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GUARDIANSHIPS IN FLORIDA AND THE ALTERNATIVE
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ADVANCE DIRECTIVES AS AN ALTERNATIVE TO GUARDIANSHIP-

Guardianships are sometimes needed but the law in Florida clearly states that if there are less restrictive alternatives to a guardianship and those alternatives will adequately protect the disabled individuals interests, a guardianship should not be established. While trusts are one way to avoid guardianship of the disabled persons property they are beyond the scope of this presentation. A series of documents collectively called advance directives are permitted under Florida law and can be used as an alternative to guardianship for a disabled individual who is 18 or over. The four advance directives in Florida are a Durable Power of Attorney, a Designation of Health Care Surrogate, a Living Will and a Declaration of Pre-Need Guardian.

Statutory references- Florida Statutes §709.08; §765.01 et seq; and §744.3045.

Advantages-

Less expensive than a guardianship;

The disabled individual gets to pick who will handle their affairs as opposed to a judge picking; and

No court interference in the disabled persons life.

Disadvantages-

The disabled individual must be competent (age 18 and have the requisite legal capacity) to consider, understand and sign the documents and that is not always the case;

The disabled individual can revoke or change the documents at any time if they are competent to do so; and

No court supervision of the disabled persons affairs.

GUARDIANSHIPS-

Guardianship is a court supervised legal proceeding that permits someone appointed by the court to handle the financial and/or personal affairs of a person who, for whatever reason, is unable to handle their own affairs. Under the current law, all guardians in Florida must be represented by an attorney. The person who is the subject of the guardianship must also be represented by his or her own independent attorney, at least during the establishment of the guardianship. The guardianship can be limited in scope or plenary (all powerful) and must always be tailored to remove only those rights that the person is incapable of handling. There can be a guardian of the person, a guardian of the property, or both.

Involuntary Guardianships-

Statutory reference- Florida Statutes §744.101 et seq.

Summary of proceeding- What most people think of when talking about guardianships. A legal proceeding where an examining committee is appointed and the court holds a formal hearing to determine if the person has the capacity to handle their own financial and/or personal affairs. If the court finds they lack capacity, some or all of that persons rights are taken away from them and given to a guardian to exercise for the benefit of that person under the supervision of the court.

Advantages-

Certainty and usually finality

Close court supervision and protection of the persons assets

Disadvantages-

Cumbersome and slow to start up

Expensive, both emotionally and financially

Guardian Advocates for the Developmentally Disabled-

Statutory reference- Florida Statutes §393.12

Summary of proceeding- If the person meets the definition of developmental disability to the courts satisfaction because the person lacks the capacity to do some but not all of the things necessary to care for themselves, the court appoints a guardian advocate to handle the persons financial and/or personal affairs, without a finding of incapacity. Once started it operates just like a traditional involuntary guardianship.

Advantages-

Less expensive and quicker to start than a traditional involuntary guardianship

No finding of incapacity, so kinder and gentler to start

Can be limited to guardian advocate of the person only

Provides for smooth and uninterrupted transition of the disabled persons care upon the death or incapacity of the primary care givers, through the appointment of a stand-by guardian advocate

Disadvantages-

Must meet the definition of developmental disability to utilize

Still a court supervised legal proceeding with some limited annual reporting duties

Necessary when a developmentally disabled person reaches the age of 18 for a parent to maintain legal decision making authority for their disabled child

Voluntary Guardianships-

Statutory reference- Florida Statutes §744.341

Summary of proceeding- No finding of incapacity. In fact, a doctor must write a letter saying the person has been examined and is mentally competent to manage their own financial affairs but, because of age or physical infirmity, does not want to. Then an individual of their choice is given legal authority to manage some or all of their financial affairs, subject to court supervision. The voluntary guardianship can be terminated by the individual at any time, as long as they are competent.

Advantages-

Easy and relatively inexpensive to start

Annual accountings must be provided to the court

Court supervision is in place if problems arise

Disadvantages-

May be terminated by person at any time they are competent to do so

More expensive than a durable financial power of attorney

Summary-

We suggest that a guardian advocate proceeding be started for a developmentally disabled family member just before they turn 18 years of age, if appropriate. This allows the parents or care giver to retain the legal authority to make decisions for that person after they turn 18. In the absence of a guardian advocate appointment the law recognizes the disabled person as an adult with full ability to make all of their own medical, social, residential and financial decisions, regardless of the limitations arising from their disability.

Once appointed the guardian advocate should consider who they would like to have be the next guardian advocate if they become incapacitated or when they pass away. The guardian advocate should have that person appointed by the court as stand-by guardian advocate.