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THE BASICS OF INCAPACITY AND GUARDIANSHIP

By: William W. Sunter
March 2009



Many people who move to Florida for retirement anticipate many years in beautiful weather and well-earned rest. Most people do not anticipate that they or a loved one may suffer physical or mental incapacity. Loved ones can find the guardianship process confusing and stressful, because they have no idea what to expect. In this newsletter, I hope to provide the framework of what a guardianship is and how a family member would proceed with a guardianship.

A guardianship is normally necessary in the care of an incapacitated individual (the "ward"). In many cases, the guardianship can be avoided if a ward has prepared the proper estate planning documents prior to incapacity. An individual's rights are divided into two categories: the rights of the person and the rights to or concerning property. A guardianship of the person allows you to make all the decisions regarding that person's personal decisions, such as normal healthcare decisions, while a guardianship over the property allows you to make all decisions regarding the assets of the incapacitated. A non-Florida family member or a Florida resident regardless of relationship can be the guardian of the ward.

After a petition has been filed with the court to determine an individual incompetent, the court will appoint a panel of three individuals, called the "examining committee," that will make recommendations to the court as to the mental and physical abilities of the ward. The examining committee is made up of a doctor as well as other healthcare professionals or a social worker that has examined the ward. Additionally, the court will appoint an attorney to represent the ward called an "elisor". The elisor will serve the petition for incapacity on the ward and will represent him or her throughout the entire process. At trial, the court will hear the recommendation of the examining committee as well as other witnesses, and if it finds the ward incompetent, a guardian will be appointed.



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If the court grants a guardianship on the petition, the guardian has the responsibility of providing an accounting to the court of all of the assets of the ward as well as an accounting of the day-to-day life of the ward. The guardian of the ward has the obligation to continue to provide an accounting of the person and the property for the rest of the ward's life, or the length of guardianship, which can be a very detailed process.

If you or a loved one require assistance in establishing, defending, or maintaining a guardianship, or need to take steps to avoid a guardianship, please contact an attorney for further details.

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