

## Law Allows “Guardian” to Decide for Incapacitated Persons

In my last column I discussed how to legally plan for a mental or physical incapacity. Through the use of a durable power of attorney and a designation of health care surrogate, you can put decision makers in place to handle your financial and health care decisions if you are incapable of handling those decisions. A living will directs your health care providers on your end of life decisions with regard to life sustaining treatments such as a ventilator or a feeding tube. But what happens if you do not have these documents and you become incapacitated or even if you do have the documents but you do not have insight that you are incapacitated?

Florida has a procedure in Chapter 744 of the Florida Statutes for having someone declared legally incapacitated and then having a decision maker called a “guardian” appointed to make all or some of the incapacitated person's decisions (those that can be delegated to a guardian). The first step is for an “interested person” to file a petition to have the person declared incapacitated. “Interested person” is loosely defined and can include your family, a neighbor, your attorney, a caregiver, and so on. Once that petition is filed, the Circuit Court Judge appoints an attorney to represent the alleged incapacitated person (AIP) as well as an examining committee to interview the AIP, their family and their health care providers. The attorney is selected from a list of attorneys with experience in guardianship and is done on a rotating basis. The examining committee is comprised of a physician and two other health care professionals all of whom have undergone training as examining committee members.

The next step, which is usually done within the next two weeks or so is for the court appointed attorney to visit the AIP, consult with them if possible and read the petitions to the AIP. The examining committee usually conducts its investigation within the same time frame and files a report with the Court within 45 days. That report specifies if the examining committee believes that the AIP is totally incapacitated, partially incapacitated or has capacity.

The next step hearing on the issue of capacity is held shortly after the examining committee report is filed with the Court. If the report found the AIP to have capacity, the petition is dismissed and no further action occurs. If the report found the AIP to be partially or wholly incapacitated, then the Court must find by clear and convincing evidence that the AIP is partially or totally incapacitated at the hearing. Any party involved may present evidence on the issue of capacity including the AIP. If the Court finds the AIP to be partially or totally incapacitated, then a guardian must be appointed for the AIP (now called “ward”) unless a less restrictive alternative exists (durable power of attorney or health care surrogate).

Usually the petitioner in the incapacity proceeding files a petition to be appointed as guardian at the same time. This petition alleges that the petitioner seeks to be appointed as guardian for the ward. Depending on the outcome in the incapacity proceeding, a qualified petitioner may be appointed as the guardian of the person (health care) or

guardian of the property or both (called a plenary guardianship if all delegable rights placed with one guardian). If more than one person files a petition to be appointed as a guardian, then the Court will hold a hearing to determine which petitioner will be appointed as guardian. This is a contested guardianship. The court will consider a number of factors such as who is family and who is capable of performing the work involved. The court will also look to see that a proposed guardian is qualified and does not have any conflicts of interest. If the ward had executed a pre-need guardian declaration naming a proposed guardian for just this moment, the court is bound to recognize a legal presumption in favor of the person named. The only person who can select a guardian for a ward is a circuit court judge.

Once a guardian of the person and/or property is appointed by the court, the guardian has certain duties and responsibilities. The guardian of the property must obtain a surety bond in the amount of the liquid assets as well as filing a verified inventory. The guardian of the property must file an annual accounting each year thereafter. The guardian of the person must file a health care plan for the coming year and on a yearly basis for each year thereafter. Additional actions can be taken by the guardian but may require a court order. Except for actions to wrap up a guardianship, once the ward dies the guardianship ends.

I hope this article has helped to further your understanding of incapacity and guardianship proceedings. For more information visit the Clerk of the Circuit Court's web site at [www.clerk.court.state.fl.us](http://www.clerk.court.state.fl.us).