

The 28th Annual Estate & Probate Seminar – Part 1

Nuts and Bolts of Contested Guardianship

Peter J. Forman, Esq.
Sean M. Lebowitz, Esq.
Gutter Chaves Josepher Rubin Forman Fleisher P.A.
www.floridatax.com

Lawrence J. Miller, Esq.
Brandan J. Pratt, Esq.
Miller & O'Neill
www.mandolaw.com

I. Filing of Petition to Determine Incapacity

a. Considerations whether Petition should be filed

i. Clear and convincing evidentiary standard

1. *In re Dempsey*, No. SC09-1747, 2010 WL 375126, *2 (Fla. Feb. 4, 2010) (“The clear and convincing standard is more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt.”)
2. Clear and convincing evidence is an “intermediate level of proof that entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.” *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995)
3. Several expansive definitions provided in *Slomowitz v. Walker*. 429 So. 2d 797, 799-800 (Fla. 4th DCA 1983):
 - a. “evidence making the truth of the facts asserted highly probable or highly probably true.”
 - b. “[c]lear and convincing evidence will produce in the mind of the fact finder a firm belief or conviction as to the truth of the facts sought to be established.”
 - c. “[c]lear and convincing evidence has also been defined as having a high capability of inducing belief . . . leaving no substantial doubt.”
 - d. clear and convincing evidence will “instantly tilt the scales in the affirmative when weighed against the evidence in

opposition and the fact finder's mind is left with an abiding conviction that the evidence is true."

- e. clear and convincing evidence is "evidence which is positive, precise and explicit, which tends directly to establish the point to which it is adduced and is sufficient to make out a prima facie case."
- f. clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

4. *Smith v. Smith*, 917 So. 2d 400 (Fla. 5th DCA 2005) – An example of the standard in practice:

- a. All four committee members recommended guardianship. However, the two experts hired by the defense disagreed with the conclusions drawn by the examining committee and in fact, opined the AIP was capable of entering into contracts and managing her property.
- b. The Court held: "this conflict in the evidence does not preclude a finding that the evidence of incompetency was clear and convincing. Nor would conflicts in the evidence require the court to find a lack of clear and convincing evidence."

ii. Legislative Intent

1. Enumerated in Florida Statute 744.1012:

- a. it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them . . . the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.

2. Significance of legislative intent

- a. "The key to interpreting a guardianship statute is to ascertain and effectuate legislative intent as expressed in the statute." § 69:14 Guardianship Statutes, 3A Sutherland Statutory Construction § 69:14 (6th ed.)

- iii. Common sense considerations when filing Petition to Determine Capacity
 - 1. Will Dad take me out of Will if I lose?
 - 2. Is AIP in “gray area”?
 - 3. Once you file the Petition to Determine Capacity, you likely cannot change your mind.
 - a. Discussion regarding dismissal of proceeding by Petitioner
- iv. Advanced Directives / Alternatives to Guardianship
 - 1. Am I named in advanced directive?
 - 2. Durable Power of Attorney Suspended per Florida Statute 709.08(03). The statute provides as follows:
 - a. If any person or entity initiates proceedings in any court of competent jurisdiction to determine the principal’s incapacity, the authority granted under the durable power of attorney is suspended until the petition is dismissed or withdrawn. Notice of the petition must be served upon all attorneys in fact named in any power of attorney which is known to the petitioner.
 - 3. Will documents be challenged or utilized?
 - a. Florida Statute 744.331(6)(f)
 - i. If interested person files verified statement alleging that trust, trust amendment or DPOA is invalid, it cannot be used as alternative to appointment of guardian
 - b. Discussion: Can this provision be abused?
- v. Attorneys’ Fees & Costs
 - 1. Basic Consideration – litigation can be expensive
 - 2. Bad Faith filing – Florida Statute 744.331(7)(c)
 - 3. Florida Statute 744.105 – Costs may be awarded
- b. Procedural Framework
 - i. Petition to Determine Incapacity

1. Florida Statute 744.3201

- a. Verified by adult person
- b. Petitioner's name, age, address and relationship to AIP
- c. Name, age, county of residence and address of AIP
- d. Factual information regarding allegation that AIP is incapacitated including names and addresses of those having personal knowledge of such facts
- e. Name and address of AIP's attending physician if known
- f. Which rights Petitioner believes AIP is incapable of
- g. Names, relationships and addresses of next of kin (DOB for minors)
- h. Must file copy of Petition for Appointment of Guardian and ETG (if applicable) with this Petition

2. Florida Statute 744.331

- a. Provides for Notice of the filing and copies of the Petitions to be served and read to AIP, served on attorney for AIP and served upon next of kin indicated in the Petition

c. Florida Probate Rule 5.095

- i. General Magistrate or Circuit Court Judge?

II. Emergency Temporary Guardianship

a. Florida Statute 744.3031

b. Procedure – Rule 5.648

i. Petition Requirements

- 1. Timing: Filed before appointment of Guardian but after Petition to Determine Incapacity filed
- 2. Forman Requirements for Petition:
 - a. Verified

- b. Include Petitioner's residence and address
 - c. Name, age, residence and address of AIP
 - d. Imminent danger of AIP or her property
 - e. Nature of emergency and reason for immediate action
 - f. Extent of ETG – Limited or Plenary?
 - i. Nature and value of property
 - g. Names and addresses of AIP's next of kin
 - h. Name, address and association of proposed guardian
- ii. Notice Requirements
 - 1. Probate Rule 5.648
 - a. Served before hearing on AIP and AIP's lawyer
- c. Finding of imminent danger – what is imminent danger?
 - i. Black's Law Dictionary defines "imminent danger" as "[a]n immediate, real threat to one's safety that justifies the use of force in self-defense." Black's Law Dictionary (8th ed. 2004)
 - d. Case law – compare to requirements of temporary injunction
 - i. *Yachting Promotions, Inc. v. Broward Yachts, Inc.*, 792 So.2d 660, 663 (Fla. 4th DCA 2001): In order for a court to grant a temporary injunction, the moving party must clearly show the following: (1) that it will suffer irreparable harm unless the status quo is maintained; (2) that it has no adequate remedy at law; (3) that it has a substantial likelihood of success on the merits; and (4) that a temporary injunction will serve the public interest.
 - e. 90 day expiration – Florida Statute 744.3031(3)

III. Counsel for Alleged Incapacitated Person

- a. Court Appointed Counsel
 - i. 744.331(2) – the Court shall appoint an attorney for AIP
 - 1. Attorney for AIP is defined by Florida Statute 744.102(1) as follows:
The attorney shall represent the expressed wishes of the alleged

incapacitated person to the extent it is consistent with the rules regulating the Florida Bar.

2. Counsel for AIP must represent the wishes of the AIP and comply with Rule Reg. Fla. Bar 4-1.14(a) (requiring attorney to maintain ordinary attorney-client relationship even though AIP may be disabled).
3. Discussion of Role of Court Appointed Counsel
 - a. Duty to defend (act zealously consistent with Florida Bar Rule 4-3.1) Petition for Incapacity (assuming defense is not frivolous) versus merely insuring the AIP is not being “railroaded” through the system (see 15 Fla. Prac., Elder Law § 28:121 (2010 – 2011)).
 - i. In other words, analogous to duty of public defender versus guardian ad litem
 - b. Attorney must represent best interests of AIP. Who decides what is in AIPs best interest? What if Plenary Guardianship is in the AIPs best interest? Should attorney substitute his best judgment for that of the AIPs?
 - ii. AIP may substitute her own attorney
 - b. Private Counsel
 - i. Right to Private Counsel
 1. Due Process Considerations
 - a. May AIP contract with attorney?
 - b. What if attorney is taking advantage of the AIP?
 2. *Holmes v. Burchette*, 766 So. 2d 387, 388 (Fla. 2d DCA 2000)
 - a. Petition to Determine Incapacity and for Guardian was filed
 - b. The trial court appointed an attorney, Charla Burchett. Holmes then filed a written notice of substitution of counsel in which Holmes stated that she was substituting her desired attorney, John Persse.
 - c. Upon receiving the notice, Burchett, the court-appointed attorney, filed a petition to confirm her appointment as Holmes’s counsel. After a hearing on the petition, the trial

court found that Holmes did not have the capacity to contract and obtain additional counsel until further order of the court. The court disallowed Persse's continued representation of Holmes.

- d. The trial court made these determinations without holding an adjudicatory hearing and without making findings based on clear and convincing evidence that Holmes was incapacitated.
- e. Holmes and Persse then petitioned for writ of certiorari, claiming that the trial court's order constitutes a departure from the essential requirements of law which cannot be remedied on plenary appeal.
- f. The 2nd DCA vacated the trial court's order holding that the trial court erred "by failing to conduct an adjudicatory hearing before finding that Holmes did not have the capacity to contract and retain counsel of her choice." The appellate court noted that Holmes's incapacity was required to be established "by due process of law." The appellate court stated that Holmes was presumed competent to contract and ordered the trial court to permit Holmes to substitute Persse as her counsel of choice pursuant to the written notice of substitution.

3. *Sprinz v. Comprehensive Personal Care Services, Inc.*, 876 So. 2d 571 (Fla. 3d DCA 2004)

- a. Decision without published opinion
- b. Holding: AIP has the right to substitute counsel unless it is found in an adjudicatory hearing by clear and convincing evidence that she lacked the capacity to contract and engage counsel
 - i. Cites to *Holmes*

4. Discussion: Does trial court hold evidentiary hearing on right to substitute counsel before the full incapacity hearing?

- 1. If so, who represents AIP?
- 2. Is this fair?

c. Attorneys' Fees for AIP's Counsel

- i. Florida Statute § 744.108 – an attorney who has “rendered services” to the ward is entitled to reasonable attorneys’ fees for services rendered
 - 1. *In re Guardianship of King*, 862 So. 2d 869 (Fla. 2d DCA 2003) (attorney who lost on appeal for AIP still entitled to attorneys’ fees because still rendering services for AIP)
 - 2. Caution – *In re Guardianship of Bockmuller*, 602 So. 2d 608 (Fla. 2d DCA 1992) (attorney will not be entitled to fees for representing Ward after adjudication of incapacity because Ward lost ability to contract)
 - 3. What services benefit the Ward? Concurrence in *King v. Fergeson, et. al.*, 862 So. 2d 873 (Fla. 2d DCA 2003) provides good commentary on subject. In essence, winning in an adversary proceeding is not enough – must show benefit to the Ward. (“As a general proposition, if an interested party hires an attorney to contest any aspect of an incapacity proceeding, including who should be appointed guardian, he or she does so with no assurance that the fees will be reimbursed if a guardianship is ultimately established. This is especially true in an involuntary guardianship proceeding, in which the ward usually does not consent to the hiring of attorneys for any purpose.”)
 - 4. Reasonableness of fees of appointed counsel subject to Florida Statute § 744.108 while privately retained counsel subject to retainer agreement
 - a. Discussion – is this fair if AIP determined to need plenary guardian?

IV. Selection of the Committee

- a. Appointment of the Committee. Section 744.331(3)(a), Florida Statutes (2007).
 - i. Three members are appointed by the court within 5 days of filing a petition.
 - 1. (Pick one) Psychiatrist or other physician
 - 2. (Pick two) Psychologist, gerontologist, psychiatrist, physician, registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology, other qualified person
 - ii. The AIP’s attending physician cannot serve on the committee, but the committee members must consult with the attending physician if available.

- iii. Committee members cannot have conflicts of interest whether financial or through personal relationships with interested persons.
- iv. The Clerk shall send notice to the committee members within 3 days after appointment.
- v. A committee member cannot serve as guardian for the AIP.
- vi. Committee members must complete a 4 hour training course.
- vii. Committee members must examine the AIP and submit a report within 15 days after appointment.
- viii. The examination must include...
 - 1. A physical examination
 - 2. A mental health examination
 - 3. A functional examination
- ix. The written report must include:
 - 1. A diagnosis, prognosis, and recommended course of treatment
 - 2. An evaluation of the alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver's license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment
 - 3. The results of the comprehensive examination and the committee member's assessment of information provided by the attending or family physician, if any
 - 4. A description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity
 - 5. The names of all persons present during the time the committee member conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer

6. The signature of the committee member and the date and time the member conducted his or her examination
 - x. A copy of each committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 5 days before the hearing on the petition.
- b. The report of the committee is essential and a court cannot determine the merits of a petition to determine incapacity without it. *Borden v. Guardianship of Den-Moore*, 818 So. 2d 604 (Fla. 5th DCA 2002).
- c. A committee member may base the report on firsthand knowledge gathered either after appointment to the committee or a reasonable time before appointment. *Taylor v. Blank*, 431 So. 2d 604 (Fla. 5th DCA 2002).
- d. If the majority of the examining committee says that the AIP is not incapacitated in any respect then the petition should be dismissed. Section 744.331(4), Florida Statute. *Mathes v. Huelsman*, 743 So. 2d 626(Fla. 2d DCA 1999).
- e. The court may not conduct an evidentiary hearing to test the examining committee's report in reaching a determination of mental capacity, rather, a litigant should move to strike the report. If the motion to strike the report is granted, the court could then order a re-examination by the existing committee or a committee member, or appoint a new committee or committee member, and order a re-examination. *Levine v. Levine*, 4 So. 3d 730 (Fla. 5th DCA 2009).
- f. Issues associated with the report that could be grounds for reexamination.
 - i. The failure to consult with primary physician
 - ii. The failure to talk to family members
 - iii. The presence of others during the examination
 - iv. The presence of a "cheat sheet" for the AIP at the examination
 - v. Inadequate time spent during the examination.
 - vi. The AIP's capacity has changed significantly since the examination.

V. Determination of Capacity

- a. Standards of Law
 - i. The standard is whether the AIP is incapable of exercising rights. See Section 744.102(9), Florida Statutes (2006).

- ii. The standard is not that the AIP might make harmful decisions. In *re Maynes-Turner*, 746 So. 2d 564 (Fla. 3d DCA 1999).
- iii. The person must be incapable of exercising rights at all, not just incapable of exercising their rights wisely. *McJunkin v. McJunkin*, 896 So. 2d 962 (Fla. 2d DCA 2005).
- iv. The burden of proof is clear and convincing evidence as indicated above.

b. Evidentiary Issues

- i. The Evidence Code Applies
- ii. The AIP does not have to testify. Section 744.1095, Florida Statutes (1997).
- iii. A court should allow expert testimony on the issue of capacity. A trial court's refusal in a guardianship proceeding to hear expert testimony concerning a paraplegic's ability to take care of herself constituted a denial of the paraplegic's due process rights. *In re Kloster*, 526 So. 2d 196 (Fla. 3d DCA 1988).

c. What does the determination mean?

- i. Certain rights are retained by the ward even after a determination of incapacity. Section 744.3215(1), Florida Statutes (2006).
 - 1. To have an annual review of the guardianship report and plan.
 - 2. To have continuing review of the need for restriction of his or her rights.
 - 3. To be restored to capacity at the earliest possible time.
 - 4. To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation.
 - 5. To have a qualified guardian.
 - 6. To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as he or she expressed or demonstrated his or her preference prior to the determination of his or her incapacity or as he or she currently expresses his or her preference, insofar as such request is reasonable.
 - 7. To be properly educated.

8. To receive prudent financial management for his or her property and to be informed how his or her property is being managed, if he or she has lost the right to manage property.
 9. To receive services and rehabilitation necessary to maximize the quality of life.
 10. To be free from discrimination because of his or her incapacity.
 11. To have access to the courts.
 12. To counsel.
 13. To receive visitors and communicate with others.
 14. To notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice.
 15. To privacy.
- ii. Certain rights may be removed from a person by an order determining incapacity but may not be delegated to a guardian. Section 744.3215(2), Florida Statutes (2006).
1. To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.
 2. To vote.
 3. To personally apply for government benefits.
 4. To have a driver's license.
 5. To travel.
 6. To seek or retain employment.
- iii. Certain rights may be removed from a person by an order determining incapacity and delegated to the guardian. Section 744.3215(1), Florida Statutes (2006).
1. To contract.
 2. To sue and defend lawsuits.
 3. To apply for government benefits.

4. To manage property or to make any gift or disposition of property.
 5. To determine his or her residence.
 6. To consent to medical and mental health treatment.
 7. To make decisions about his or her social environment or other social aspects of his or her life.
- iv. Execution of Estate Planning Documents and Gifts after a determination of incapacity.
1. There is a presumption of incapacity related to wills and gifts made after a person has been determined incapacitated, but the presumption is not conclusive and may be overcome by proof that the person is in fact capable at the time of any transaction. *Fleming v. Fleming*, 352 So. 2d 895 (Fla. 1st DCA 1977); *Skelton v. Davis*, 133 So. 2d 432 (Fla. 3d DCA 1961).
 2. If a will has been executed after a testator has been declared legally incompetent, it must be proved that the testator returned to a state of testamentary capacity by demonstrating that the will was executed during a lucid moment. *American Red Cross* 708 So. 2d 602. See also *Florida Power and Light* 68 So. 2d 406 regarding a lucid interval to testify in court proceedings.

VI. Appointment of a Guardian

- a. The distinction between guardian over person and guardian over property. *Salley v. Compressive Personal Care Services, Inc.*, 742 So. 2d 268 (Fla. 3d DCA 1997).
 - i. "The primary function of a guardian of the person is to become responsible for and ensure that one's ward is humanely treated and cared for in circumstances consistent with their lifestyle and the financial ability of their estate to sustain such a lifestyle. Even where a ward is destitute, it is nonetheless the responsibility of the guardian of the person to see that the ward is placed in a charitable facility and that humane care is provided for the ward within the facility's ability."
 - ii. "A guardian of one's property has the responsibility to marshal and inventory the property and file an annual accounting, investing and reinvesting the ward's estate so as to sustain the ward according to their needs. Nonetheless, the guardian of the property should invest and manage the ward's property so as to enhance it and maximize the potential for distribution to: a) the ward's estate; and b) upon her demise, to her beneficiaries or heirs at law."
- b. The distinction between limited guardianship and plenary guardianship.

Section 744.102 (9)(a, b), Florida Statute (2006).

- i. "Limited guardian" means a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of a limited guardian.
- ii. "Plenary guardian" means a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property
Plenary.

c. Lesser Restrictive Alternative

- i. "The Legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary. The Legislature further finds that it is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs." Section 744.1012, Florida Statute (1997).
- ii. A guardian should not be appointed if there is a lesser restrictive alternative and a court must determine that there is no lesser restrictive alternative prior to appointing a guardian. Section 744.331(6)(b), Florida Statute (2007). Section 744.344, Florida Statute (1997); *In re Guardianship of Fuqua*, 646 So. 2d 795 (Fla. 1st DCA 1994).
- iii. Health Care Surrogate can be a lesser restrictive alternative to guardian over the person. Section 765.101(5), Florida Statute (2006). A person is competent until it is determined otherwise. Section 765.204(1), Florida Statute (2000).
- iv. A DPOA can be a lesser restrictive alternative to the appointment of a guardian over the property. *Smith v. Lynch*, 821 So. 2d 1197 (Fla. 4th DCA 2002). Section 709.08(3)(b), Florida Statute (2007). Also, a POA is suspended upon the filing of a petition to determine incapacity. Section 709.09(3), Florida Statutes (2007).
- v. A trust can be a lesser restrictive alternative to the appointment of a guardian over the property. See. Section 744.331(6)(f), Florida Statute 2007).
- vi. There are difference in qualifications for someone to serve as a DPOA and guardian since the DPOA is not subject to the statutory qualifications that guardians are subject to.

- d. A Petition for Appointment as Guardian must comply with Section 744.334, Florida Statute (1997).
 - i. The petition must be verified by the petitioner.
 - ii. The petition must state the name, age, residence, and post office address of the alleged incapacitated person or minor.
 - iii. The petition must state the nature of her or his incapacity, if any; the extent of guardianship desired, either plenary or limited; the residence and post office address of the petitioner.
 - iv. The petition must state the names and addresses of the next of kin of the incapacitated person or minor.
 - v. The petition must state the name of the proposed guardian; the relationship and previous relationship of the proposed guardian to the ward.
 - vi. The petition must state the nature and value of property subject to the guardianship.
 - vii. The petition must state the reasons why the person should be appointed guardian.
 - viii. If a willing and qualified guardian cannot be located, the petition must so state.
 - ix. The petition for appointment of a professional guardian state that the petitioner is a professional guardian.
- e. Qualifications.
 - i. The statutory requirements are identified in Section 744.309, Florida Statute (2010).
 1. Any resident of this state who is *sui juris* and is 18 years of age or older is qualified to act as guardian of a ward.
 2. A nonresident of the state may serve as guardian of a resident ward if he or she is related by blood or marriage to the ward as broadly defined in the statute.
 3. No person who has been convicted of a felony or who, from any incapacity or illness, is incapable of discharging the duties of a guardian, or who is otherwise unsuitable to perform the duties of a guardian, shall be appointed to act as guardian.

4. No person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in s. 39.01 or s. 984.03(1), (2), and (37), or who has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under s. 435.04 or similar statute of another jurisdiction, shall be appointed to act as a guardian.
 5. A person who provides substantial services to the proposed ward in a professional or business capacity, or a creditor of the proposed ward, may not be appointed guardian and retain that previous professional or business relationship.
 6. A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest.
 7. The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.
- ii. If the potential guardian has a conflict of interest, the person should not be appointed as the guardian. *Tagliabue v. Fraser*, 576 So. 2d 401 (Fla. 5th DCA 1991).
1. Spouses with jointly titled assets can have a conflict. *Guardianship of Medley v. Southeast Bank, N.A.*, 573 So. 2d 892 (Fla. 2d DCA 1991).
 2. A beneficiary of the ward's residual estate and the trustee of the wards trust can have a conflict of interest if serving as guardian. *Tagliabue v. Fraser*, 576 So. 2d 401 (Fla. 5th DCA 1991).
 3. A guardian may have a conflict with the wards desire to keep the contents of her estate planning documents confidential. *Glatthar v. Hoequist*, 600 So. 2d 1205 (Fla. 5th DCA 1992).
 4. A conflict of interest was shown by evidence that the pre-need guardian paid off her mortgage using the wards money, purchased real estate from the ward at less than fair market value, and that the ward's bank account was depleted during that same time period. This conflict of interest prevented the preneed guardian from being appointed. *Davis v. King*, 686 So. 2d 763 (Fla. 5th DCA 1997).

5. A court refused to appoint a pre-need guardian where the pre-need guardian testified that she would move the ward from her home. Other evidence presented showed that the move would be traumatic for the ward. This could either be a conflict of interest or a determination that the pre-need guardian would not act in the ward's best interest. *Butler v. Guardianship of Peacock*, 898 So. 2d 1139 (Fla. 5th DCA 2005).
6. In contrast, it was within the court's discretion to appoint a granddaughter who was (1) nominated as the personal representative of her grandmother's estate, (2) serving as trustee of her grandmother's trust, and (3) was a residual beneficiary of her grandmother's estate even though a conflict of interest existed. *Poteat v. Guardianship of Poteat*, 771 So. 2d 569 (Fla. 4th DCA 2000).
7. There was no conflict of interest between a mother and her minor children when mother may have killed their father and the children inherited a large sum of money through the father's estate. Any conflict of interest that may arise in the future as a result of the mother having additional children could be dealt with at that time with the appointment of a guardian ad litem. *In re Castro*, 344 So. 2d 270 (Fla. 4th DCA 1977).

f. Preference in Appointment

i. Preneed Guardian

1. "A competent adult may name a preneed guardian by making a written declaration that names such guardian to serve in the event of the declarant's incapacity." Section 744.3045(4)(6), Florida Statutes (1990).
2. The court shall appoint the designated preneed guardian, if the person designated is qualified to serve as guardian, unless the court determines that appointing such person is contrary to the best interests of the ward. Section 744.312(4), Florida Statutes (1990).
3. Generalized family concern that a pre-need guardian would be too busy to perform guardianship duties, without substantiating evidence, cannot preclude a pre-need guardian from appointment. *Salley v. Comprehensive Personal Care Services, Inc.*, 742 So. 2d 268 (Fla. 3d DCA 1997).
4. The presumption that a designated pre-need guardian is entitled to serve as guardian is a rebuttable presumption in that the trial court is not bound to appoint the pre-need guardian if the pre-need guardian is found to be unqualified. *Butler v. Guardianship of Peacock*, 898 So. 2d 1139 (Fla. 5th DCA 2005).

5. A financial conflict of interest can render a pre-need guardian unqualified to serve. *Davis v. King*, 686 So. 2d 763 (Fla. 5th DCA 1997).

ii. Relatives

1. The factors that a court should consider when deciding who has preference in appointment as guardian are identified in Section 744.312(2)(3), Florida Statute (1990).
 - a. Related by blood or marriage
 - b. Has education, experience, and ability necessary.
2. A court's discretionary decision to appoint the ward's daughter as guardian instead of the ward's husband is subject to the test of reasonableness, that is, it must be supported by logic and justification for result and founded on substantial, competent evidence. *Wilson v. Robinson*, 917 So. 2d 312 (Fla. 5th DCA 2005).
3. The guardianship statute does not confer upon certain family members and absolute and automatic right to be appointed as guardian. While family members, if otherwise qualified, are generally entitled to preference in appointment as guardian over strangers, that preference can be overcome if they, intentionally or unintentionally, engage in conduct detrimental to a ward's best interests. *In re Guardianship of Stephens*, 965 So. 2d 847 (Fla. 2d DCA 2007).

iii. Others

1. Courts have discretion to appoint a professional guardian even if a family member files a petition for appointment. *Treloar v. Smith*, 791 So. 2d 1195 (Fla. 5th DCA 2001).
2. Court had discretion to appoint a neighbor over relatives. The best interest of the ward trumps other considerations in the appointment of a guardian. *Morris v. Knight*, 1 So. 3d 1236 (Fla. 4th DCA 2009).
3. The ward's personal enmity toward her daughter and her expressed wishes as to who should be appointed as well as the ward's long-standing favorable relationship with a neighbor warranted the court's exercise of discretion to appoint the ward's neighbor rather than the ward's daughter to act as guardian. *In re Guardianship of Quindt*, 396 So. 2d 1217 (Fla. 3d DCA 1981).

VII. Actions of a Guardian

- a. The actions that a guardian may take without court approval are identified in Section 744.444, Florida Statute.
 - i. Retain assets owned by the ward.
 - ii. Receive assets from fiduciaries or other sources.
 - iii. Vote stocks or other securities in person or by general or limited proxy or not vote stocks or other securities.
 - iv. Insure the assets of the estate against damage, loss, and liability and insure himself or herself against liability as to third persons.
 - v. Execute and deliver in his or her name as guardian any instrument necessary or proper to carry out and give effect to this section.
 - vi. Pay taxes and assessments on the ward's property.
 - vii. Pay valid encumbrances against the ward's property in accordance with their terms, but no prepayment may be made without prior court approval.
 - viii. Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial condition of the ward. This subsection does not authorize the guardian of a minor to expend funds for the ward's living expenses if one or both of the ward's parents are alive.
 - ix. Elect to dissent from a will under s. 732.2125(2), seek approval to make an election in accordance with s. 732.401, or assert any other right or choice available to a surviving spouse in the administration of a decedent's estate.
 - x. Deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, money market mutual funds, or other prudent investments. The guardian may redeem or sell such deposits or investments to pay the reasonable living expenses of the ward as provided herein.
 - xi. Pay incidental expenses in the administration of the estate.
 - xii. Sell or exercise stock subscription or conversion rights and consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

- xiii. When reasonably necessary, employ persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties.
 - xiv. Execute and deliver in his or her name as guardian any instrument that is necessary or proper to carry out the orders of the court.
 - xv. Hold a security in the name of a nominee or in other form without disclosure of the interest of the ward, but the guardian is liable for any act of the nominee in connection with the security so held.
 - xvi. Pay or reimburse costs incurred and reasonable fees or compensation to persons, including attorneys, employed by the guardian pursuant to subsection (13) from the assets of the guardianship estate, subject to obtaining court approval of the annual accounting.
 - xvii. Provide confidential information about a ward that is related to an investigation arising under part I of chapter 400 to a local or state ombudsman council member conducting such an investigation. Any such ombudsman shall have a duty to maintain the confidentiality of such information.
- b. A comprehensive list of the actions that a guardian may take with court approval are identified in Section 744.441, Florida Statutes (2007). A few of the interesting and most litigated actions that a guardian may take with court approval are identified below.
- i. A guardian can prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Section 744.441(11), Florida Statutes (2007). This section can encompass attacking *inter vivos* transfers and beneficiary designation forms.
 - ii. A guardian can contest the validity of all or part of a trust, but before authorizing that guardian to bring the action, the court must find that the action appears to be in the ward's best interests during the ward's probable lifetime. Section 744.441(11), Florida Statutes (2007); Section 736.0207, Florida Statutes (2007).
 - iii. A guardian can make gifts of the ward's property to members of the ward's family in estate and income tax planning procedures; however, in order to obtain court approval, the guardian must show that making the gift is what the ward would have wanted to do if she were competent. Section 744.441(11), Florida Statutes (2007); *In re Guardianship of Bohac*, 380 So. 2d 550 (Fla. 2d DCA 1980).

- iv. A guardian, with approval of court, had statutory power to designate the ward's estate or family members as beneficiaries for the ward's IRA. *Goeke v. Goke*, 613 So. 2d 1345 (Fla. 2d DCA 1993) *citing* Section 744.441(17-19, 21), Florida Statutes.
- v. A Guardian cannot create a new trust with the ward's assets under which the remainder would go to different beneficiaries than those designated in the ward's will, created before she was adjudicated incapacitated; doing so was tantamount to amending the ward's will, which is permitted under the statute only in limited circumstances that did not apply. The change in beneficiary had nothing to do with tax or estate planning so as to be authorized by the statute. *Guardianship of Sherry v. Klevansky*, 668 So. 2d 659 (4th DCA 1996).
- vi. A guardian cannot revoke a will executed by a ward prior to the ward's incapacity. *Witley v. Craig*, 710 So. 2d 1375 (Fla. 5th DCA 1998).
- vii. The practice of "Medicaid Estate Planning," whereby "individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings," is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one sues the Internal Revenue Code to his or her advantage in preparing taxes. *Thompson v. Dept. of Children and Families*, 835 So. 2d 357 (Fla. 5th DCA 2003). *Maxson v. Dept. of Children and Families*, 869 So. 2d 653 (Fla. 4th DCA 2004).
- viii. In considering a guardian's petition to implement Medicaid planning on behalf of the ward, the trial court was required to hold an evidentiary hearing to determine whether after transfer of the ward's assets there would be a period of ineligibility before the ward could qualify for Medicaid benefits, and, if so, whether there would be sufficient funds to pay for the ward's nursing care during the period of ineligibility. *Rainey v. Guardianship of Mackey*, 773 So. 2d 118 (Fla. 4th DCA 2000). See *Thomas v. Fla. Dept. of Children and Families*, 707 So. 2d 954 (Fla. 4th DCA 1998) regarding the use of personal service contracts.

c. Procedure for Obtaining Court Approval

- i. The guardian should file a Petition for Authorization to Act in the guardianship proceedings as set forth in Section 744.447(1), Florida Statutes.
- ii. The standard for decision making by guardians on behalf of their wards is the "substitute judgment" standard, which requires surrogate decision makers to act as they feel the wards themselves would act. Under this standard the court substitutes its judgment for that of a disabled person and does what the disabled person could have done for himself or herself if able. *Rainey v. Guardianship of Mackey*, 773 So. 2d 118 (Fla. 4th DCA 2000).

VIII. Removal of Guardian

- a. A guardian is held to the same standards as a POA. Section 744.361, Florida Statutes.
- b. A guardian has the duty to act in the best interests of the ward. See *Bergman v. Serns*, 443 So. 2d 130 (Fla. 3d DCA 1984).
- c. A guardian may be removed for 20 statutory reasons that are identified in Section 744.474, Florida Statute and include the following:
 - i. Failure to discharge duties.
 - ii. Failure to comply with any order of court.
 - iii. Development of a conflict of interest.
 - iv. Improper management of the ward's assets.
- d. A guardian can be removed for improper investing a ward's assets. The law looks upon guardians as trustees in the full sense of the word and a guardian is held to the strictest accountability of the funds of the ward. *McBride v. McBride*, 195 So. 602 (Fla. 1940).
- e. A guardian can be removed for failing to provide reports; however, a court cannot order a guardian to submit a resignation. *Anderson v. Dawson*, 711 So. 2d 1318 (Fla. 2d DCA 1998).
- f. A guardian can be removed for failing to complete returns and failing to seek court approval prior to taking actions. *Valentine v. Kelner*, 452 So. 2d 965 (Fla. 3d DCA 1984).
- g. A guardian can be removed for failing to provide adequate care to the ward. *Guardianship of Dailey v. Darnell*, 402 So. 2d 537 (Fla. 5th DCA 1981).