Florida Statutes are rife with titles of persons who can apply to care for the person and property of other individuals while they are alive. There are also titles for persons who propose to care for the property of a decedent. But deciding whom to appoint from the multiple choices—a guardian, an administrator, a custodian or a curator—can be confusing to new attorneys.

Durable Power of Attorney

A durable power of attorney is a written power of attorney by which a principal designates another as the principal’s attorney in fact pursuant to F.S. §709.08. The agent is the person appointed and acts on behalf of the principal in whatever designated scope the parties have agreed to: a limited capacity for some singular purpose or time; or a general purpose. If a petition for determination of incapacity is filed on the principal, the authority of the agent is suspended until the petition is dismissed or withdrawn, or the court determines that authority granted by the durable power of attorney is to remain exercisable by the attorney-in-fact.1 The principal can be very susceptible to fraud, duress, undue influence, deceit, and whims of fancy and may revoke or change his power of attorney based on the influence or attentions of another person or for no reason at all. An individual may execute a limited power of attorney if he is unable to perform some legal duty and requires someone to act on his behalf in a particular legal matter.

A power of attorney may be exercisable immediately or may be conditioned upon the principal’s lack of capacity to manage property and specific requirements must be met. The person to whom this power is granted owes the principal a fiduciary duty and may not use the principal’s money and resources for his own benefit.2 Sometimes the power and control that come with the power of attorney create too much temptation in that an attorney-in-fact is usually not under court oversight unless an objection or claim is filed.

In Bonezeman v. John Hancock Mutual Life Ins. Co., 710 So.2d 671 (Fla. 5th DCA 1998) the agent of a durable family power of attorney attempted to designate herself to be the beneficiary of the life insurance policy of the principal but the court found that she lacked the authority to change the beneficiary after a petition for determination of incapacity had been filed. If the principal is concerned about the agent having access to his finances, it may be prudent to consider appointing a corporate agent such as a financial institution. If the principal later undergoes an adjudication of incapacity certain authority granted by the durable power of attorney may remain exercisable by the attorney in fact after adjudication of incapacity to create a less restrictive guardianship for the ward and be in the ward’s best interests.3

Guardianship

The Florida Legislature has recognized that adjudicating a person totally incapacitated and in need of a guardian deprives that person of all her civil and legal rights and may not be completely necessary.4 Since the ward is the intended beneficiary of the guardianship, the attorney who represents the guardian of a person who is adjudicated incapacitated and who is compensated from the ward’s estate for such services owes a duty of care to the ward as well as to the guardian pursuant to the Attorney General’s Advisory Legal Opinion 96-94 on this matter filed on November 20, 1996 which stated that,

“It is clear that the ward is the intended beneficiary of the (guardianship) proceedings…. Accordingly I am of the opinion that as the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward’s estate for such services owes a duty of care to the ward as well as to the guardian.”

This does not mean that the attorney who represents the guardian can also fairly represent the interests of the ward, only that because the ward is the intended third-party beneficiary of the proceedings, the attorney owes a fiduciary duty to the ward while representing the guardian despite a lack of privity. It is not only important but it is essential that the potential ward, also referred to as the alleged incapacitated person or AIP, be represented by their own attorney to protect their interests.5 A guardianship should be consistent with the welfare and safety of the AIP but must be the least restrictive appropriate alternative means of caring for another person.6 The court prefers limited guardianships where the AIP is allowed to retain control of his or her person or property and therefore will consider an executed a durable power of attorney or health care surrogate or trust, or other pre-arrangements such as in Smith v. Lynch, 821 So. 2d 1197 (Fla. 4th DCA 2002) where although the subject of the guardianship proceedings was declared to be incompetent, no guardianship was required because the Ward had previously executed a durable power of attorney to manage and deal with the property.

Guardian Advocate

A guardian advocate is a person who has been appointed by the court to represent a person with develop-
mental disabilities." In Florida, F.S. 393.063(9) enumerates five developmental disabilities: (1) Prader-Willi syndrome, (2) autism, (3) cerebral palsy, (4) retardation, and (5) spina bifida; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. A circuit court may appoint a guardian advocate without an adjudication of incapacity for a person with developmental disabilities, if the person lacks the decision-making ability to do so, but not all, of the decision-making tasks necessary to care for his or her person or property, or if the person has voluntarily petitioned for the appointment of a guardian advocate. Occasionally there is some confusion by practitioners and guardian advocates who have incorrectly assumed that reports are not required under Chapter 393, Florida Statutes. However it is stated in F.S. §393.12(10) that a guardian advocate has the same powers, duties and responsibilities are found under F.S. §744.351 and therefore must comply with the rules and file the required reports with the court annually.

**Administrator ad litem and Guardian ad litem**

When it is necessary that the estate of a decedent or a living ward be represented in any probate or guardianship proceeding and there is no personal representative of the estate or guardian of the ward, or the personal representative or guardian may be interested adversely to the estate of the ward, or is enforcing the personal representative's or guardian's own debt or claim against the estate or ward, or the necessity arises otherwise, the court may appoint an administrator ad litem or guardian ad litem, as the case may be, without bond or notice of that particular proceeding. A guardian ad litem is appointed to represent the ward, if the current guardian is unable to do so or if no guardian has been appointed, for example, to represent the minor's interest before approving the settlement of the minor's portion in any case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the gross settlement of the claim exceeds that amount allowed by statute (currently $15,000.00). In an estate proceeding, a personal representative may be unable to represent the estate in a particular matter and the court can therefore appoint an administrator ad litem to represent the estate.

In *Re Estate of Verdier v. Verdier*, 281 So. 2d 543 (Fla. 2d DCA 1973) the appellate court required the appointment of an administrator ad litem to represent the interests of the estate when it found that the interests of the brother of the decedent who had been appointed the executor were distinctly and obviously adverse to the interests of the estate and the will of the decedent and the assets had been either transferred to other family members or were the subject of extraordinary claims by the other family members. These appointments are for a particular legal case.

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matter only and the guardian ad litem or administrator ad litem is then discharged when his duty is complete.¹¹

**Custodian**

Black's Law Dictionary, Second Pocket Edition, 2001 defines a custodian as a person or institution that has charge or custody of something such as property, papers or other valuables. A custodian is designated by the court to care for custodial property of a minor when a minor receives property via a will, trust, benefit plan, intestacy, a liquidated debt, an irrevocable gift, or a security. A custodianship remains subject to the act despite a change in residence of the custodian or the minor or relocation of the property, unlike property placed in a guardianship that normally transfers with the ward to the new state of residence.¹² A custodian collects, holds, manages, invests and reinvests the property for the minor until the minor reaches the age of majority, keeping that property separate from his own and other property in a manner sufficient to identify it as custodial property of the minor.¹³

**Curator**

If a person dies while owning property and no personal representative has been appointed and there are assets that must be taken care of during this time, the court has the authority to appoint a curator to take control of the property to prevent waste, destruction or loss through removal.¹⁴ Typically a curator is appointed if there is a delay in the appointment of a personal representative which could be due to a will contest, failure of anyone to petition the court, removal of a personal representative, failure to nominate and appoint a successor, or the inability of someone nominated as a personal representative to act in that capacity. In the Estate of Katz, 301 So. 2d 68 (Fla. 3d DCA 1987) the court upheld the appointment of a curator to marshal the decedent’s assets in a will contest involving multiple beneficiaries, one of whom was making distributions of assets in certain joint account property. The court in re the Estate of Miller, Smith v. Miller, 568 So.2d 487 (Fla. 1st DCA 1990) considered the appointment of a curator an extraordinary measure when a personal representative has been nominated by the will. The Florida Supreme Court In The Estate of Sale, 227 So. 2d 199 cited F.S. 732.21 (3) stating that, “a Curator is ordinarily appointed only as a temporary expedient to take possession of and preserve the assets of the estate until a personal representative is appointed; or conceivably, after an estate is ready for distribution and an heir is missing, to take possession of and preserve the share of the estate to which such heir is entitled, pending a search for him and his heirs.” A curatorship ends when the personal representative is appointed and letters of administration are issued. The curator has the same fiduciary duty as a personal representative.

**Conservator**

The Florida Statutes at section 747.01 define a conservator as someone who is appointed by the court to hold the assets of an absentee until the absentee either returns or is declared deceased and includes: members of the Armed Forces, Red Cross or Merchant Marines who are serving during a period of time when a state of hostilities exists between the United States and any other power and for 1 year thereafter if that person has been reported as missing in action, interned in a neutral country, beleaguered, besieged or captured by the enemy; or for a resident of this state or any person owning property in this state disappears under circumstances indicating that he or she may have died either naturally, accidentally, or at the hand of another, or may have disappeared as the result of mental derangement, amnesia, or other mental cause. If the individual had not executed a power of attorney or other document that would appoint someone to care for his property in his absence, the court must consider whether the necessity exists of appointing a conservator or leaving the property in limbo. The court, in its discretion, may appoint a guardian ad litem to represent the alleged absentee at the hearing similar to appointing a guardian ad litem to represent a ward in a guardianship action.¹⁵ Until the court has made a determination based on the evidence that a person is deceased, the estate of that person is treated similarly to a guardianship.

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Executor de son tort - not a legally appointed representative

An executor de son tort is one who, without authority, performs acts properly belonging to the administrator and is thus liable for assets with which he has meddled. He is a person who has not been appointed by the court to represent the estate but acts as though he has that right and holds himself out to be the executor of the estate causing others to rely on his actions. Although a person may be motivated by a desire to intercede on behalf of "family property" or other good intentions, if he has no authority or permission to do so, he is liable to the personal representative if the property is taken or converted for his own use or if the estate is otherwise deprived of its right to the property. This person will not be entitled to any set-off against his own claim against the decedent. The executor de son tort is subject to all the liabilities of ordinary executors or administrators or personal representatives but has none of the privileges and cannot obtain a personal advantage from meddlesome. However, the executor de son tort may later be appointed as the personal representative in the estate and after receipt of his letters of administration, may ratify his previous actions for the benefit of the estate and beneficiaries.

There are multiple persons who can be appointed by the court to intercede on behalf of a principal to care for property, the estate, a potential ward or AIP, a ward, a child, a decedent, or a person who is missing. Once the practitioner has a grasp of what particular duties are required by the appointed person then determining what to recommend in each situation is simplified.

Endnotes:
1. F.S. 709.08(3)(b)-(c)
2. F.S. 736.0901, 518.10
3. F.S. 709.08(3)
4. F.S. 744.1012
5. F.S. 744.331
6. Smith v. Lynch, 821 So. 2d 1197 (Fla. 4th DCA 2002)
7. F.S. 393.063
8. F.S. 393.12(2)(a)
9. FPR 5.120
10. F.S. 744.3025
11. F.S. 744.102(10)
12. F.S. 710.103(1), 744.524, FPR 5.670
13. F.S. 710.114(1)
14. F.S. 733.501
15. F.S. 747.031 (3)
16. F.S. 733.309
17. Albritton v. Albritton, 731 So. 2d 154 (Fla. 1st DCA 1999)
18. Black v. Hart, 301 So. 2d 787, (Fla. 3d DCA 1974)
19. Johnston v. Thomas, 93 Fla. 67, 111 So. 541 (1927)
20. Albritton, supra.