

Notice - The Probate Division of the Seventeenth Judicial Circuit for Broward County, Florida, gratefully acknowledges Judge William J. Self, II of the Probate Court of Bibb County, Macon, Georgia, for allowing modification of his work to reflect Florida law and local procedures. (Revised September 2005)

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INTRODUCTION FROM THE COURT

You have been appointed by the Probate Court as a **GUARDIAN** of or for another person. The person for whom you are guardian is referred to in the law and in this handbook as the **WARD**. The proceedings in the Court, as well as the property over which you serve as guardian, are referred to as the **GUARDIANSHIP**.

This handbook has been designed as a helpful reference. It will briefly cover the general information about guardianships with which you are expected by the Court to become familiar. It will also provide certain information about the reporting requirements placed upon you by Florida law. It is prepared in what is hoped to be easily understood language, with as few “legal terms” as possible.

This handbook is **NOT** intended to be a complete or exhaustive restatement of the many laws governing guardianships in Florida, nor is it intended to take the place of good legal advice from your attorney. It is also not intended to substitute for the required training course. It is hoped that the information will give you the basic understanding necessary for you to comply with the legal requirements and limitations placed upon you, thereby avoiding problems or difficulties with the Court. However, the Court encourages you to confer with your **ATTORNEY** whenever you have questions or concerns about your obligations, responsibilities, duties, authority or liability, and, whenever possible, you should consult your attorney **BEFORE** taking any action about which you are concerned.

It is important for you to understand the relationship between you and the Court and its staff. The Judge of the Probate Court is an elected public official, a “public servant,” but one with specific responsibilities. The Judge is **NOT** and must not become your legal advisor. The law requires the Judge to remain impartial, and there is a specific rule against the Judge discussing any aspect of any case which **is or may become** contested with any party to the case unless all interested parties are present. Therefore, you should not attempt to contact the Judge to privately discuss your case, and you should not be offended if you are informed that the Judge cannot discuss the matter with you outside a hearing.

The Judge’s staff are employees of the Court who work for and at the direction of the Judge. It is their responsibility to process the volume of

paperwork filed in the office and to attend to the administrative aspects of the operations of this office. They are here to serve you, and they will want to do so to the best of their abilities. However, they also may not serve as your legal advisors, and you should not expect them to perform legal or clerical services for you. It is **NOT** their responsibility or duty to complete any paperwork for you, and it is not their responsibility to make a legal determination and advise you on which proceeding may be the most appropriate or advisable for you or your circumstances.

You should understand that it is the responsibility of the Judge and staff of the Court to enforce all of the requirements of the guardianship laws and the rules of the Court upon **EVERY** guardian. You have taken an oath as guardian to properly administer the guardianship and to comply with those laws and rules, in other words, to fulfill **YOUR** responsibilities. The Judge has also taken an oath to enforce the laws and to fulfill **HIS/HER** responsibilities, and the Judge will seek to do so. The Judge did not **MAKE** the laws but has the duty to **ENFORCE** them. The Judge and staff all well understand that serving as a guardian for another person is not always an easy task. It is often really a **BURDEN** upon the guardian, and it is not the intent or desire of the Court to make that burden any greater.

Finally, please understand that the Court monitors guardianships, in addition to the many other Probate Court proceedings. The Judge and staff do try to maintain a certain familiarity with the Court files, and they often become very familiar with some files. However, everyone is best served when there is certainty about the subject of discussion. It will always be best for you to clearly identify yourself, the ward and the file (by Case Number) in any conversation or correspondence with the Court. It may become necessary for the Judge or staff member to pull the particular file for review to properly and fully discuss the file, and you might be asked to provide some information to “refresh the memory” of the Judge or staff when referring to earlier conversations with or correspondence from the Court. The Court appreciates your willingness to serve in this capacity and looks forward to working with you for the benefit of the ward. Do call upon the staff of the Court if they may be of service to you. In addition, you may wish to visit the Circuit’s website at, www.17th.flcourts.org, for more information.

GENERAL INFORMATION AND INSTRUCTIONS

Guardianship is a **LEGAL RELATIONSHIP** between the guardian and ward, much like that of an agent or attorney-in-fact, which is created by Order of a court with proper jurisdiction. In Florida, the Probate Courts has exclusive jurisdiction over the appointment of guardians for minors and incapacitated adults.

Guardianship may be created for the **PERSON** of the ward, for the **PROPERTY** of the ward or for **BOTH**. Guardianship of the person of a minor child does differ from **CUSTODY** of a minor child. A Probate Court is without authority to grant guardianship of the person of a minor child with a living parent to anyone other than the parent(s) without the consent of or notice to each living parent. The guardian of the person need not be the same person as the guardian of the property, although one person may certainly serve as both. There may be two or more guardians, who would be referred to as co-guardians.

When an Order has been issued appointing a guardian, **LETTERS OF GUARDIANSHIP** are issued by the Court to the person appointed. The Letters of Guardianship serve as evidence that the guardian has authority over the person or property (or both) of the ward. The guardian is first required to take and sign an **OATH** that the guardian will comply with all of the requirements of Florida law applicable to guardians.

In addition, every guardian of the property of another is required to post a surety **BOND** with the Court, in such amount as may be set by the Court, to secure the faithful performance of the guardian's duties and responsibilities. The bond is, in effect, an insurance policy against any misappropriation or mismanagement of the ward's property by the guardian.

A guardian of the person or property of another owes a duty of undivided loyalty to the ward and must act in the **BEST INTEREST** of the ward and the ward's property. Guardians should always avoid even the appearance of a conflict of interest in management of the ward's property and/or in decisions about the ward's person. Additionally, any expenditure that appears to or does benefit another, especially the guardian, more than the ward will be subject to scrutiny by the Court.

GUARDIANS OF THE PERSON

A guardian of the person of another has those rights and powers reasonably necessary to provide adequately for the support, care, education and well-being of the ward. A guardian of the person is much like the parent of a child who has both the authority and the responsibility of making decisions for the child. This may mean that a guardian must make a decision which is considered to be in the ward's best interest even if the ward voices an objection, much like a parent requiring a child to attend school or receive medical treatment. It is also the guardian's duty to assist the ward in improving and developing any talents, skills or abilities the ward may have and to help the ward gain and maintain self-confidence and as much independence as may be appropriate to each circumstance. It is also the guardian's responsibility to preserve and protect, to the extent possible under the circumstances, the dignity of the ward.

A guardian of the person is entitled to custody of the ward and may establish the ward's residence, consistent with the terms of any restrictions or directions from the Court. The guardian is required to make arrangements, from funds available from the ward's estate or other sources, to support the ward in the least restrictive environment, according to the needs and resources of the ward. The guardian may also participate in legal proceedings in the name of the ward and for the ward's benefit. A guardian must be reasonably accessible to and maintain regular contact with the ward, should be friendly, courteous and tactful toward the ward at all times, and must respect and protect the individual rights and dignity of the ward. The Court's order may limit or remove from the ward certain rights or may reserve to the ward certain rights, and the authority of the guardian will be governed by the Court's order.

Guardians of the person are required to file with the Court written reports on the ward's general condition, living circumstances, progress and development, and needs. These reports are called **PLANS** and are covered more fully under the section on Reporting Requirements. It is also the guardian's responsibility to keep the Court fully informed on the whereabouts of the guardian and ward, and ***the guardian must report to the Court (through his/her attorney) any change in the address and telephone number of the guardian and the ward.***

GUARDIANS OF THE PROPERTY

A guardian of the property of another has the duty to exercise ordinary diligence in dealing with the ward's property and may be held liable for any loss resulting from a lack of such diligence. A guardian of the property has the duty to collect and preserve the assets of the ward. Except as limited by law or the Court's order, a guardian of the property has control and authority over all property (real, personal and intangible) of the ward.

All funds and property of the ward must be maintained, preserved, expended and used for the benefit of the ward and those who may be legally dependent upon the ward. The ward's estate should be utilized to feed, clothe, house, educate and care for the ward and his lawful dependents in the standard to which the ward and his dependents are accustomed, to the extent of and as may be limited by the ward's resources. Utilization of the ward's estate for his dependents should be after taking into account all other income of or support for the dependents. Utilization of the ward's estate for his own benefit should take into account all income and support of the ward and the expected duration of the guardianship. While preservation of the ward's estate for his heirs at law should not be of primary concern for the guardian, preservation and utilization of the estate over the expected duration of the guardianship is important and should be given due consideration by the guardian. On the other hand, the guardian should **NOT** waste the assets of the estate or expend it exorbitantly or above the usual standard of the ward simply to avoid preservation for the heirs or those who may be beneficiaries of a will of the ward. It is the duty and responsibility of the guardian of the property to properly manage and invest the ward's estate, and all funds of the estate must be properly invested so as to earn reasonable income for the ward.

Noncash assets of the ward must also be properly managed and protected for the benefit of the ward. If an asset is reasonably capable of earning income, it must be dedicated to that purpose unless there is a compelling reason otherwise. Non-income-producing assets should be preserved and protected or liquidated (after proper authority is granted), as may be appropriate under the circumstances.

A guardian of the property does **NOT** have authority to sell, convey, transfer, mortgage, pledge or give away property of the ward **without an order** from the Court. The Court may, upon the application of the guardian and after appropriate notice is given as required by law, grant the guardian

such authority if the proposed transaction is considered by the Court to be appropriate and proper. Generally, the assets of the ward are to be preserved for the ward's use and benefit, and sales of property of the ward are usually permitted only when necessary to provide for the care and support of the ward (and/or those dependent upon the ward) or when preservation of the asset is burdensome to the guardianship. The Court may, as appropriate, grant authority to the guardian to sell the asset at a public sale (a legal auction) or at a private sale under a specific contract.

All property of the ward titled or registered in the name of the guardian must be titled or registered in the **FIDUCIARY CAPACITY** of the guardian (i.e., as a guardian) and not in the guardian's name alone. Typically, the title, account or deed will be registered as "John Doe, as Guardian of the property of Richard Roe," although any variation which clearly shows the fiduciary nature of the registration for the benefit of the named ward may be accepted and approved by the Court. Bank accounts should be especially clearly designated, so as to avoid unintentional commingling of funds or attachment for debts of the guardian, and the ward's Social Security number should be provided to the bank for the reporting of interest income and other matters to the Internal Revenue Service. Tangible items and personal property of the ward should be maintained and protected by the guardian and not commingled with personalty of the guardian to lose its identity as the ward's property. A guardian has no authority, absent the Court's approval, to use property of the ward in such a manner as to dissipate, depreciate, waste or consume it or otherwise use it for the guardian's own benefit.

A guardian of the property of another has the responsibility of filing, on behalf of the ward, all federal and state income tax returns which might be required from the ward.

EMERGENCY GUARDIANS

In situations or circumstances that pose an immediate danger to the ward or to the ward's assets, an emergency guardian may be appointed by the Court. Emergency guardians may do only those things which may be reasonably necessary to protect the ward or the ward's assets from the described danger, and the powers and duties of the emergency guardian are generally specified in the Court's order. Unless an earlier termination date is set in the Court's order or unless the proceeding is converted to permanent

guardianship proceedings, the emergency guardianship terminates sixty (60) days from the date of the order.

GUARDIANS OF INCAPACITATED ADULTS

In Florida, the Probate Court may grant guardianship of the person and/or property of an adult resident of the state (or one located in this state) who, because of physical or mental illness or disability, detention by a foreign power, or other just cause, lacks sufficient understanding or capacity to make significant responsible decisions concerning his person (or is incapable of communicating those decisions) AND/OR is incapable of managing his estate or property which is likely to be wasted or dissipated unless proper management is provided.

The petition seeking guardianship of the person or property of an alleged incapacitated adult is filed by an individual having knowledge of the pertinent facts. The Court will appoint an attorney for the alleged incapacitated person. An evaluation of the proposed ward is performed by an examining committee, which must file a written report of the evaluation with the Court. Unless the petition is earlier dismissed by the Court, a final hearing is held and a decision made on the petition.

The Probate Division of the Circuit Court has the authority, if the petition is granted, to restrict or revoke certain rights or powers of the incapacitated individual, including:

- ! to contract
- ! to marry
- ! to consent to medical treatment
- ! to establish a residence or place of abode
- ! to bring or defend any action at law or equity
- ! to buy, sell or otherwise dispose of real, personal, intangible, or trust property
- ! to enter into any business or commercial transaction.

Guardianship may be granted for the ***PERSON*** and/or over the ***PROPERTY*** of the incapacitated adult, and the guardian of the person need not be the same person as the guardian of the property. The respective responsibilities of the guardian of the person and the guardian of the property were more fully explained under General Information and Instructions.

GUARDIANS OF PROPERTY OF MINORS

In Florida, the Probate Court may grant guardianship of the property of minors. No third person may be named as guardian of the property of a minor with a living mother or father without the written consent of to the living parent(s).

A guardian of property of a minor has the same obligations with reference to management of the minor's estate as does a guardian of an adult. Guardians generally have authority to expend ***INCOME*** in the guardianship for the benefit of the ward. However, if there is someone (a parent or parents) legally obligated to support the minor, the minor's guardianship may be used for the purpose of support and maintenance only after such obligation of support has been fully satisfied and to the extent of the inability of those so responsible to provide for all the necessities of the minor. In other words, a guardian cannot use even the ***INCOME*** from the child's guardianship until the parental obligation of support has been satisfied.

Guardianship of the property of a minor terminates by law upon the minor attaining the age of majority (presently age **18** in Florida). As soon as reasonably practicable after the child's 18th birthday, the guardian is required to turn over to the ward all property of the minor then remaining in the hands of or under the control of the guardian. The guardian must file a final return and a Petition for Discharge, to which will be attached the receipt from the former minor. NOTE: The guardian should reserve the funds to pay the costs of court in connection with the final filings as well as final attorney fees and costs.

Termination of the minor guardianship at the age of majority is required by law, even if the guardian believes the child is not sufficiently mature to properly manage the property to which he/she is entitled. Parents and other guardians are encouraged to use such guidance and influence as might be necessary or appropriate to aid the former minor in the proper investment and management of such property. If the former minor is incapacitated and considered by the guardian to be incapable of managing his/her estate after attaining the age of majority, the guardian may want to consider filing adult guardianship proceedings immediately after the child's 18th birthday and seek an order from the Court having jurisdiction over those proceedings to hold the minor guardianship funds until the adult case may be heard.

INVESTIGATION REQUIREMENTS

Guardians are required to submit to an initial as well as an annual background investigation. Each application package, per administrative order must be submitted with a Mandatory Checklist for Guardianship Applications. The Mandatory Checklist accounts for the following items:

1. Application for Appointment (Disclosure Statement for Nonprofit Corporate Guardians)
2. \$50 Investigatory Cost payable to Clerk of Court
3. Fingerprint Card
4. \$47 Fingerprint Card Processing Cost payable to FDLE
5. Professional Guardians Only - \$7.50 Clerk's Processing Cost

All of the necessary forms are contained in the "Background Investigation Package," which is available in the Probate Clerk's Office, 252 of the Broward County Courthouse located at 201 SE 6th Street, Ft. Lauderdale, FL. 33301. All of the forms, except the fingerprint card, are also available at www.17th.flcourts.org at the Probate and Guardianship page under Background Investigation link.

PROSPECTIVE GUARDIANS

Prospective guardians must submit the Mandatory Checklist along with an Application for Appointment, and the \$50 investigatory cost directly to the Clerk's Office. Prospective Guardians may submit their fingerprint card and \$47 fingerprint card cost directly to FDLE, although for expediting the appointment process, all guardians are encouraged to submit the cards and costs directly to the Clerk's Office. The costs are the same regardless of where the card is submitted. Guardian's submitting their fingerprint card and \$47 cost directly to the Clerk must send two separate checks, (1) \$50 made payable to the Clerk of Court, and (2) \$47 made payable to FDLE.

APPOINTED GUARDIANS

Appointed guardians must submit the Mandatory Checklist along with an Application for Appointment and the \$50 investigatory cost every year with the filing of their annual accounting. If an extension of time has been granted for

the filing of the annual accounting only, the above referenced documents must be filed at the time the annual plan is due.

GUARDIAN EDUCATION REQUIREMENTS

In accordance with §744.3145(2), Fla. Stat., “[e]ach person appointed by the court to be a guardian, other than a parent who is the guardian of the property of a minor child, must receive a minimum of 8 hours of instruction and training[.]” In accordance with § 744.3145(3), Fla. Stat., “[e]ach person appointed by the court to be the guardian of the property of his or her minor child must receive a minimum of four (4) hours of instruction and training[.]” To satisfy either of the foregoing requirements, each guardian must, within one (1) year of appointment, complete the appropriate guardianship training course. Contact The Broward County Bar Association at (954) 764-8040 for further information.

REPORTING REQUIREMENTS

Guardians are required to file certain periodic reports with the Court having jurisdiction over the proceedings. These reports are intended to provide the Court certain information for the Court to properly supervise the affairs of the ward and to supervise and monitor the guardian’s performance of the lawful duties and responsibilities. Failure to comply with any of the reporting requirements can subject the guardian being ordered to appear before the Court. The Court may assess costs against the guardian, may fine the guardian, may remove the guardian, or may take such other actions as may be appropriate to the circumstances of the case.

PLANS

Guardians of the person are required to file reports with the Court which discloses the status, condition, needs and circumstances of the ward. The reports, called “Annual Plans,” inform the Court where the ward is located, how the ward is doing generally, how the ward’s needs are being met, and whether there has been any change in the condition or status of the ward which might warrant the Court’s intervention or a change in the ***guardianship order***. The Initial Plan is due from the guardian ***within sixty (60) days*** of

the date of appointment of the guardian. Thereafter, Plans are filed **ANNUALLY**.

INVENTORIES

Guardians of the property are required to file with the Court, ***within sixty (60) days*** from the date of appointment, an inventory of ***ALL*** assets in the estate of the ward. The Inventory must sufficiently itemize the assets and set forth a reasonable value thereof to fully disclose of record the property of the ward over which the guardian has control or authority. Inventories are designed to disclose to the Court and anyone interested in the guardianship the full value of the guardianship, which is often not known or only estimated at the time the proceedings are filed, and the guardian is given 60 days to make the complete and more accurate determination. Inventories also allow the Court to determine the sufficiency of the bond posted by the guardian.

ANNUAL ACCOUNTINGS

Guardians of the property are also required ***ANNUALLY*** to file returns with the Court. The annual reports render an ***ACCOUNTING*** to the Court of the actions of the guardian by itemizing all receipts and expenditures in the guardianship. The Court is required by law to audit the returns of guardians, and guardians are required to maintain complete and accurate records of all of their actions as guardians. Guardians are required to maintain the records for a period of three years after the date of discharge. Upon the termination of the guardianship or upon the appointment of a successor guardian, the first guardian will be required to file a final return, which will evidence final disposition of the remaining property as required by law.

TAX RETURNS

Although not filed with the Probate Court, a guardian of the property has the legal responsibility of filing all required tax returns for the ward. The Internal Revenue Code contains provisions for the assessment of certain penalties against the guardian ***PERSONALLY*** for failure to file returns under certain circumstances. In addition, there are usually penalties and/or interest payable for delinquent returns (including ad valorem and intangibles returns),

and such penalties or interest may be assessed by a court against the guardian personally if same result from unexcused or inexcusable neglect of the guardian.

FEES AND EXPENSES

Guardians are allowed to recover and reimburse themselves for certain expenses incurred in connection with their services as guardians. Guardians are also entitled to receive from the guardianship certain compensation for the guardian's service.

Out-of-pocket expenses reasonably incurred by a guardian in the performance of the guardian's duties are reimbursable to the guardian from the guardianship. To be reimbursable, the expenses must be reasonable in amount (i.e., not excessive) and must have been incurred by the guardian as a consequence of performance of some duty the guardian owes to the ward (i.e., related specifically to the guardian's duties and responsibilities to the ward as guardian, as opposed to some other relationship). Reimbursable expenses do **NOT** include expenses incurred by a guardian in carrying out other duties or matters related to natural affection (e.g., a son who is also his mother's guardian is not entitled to reimbursement of expenses incurred in a familial visit or for presents given his mother; i.e., those things for which there was no reimbursement before the guardianship do not become reimbursable under guardianship, unless done specifically in connection with the guardianship petition itself). Reimbursable expenses can include transportation costs, lodging and meals during out-of-town travel (when appropriate), and other costs, losses and expenses actually incurred by the guardian.

The fee payable to nonprofessional guardians in Broward County is currently \$30 per hour. Professional Guardians fees are \$50 per hour for years zero to five as a professional guardian and \$75 per hour for six or more years as a professional guardian. ***Please note, each task submitted is scrutinized and any billing deemed to be excessive in nature will be reduced or even eliminated.*** Guardians who fail or refuse, without just cause, to file returns with the Court within the time set by law forfeit the right to fees and expenses for the period covered by the return. In addition, Guardians who are removed by the Court for waste or gross mismanagement are not entitled to receive fees.

! This handbook has been changed, with the permission of it's author, to reflect Florida law.

* Council of Probate Court Judges of Georgia Administrative Office of the Courts , Suite 550, 244 Washington Street , Atlanta, GA 30334-5900 (1998)

The Probate Court Judges of Broward County, Florida, and their staff are pleased to present this handbook to give insight into what is involved in guardianship administration. The handbook is a basic outline for guardians; however, it is not a "do-it-yourself" guide and cannot be used as a substitute for attorneys, accountants, trust officers and other professional advisors necessary for proper guardianship administration. Nothing contained in this handbook constitutes legal advice. Legal advice should be obtained from your own attorney. This is not an official record of any court. Portions of the material on this Web site may be incorrect or not current. Any person or entity who relies on any information obtained on the Web site does so at his or her own risk.