

DON'T FORGET THE PRENEED GUARDIANSHIP DOCUMENT

By: James W. Mallonee

June 2016

If you are concerned about what might happen to you or your child in the event you are no longer able to care for yourself or your child, then you should consider having a Pre-need Guardianship document prepared in the event a catastrophic condition affects your person and property. Moreover, with the recent press concerning some of the abuses of the guardianship process, it only makes sense to include it in your estate planning repertoire.

A Pre-need Guardianship gives you the ability to name a third party to become the guardian over your affairs or that of your child in the event of your incapacity or death. It is important to remember that the individual you select is someone that is aware of your needs and willing to step into your shoes in the event you are no longer capable of managing your person or property. The selection of a competent guardian becomes even more important when a parent dies leaving minor children.

By naming a party as your guardian (in the event you need one) you essentially are removing the incentive of outsiders to impose a guardianship over you because they either don't like your behavior patterns or want to control your assets.

When preparing a Pre-need Guardianship for an adult, it must identify you and the guardian you desire to act in such role. The Pre-need Guardianship document must be signed by two witnesses at the time of your execution of the same document. The author strongly suggests that you include the addresses of both you and the named guardian along with a named successor in the event your initial guardian selection is unable, unqualified or unwilling to serve. Although not required, it is also suggested that you have your signature acknowledged by a notary public upon your execution of the Pre-need Guardianship document while in the presence of the two witnesses.

When preparing a Pre-need Guardianship for a minor, it must identify you as the parent (natural or adoptive) and the nominated guardian that you desire to take control of your children. The declaration must state the minor's full name as it is found on their birth certificate along with his or her date of birth and social security number. If there are multiple children, the same information must be supplied for each child named in the Pre-need Guardianship document. The procedure for signing is the same as that for a Pre-need Guardianship involving an adult. The declaration must be signed by two witnesses at the same time that you are signing. The author also suggests that you have your signature acknowledged by a notary public while executing in the presence of the two witnesses.

Although not required, once you have completed the Pre-need Guardianship declaration for an adult you can file it with the clerk of court. However, in the case of a Pre-need Guardianship for a minor, the declaration must be filed with the clerk of court. The clerk may or may not (depending on the clerk's policy) record the document as part of the public record.

Assuming that the Pre-need Guardianship is filed with the clerk of court, upon the filing of a petition for incapacity in a guardianship proceeding, the clerk of court must produce the declaration. Once the declaration is delivered to the Court, the named Pre-need Guardian will be entitled to serve as guardian; however, the Court is not bound to appoint the nominated individual but will likely do so unless the nominated person is unqualified to serve in such role.

To serve as a guardian, the following general qualifications must be met,

1. The nominee must be at least 18 years of age and a resident of the State of Florida;
2. No judge may serve unless related by blood or marriage or has a close relationship with the Ward or family and serves without compensation;
3. If a non-resident of Florida, the nominated person must be related by lineal consanguinity to the incapacitated person;
4. The nominee must not be a convicted felon or incapacitated individual;
5. The nominee must not have been judicially determined to have committed abuse, abandonment, or neglect against a child;
6. The nominee must not possess a professional or business conflict of interest with the incapacitated person; or,
7. Any health care provider may not serve as a guardian unless the Court specifically finds that there is no conflict of interest with the incapacitated person.

If the above qualifications are met, the Court will then take into consideration the following when appointing the guardian:

1. Is the nominee related by blood or marriage;
2. Does the nominee possess special education, professional or business experience relevant to the incapacitated person's needs;
3. Does the nominee have the capacity to manage financial resources;
4. Does the nominee have the capacity to meet the unique needs of the individual; and,
5. The Court will take into consideration the wishes expressed by the incapacitated person (e.g. Pre-need Guardian declaration).

An interesting side note is that once the Court rules that the person who executed the Pre-need Guardianship is incapacitated, the nominated Pre-need Guardian can assume his or her duties immediately. However, to execute on such duties, the Pre-Need Guardian will ordinarily need Letters of Guardianship. Letters of Guardianship can only be provided by the Court. Letters of Guardianship are usually signed following a hearing concerning a person's incapacity. In the event the Court does not immediately rule on the appointment of a Guardian following an incapacity hearing, the named Pre-need Guardian must petition the Court for confirmation of his or her appointment within 20 days after the adjudication of incapacitation. Assuming the named Pre-need Guardian is qualified to serve, the Court must confirm the appointment.

If you are a parent or an elderly person who is concerned about identifying a person to manage your affairs in the event you cannot, consider having a Pre-need Guardian document

prepared along with a Durable Power of Attorney and Health Care Surrogate. The attorney of your choice can prepare such document and make certain that it is properly filed. By having a Pre-need Guardian declaration prepared you will ultimately save intra-family conflicts about who will act for you and remove incentives to seek a guardianship proceeding.