

GUARDIANSHIP
Chapter 744, Florida Statutes

Voluntary vs. Involuntary

VOLUNTARY

1. You must have capacity to create this.
2. This is only a guardianship of your property.
3. You must be incapable of care, custody and management of your property by reason of your
 - i. Age, or
 - ii. Physical infirmity
4. A licensed physician must state in an affidavit that you have capacity and understand the nature of the guardianship and delegation of authority to the guardian as your agent.
5. Voluntary guardian can control less than all of your assets.
6. Voluntary guardian must follow Florida law, same as an involuntary guardian, including filing an initial inventory and annual accounting.
7. You can terminate the guardianship by filing a notice with the court and serving the notice on the guardian and other interested persons.

** Note: guardian must file final accounting and receive an order of discharge before all property can be returned to you.

INVOLUNTARY

1. Someone with knowledge files a complaint (or petition) in court suggesting that you lack capacity to manage your person and/or property in some or all areas.
2. Court can only appoint an involuntary guardian for you in two situations:
 - a. Emergency Temporary Guardian
 - b. After court determines that you lack capacity in some area of your life.
3. Emergency Temporary Guardian
 - a. Must be imminent danger that physical or mental health or safety will be seriously impaired or that property is in danger of being wasted, misappropriated or lost.
 - b. Only lasts 90 days, typically.
 - c. No determination of capacity . . . too early.
4. Involuntary Guardian
 - a. Can be a full or limited guardianship
 - b. Can be of person, only, of property, only, or of both.
 - c. Court determines whether you have capacity, after presentation of
 - i. 3 expert reports
 - ii. testimony from you (if you want to or can give it)
 - iii. other evidence
 - iv. other experts you call
 - v. medical documentation

d. Final hearing usually within a month from date the petition filed to determine your capacity.

e. Removal of Rights

i. *What can be removed:*

1. right to marry
2. right to vote
3. right to personally apply for government benefits
4. right to have driver's license
5. right to travel
6. right to seek or retain employment

ii. *What rights guardian can exercise:*

1. right to contract
2. right to sue or defend lawsuits
3. right to apply for government benefits
4. right to manage property
5. right to determine your residence (including city and type of residence)
6. right to consent to medical and mental health treatment
7. right to decide your social environment or other social aspects of your life

5. Guardian duties

a. Report to the court every year on person and property

b. Ensure that your retained rights are protected (right to privacy, right to access to courts, right to counsel, right to communicate with others, right to remain as independent as possible, right to be treated humanely and with respect)

6. Interested persons can request court review of guardian's actions

7. Guardian qualifications

- a. Any resident 18 years or over
- b. Any non-resident who is related by blood, is your adopted child or adoptive parent, or your spouse.
- c. Professional guardian; trust company
- d. GUARDIAN CANNOT BE:
 - i. your own doctor or other health care provider;
 - ii. anyone convicted of a felony;
 - iii. anyone who lacks capacity;
 - iv. anyone determined to have committed abuse, abandonment or neglect; or
 - v. any other person who has a conflict of interest in acting as guardian.

8. Preference given to relative or spouse.

9. Relationship to Health Care Surrogate Designation and Durable Power of Attorney

- a. Any Health Care Surrogate appointment remains in authority unless the court revokes it based on evidence.
- b. Unless the agent is the parent, spouse, child or grandchild of the principal, any Durable Power of Attorney is suspended unless the court authorizes certain powers to remain during an emergency pending the outcome of the court incapacity and guardianship proceedings. The power of attorney may also be suspended if the agent is a parent, spouse, child or grandchild if certain verified allegations are made regarding the validity of the power of attorney or the actions by an agent using the power of attorney.

10. Generally, all costs are paid from guardianship assets, including the clerk's filing fee, the bond of guardian (if required), attorney's fees, guardian fees, etc. If the incapacity or guardianship petitions are filed in bad faith, then the court has the right to require the petitioner to pay these fees and costs.