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FAMILY WEALTH & LEGACY COUNSELLORS

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### **The Ins and Outs of Traditional Guardianship and Guardian Advocacy**

What is guardianship exactly? Guardianship is a legal relationship between a competent adult (the "Guardian") and a person who, because of incapacity, cannot take care of his or her own affairs (the "Ward"). In Florida there are several types of guardianship: guardianship of the person, guardianship of the property, plenary guardianship (which is both guardian of the person and property), guardianship of a minor, emergency temporary guardianship and guardian advocacy. This article will specifically discuss traditional guardianship, which is typically the guardianship of an individual who once had capacity, but no longer does, and guardian advocacy, which is guardianship for an individual with a developmental disability, diagnosed by age eighteen.

Traditional guardianship usually requires a relatively involved court process. Two petitions, a petition to determine incapacity along with a petition for the appointment of guardian, must be filed with the court. Further, Florida law requires the appointment of an examining committee. The examining committee is comprised of three medical professionals who evaluate the Alleged Incapacitated Person ("AIP") in order to determine if the guardianship is appropriate. The guardianship is only established if the medical professionals determine the AIP does not have the capacity to handle his or her own medical and/or financial decision making. These steps are often cumbersome but they are in place as protection for the AIP in order to ensure legal rights are not removed from a competent individual.

In contrast, guardian advocacy is a summary form of guardianship specifically designed for an adult (someone over eighteen years old) who has a developmental disability and lacks the capacity to do some of the tasks necessary to care for his or her person, property, or estate. Florida law specifically defines a developmental disability as: mental retardation, cerebral palsy, Prader-Willi syndrome, autism, or spina bifida. In order for someone to qualify for the guardian advocacy process they must be eighteen years old and have been diagnosed with a developmental disability, as defined by Florida law, prior to his or her eighteenth birthday.

Guardian advocacy is the least restrictive and least costly form of guardianship, specifically established for persons with developmental disabilities. A guardian advocacy does not require a determination of incapacity or the appointment of an examining committee, both of which are required for the establishment of a traditional guardianship. In a guardian advocacy, a letter from the doctor of the individual with a developmental disability outlining the individual's condition and prognosis takes the place of an incapacity determination by an examining panel.

Usually, a parent (or parents) files a petition for appointment as Guardian Advocate after their child with a developmental disability reaches the age of eighteen. At

eighteen, in the eyes of the law, the individual with the developmental disability is capable of making all of his or her own personal and legal decisions - this includes the right to vote, marry, and enter into binding contracts. Practically speaking, in many cases, an adult with a developmental disability is not equipped or prepared to make these decisions upon turning eighteen, or even later in his or her life. In fact, having these legal rights can often lead to administrative hurdles, legal issues, and even exploitation of the individual. In order for the parent of the person with a developmental disability to retain the personal and legal authority to make decisions for their child beyond their eighteenth birthday, the parent will need to be appointed by the court as the Guardian Advocate. A Guardian Advocate has the same powers, duties, and responsibilities required of a Guardian under a traditional guardianship. Any resident of the State of Florida who is eighteen years old and of sound mind is qualified to act as Guardian Advocate. In addition, a non-resident may serve if he or she is related to the individual with a developmental disability by blood, adoption, or law.

Like traditional guardianship, the guardian advocacy process does require the filing of court documents and attendance and presentation of evidence at a court hearing. The Guardian Advocate is also required to file all of the usual paperwork under a traditional guardianship, including Annual Plans and Accountings, and is also required to attend a guardian education course.

The Law Offices of Hoyt & Bryan assists families in the protection of their loved ones by focusing their practice in the areas of Estate Planning, Probate and Trust Administration, Elder Law including Medicaid and VA Planning and Special Needs Planning, Pet Planning, Business Succession Planning and Real Estate. The founders, Peggy Hoyt and Randy Bryan, are both dual board certified by the Florida Bar in Wills, Trusts and Estates as well as Elder Law. Hoyt & Bryan is the only law firm in Florida with the distinction of two attorneys with these certifications. We offer many complimentary educational workshops each week in our Learning Center at The Law Offices of Hoyt & Bryan and monthly workshops in the Auditorium of One Senior Place in Altamonte Springs. For more information please contact our office at 407-977-8080 or visit our website HoytBryan.com.