date the Guardianship was actually ordered opened by the court.

Costs of Guardianship: The cost of establishing a Guardianship can be upwards of \$7,500.00 for legal fees, the costs of the court appointed attorney, the costs of the three (3) examining committee and the court filing fees.

When is a Guardian Appointed: a Guardian is ordered appointed by the courts where a person does not have advanced directives in place prior to becoming incapacitated or if those documents are not working sufficiently to solve the problems. These documents are the Durable Power of Attorney, Healthcare Surrogate Designation, and Living Will. The Durable power of Attorney and healthcare Surrogate allow a person to pre-appoint a loved-one or other trusted person to handle his/her financial and/or healthcare decisions if or when he/she becomes incapable of handling those affairs alone.

Courts Discretion to Appoint Limited Guardian: Courts must order the least restrictive means to ensure a persons affairs are managed properly. (See [Florida Statute 744.331\(6\)\(b\)](#)). Cost to draft the Durable Power of Attorney, Healthcare Surrogate Designation and Living Will is much lower than the cost of a guardianship, that cost ranging from approximately \$600.00 to \$1,000.00. However in order to execute the documents a person must have mental capacity to do so, understand what he/she is signing and be able to make an informed decision at the time of signing as to who he/she wants to appoint.

After appointment the Guardian's actions and responsibilities are closely monitored by the court. Guardians responsibilities are outlined in the Florida Statute. The Guardian must file accountings and reports with the court annually. The Guardian has a duty and responsibility to protect the person he/she is appointed to help.