

GUARDIANSHIP 101

Types of Guardianship
Incapacity & Procedure
Post Appointment





What is a Guardianship?

CHAPTER 744 - GUARDIANSHIP

Guardianship is the process designed to protect and exercise the legal rights of individuals whose functional limitations prevent them from being able to make their own decisions.

Plenary vs. Limited Guardianship

Guardianship in the Media?



What Rights We Talking 'Bout?

744.3215(2) Rights of persons determined incapacitated.

- to marry
- to vote
- to contract
- to travel
- to sue and defend lawsuits
- to have a driver's license
- to determine his or her residency
- to seek or retain employment
- to consent to medical and mental health treatment
- to manage property or to make any gift or disposition of property
- to personally apply for government benefits
- to make decisions about his or her social environment or other social aspects of his or her life.

FREE BRITNEY: Why a guardianship?

- No planning documents whatsoever
- Documents that cannot be implemented because you are running amuck
- Documents that have been implemented but your interested people don't like what you have done
- Documents that have been implemented but your interested people believe bad acts are being committed





1. Types of Guardianships

- 744.3021 - Guardians of minors
- 744.3031 - Emergency temporary guardianship
- 744.304 - Standby guardianship
- 744.3085 - Guardian advocates
- 744.3045 - Preneed guardian
- 744.3046 - Preneed guardian for minor
- 744.341 Voluntary guardianship

744.3021 - Guardians of Minors



Upon petition of a parent, brother, sister, next of kin, or other person interested in the welfare of a minor, a guardian for a minor may be appointed by the court without [being declared incapacitated]. A guardian appointed for a minor, whether of the person or property, has the authority of a plenary guardian.

A minor is not required to attend the hearing on the petition for appointment of a guardian, unless otherwise directed by the court.

In its discretion, the court may appoint an attorney to represent the interests of a minor at the hearing on the petition for appointment of a guardian.



Emergency temporary guardianship

- A court, prior to appointment of a guardian but after a petition for determination of incapacity has been filed...may appoint an emergency temporary guardian for the person or property, or both, of an alleged incapacitated person. The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.



Emergency temporary guardianship

- The authority of an emergency temporary guardian expires 90 days after the date of appointment or when a guardian is appointed, whichever occurs first. The authority of the emergency temporary guardian may be extended for an additional 90 days upon a showing that the emergency conditions still exist.

Standby Guardian

- Upon a petition by the natural guardians or a [minor] guardian, the court may appoint a standby guardian of the person or property of a minor. The court may also appoint an alternate to the guardian to act if the standby guardian does not serve or ceases to serve after appointment.
- Upon petition of a currently serving guardian, a standby guardian of the person or property of an incapacitated person may be appointed by the court.
- The standby guardian or alternate shall be empowered to assume the duties of guardianship immediately on the death, removal, or resignation of the guardian of a minor, or on the death or adjudication of incapacity of the last surviving natural guardian of a minor, or upon the death, removal, or resignation of the guardian for an adult.

Guardian Advocates

- A court may appoint a guardian advocate, without an adjudication of incapacity, for a person with developmental disabilities if the person lacks the capacity to do *some, but not all*, of the tasks necessary to care for his or her person, property, or estate, or if the person has voluntarily petitioned for the appointment of a guardian advocate.

744.3045 - Preneed guardian
744.3046 - Preneed guardian for minor

744.3045 PRENEED GUARDIAN

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.

The preneed guardian shall assume the duties of guardian immediately upon an adjudication of incapacity.

744.3046 PRENEED GUARDIAN FOR MINOR

Both parents, natural or adoptive, if living, or the surviving parent, may nominate a preneed guardian of the person or property, or both, of the parent's minor child by making a written declaration that names such guardian to serve if the minor's last surviving parent becomes incapacitated or dies.

The preneed guardian shall assume the duties of guardian immediately upon an adjudication of incapacity of the last surviving parent or the death of the last surviving parent.

744.341 - Voluntary guardianship

Without adjudication of incapacity, the court shall appoint a guardian of the property of a resident or nonresident person who, though mentally competent, is incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and who has voluntarily petitioned for the appointment. The petition shall be accompanied by a certificate of a licensed physician specifying that he or she has examined the petitioner, and that the petitioner is competent to understand the nature of the guardianship and his or her delegation of authority.

Unless the voluntary guardianship is limited...any guardian appointed under this section has the same duties and responsibilities as are provided by law for plenary guardians of the property, generally.




744.341 - Voluntary guardianship

A guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward not more than 90 days before the annual report is filed with the court. The certificate must certify that the ward is competent to understand the nature of the guardianship and of the ward's authority to delegate powers to the voluntary guardian.

A voluntary guardianship may be terminated by the ward by filing a notice with the court that the voluntary guardianship is terminated. A copy of the notice must be served on all interested persons.





2.Procedures to Determine Incapacity

1. Petition to Determine Incapacity
2. Court-Appointed Counsel for Ward
3. Examining Committee and Reports
4. Hearing on Petition to Determine Incapacity
5. Fees

Petition to Determine Incapacity

1. Petitioner's name, location, relationship to the Ward (or Alleged Incapacitated Person, or "AIP")

2. Information as to incapacity.

3. Names or people with knowledge as to the facts through personal observation

4. The rights you are requested be removed from the Ward

5. Plenary vs. Limited

6. Existence of alternatives to guardianships? I.E. Trust agreements, POAs, Health Care Surrogates. NOTE: if these documents exist, you must explain why they are not sufficient to meet the Ward's needs.

7. Names of next of kin.

8. Ward's treating physician



I Filed! Now What?

Once your Petition for Incapacity and for Appointment of Guardian are filed, the Court will do a few things:

1. If you filed for an ETG, the Court can either grant your Petition without a hearing and issue letters and an Order Appointing an ETG, or require a hearing to show why the emergency exists.
2. Regardless if an ETG is filed, the Court will also set your Petition for a hearing, appoint an attorney for the alleged incapacitated person, and assign three members making up the Examining Committee

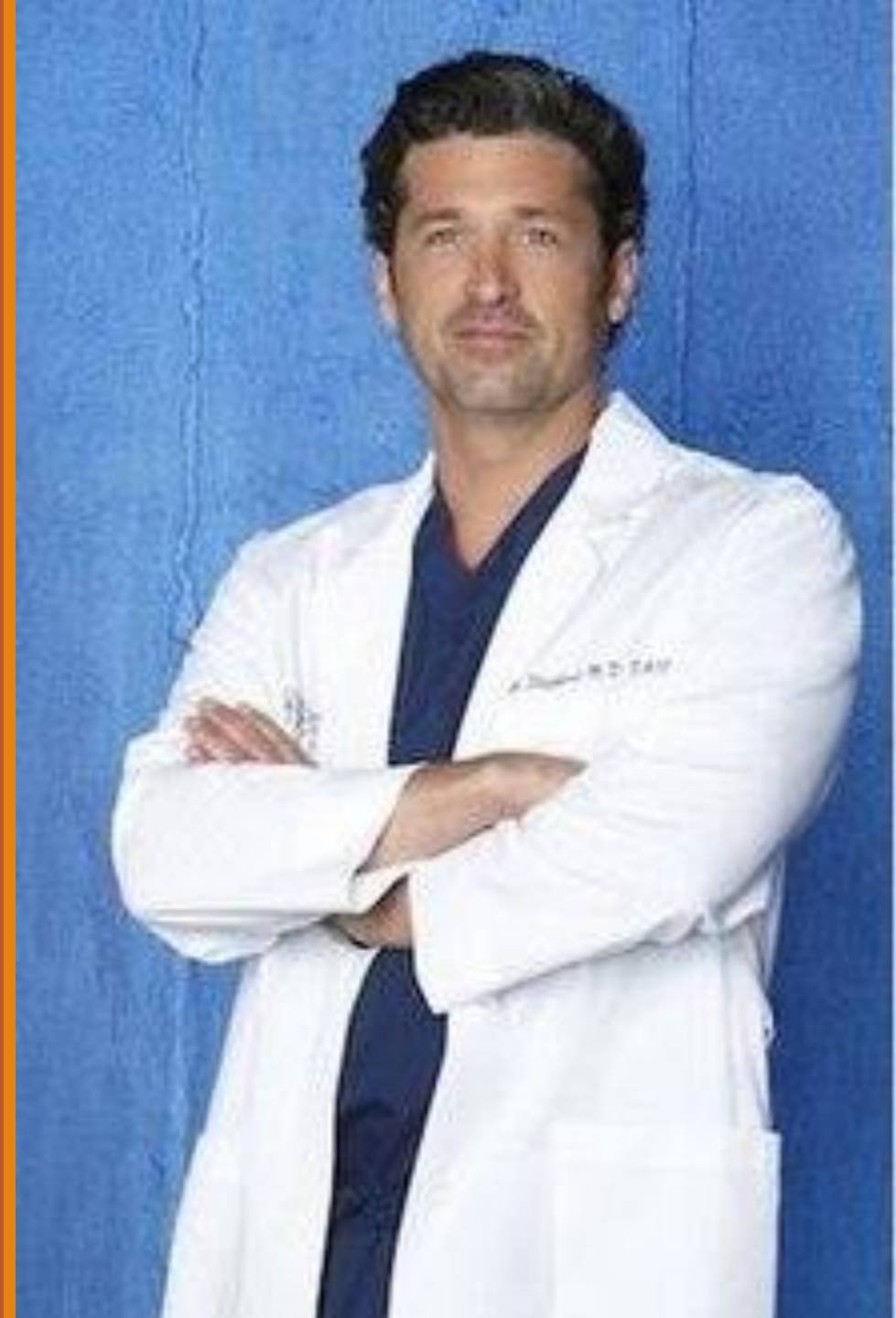
Attorney for the Alleged Incapacitated Person

744.331(2)(a)-(d)

- (a) When a court appoints an attorney for an alleged incapacitated person, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney...Appointments of private attorneys must be made on a rotating basis.
- (b) The court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court.
- (c) Any attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.
- (d) An attorney seeking to be appointed by a court for incapacity and guardianship proceedings must have completed a minimum of 8 hours of education in guardianship. A court may waive the initial training requirement for an attorney who has served as a court-appointed attorney in incapacity proceedings or as an attorney of record for guardians for not less than 3 years. This training requirement does not apply to a court-appointed attorney employed by an office of criminal conflict and civil regional counsel.

744.331(3) - Examining Committee

Within 5 days after a petition for determination of incapacity has been filed, the court shall appoint an examining committee consisting of three members. One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, a gerontologist, a psychiatrist, a physician, an advanced practice registered nurse, a registered nurse, a licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or any other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.

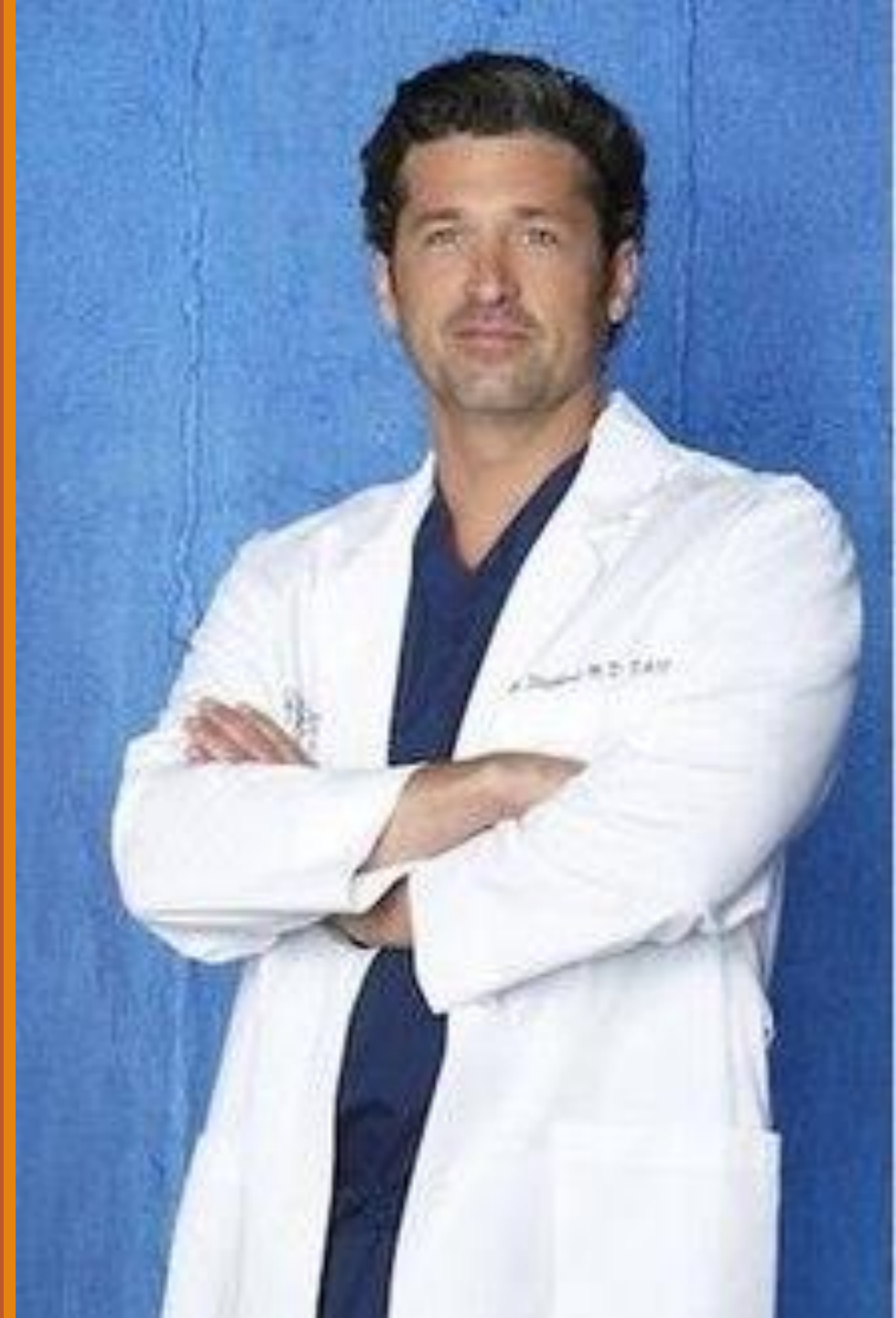


744.331(3) - Examining Committee

Each member of the examining committee shall examine the person. Each examining committee member must determine the alleged incapacitated person's ability to exercise those rights specified in s. 744.3215. In addition to the examination, each examining committee member must have access to, and may consider, previous examinations of the person, including, but not limited to, habilitation plans, school records, and psychological and psychosocial reports voluntarily offered for use by the alleged incapacitated person. Each member of the examining committee must file his or her report with the clerk of the court within 15 days after appointment.

The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be filed by each examining committee member as part of his or her written report. The comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision. The comprehensive examination must include, if indicated:

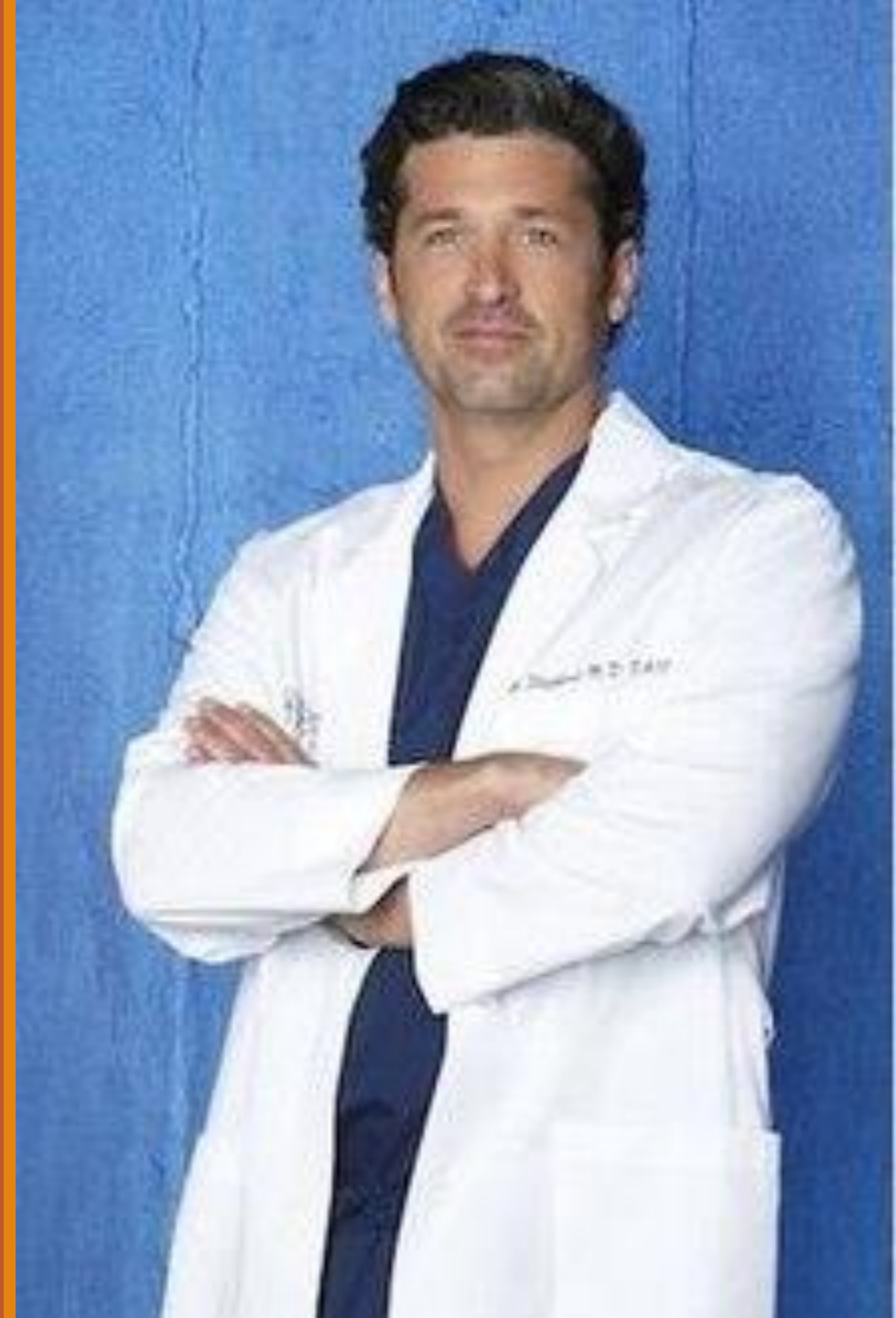
1. A physical examination;
2. A mental health examination; and
3. A functional assessment.



744.331(3) - Examining Committee

DISMISSAL OF PETITION.—If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition.

Once the reports are submitted, the Court can use the reports as evidence of incapacity.





Stop!
Hearing
Time!

You've Made It to the Hearing!

**Contested
proceeding**

**Non-
contested
proceeding**

Contested Guardianship Proceeding



Attorney for the AIP is “obligated” to advocate for the wishes of the AIP.



Even if the Court-appointed attorney believes that the AIP needs a guardian, if the AIP says they want to contest the guardianship, that attorney must advocate for their wishes.

Contested Guardianship Proceeding

Along with the exam committee reports, you can present additional evidence or testimony as needed in your case to show incapacity. Once all the evidence and testimony is heard, the Judge will rule on where there needs to be:

A Plenary Guardianship

A Limited Guardianship

No Guardianship At All



Non-Contested Proceeding

If it is clear that the AIP needs a guardian, and they either do not object or do not have the ability to object, upon agreement of the parties and the admission of the exam committee reports, the Court can enter and Order appointing guardian.

Fees

- The spirit of guardianship is that the assets from the AIP's estate will fund the guardianship.
- If someone has access to the AIP's account as POA or signatory, attorney's fees and examining committee fees, upon Court approval, can be paid using the Ward's assets.
 - What if there is no money???
- Guardianship can be expensive. If the AIP has no funds, then retainers for attorneys must come either from the Petitioner or another entity, such as friends or family.
- If an AIP is declared to be indigent, the Office of Regional Counsel will be appointed at no cost to the AIP and the exam committee members get paid a flat fee by the State.



Overview: Incapacity and Procedure

- Voluntary or Involuntary
- Involuntary filed by a “petitioner” (interested person) alleging incapacity
- Attorney appointed to represent AIP
- Examining committee appointed
- Court Hearing on Incapacity
- Court Hearing on LESS restrictive options (documents)
- Nothing less restrictive Court entertains appointment of guardian
- Annual reports
- **Bond**/Accounting – COSTS COSTS COSTS



4. Post Appointment Or How I Learned How To Be A Guardian

So you got yourself a Guardianship? What happens now?



Post Appointment Procedure

- Once a guardianship is established, the guardian has some responsibility to the Court.
- Guardianship of person = initial plan
 - (due within 60 days of appointment)
- Guardianship of property = initial inventory
 - (due within 60 days of appointment)
- Annual Plan and/or Annual Accounting

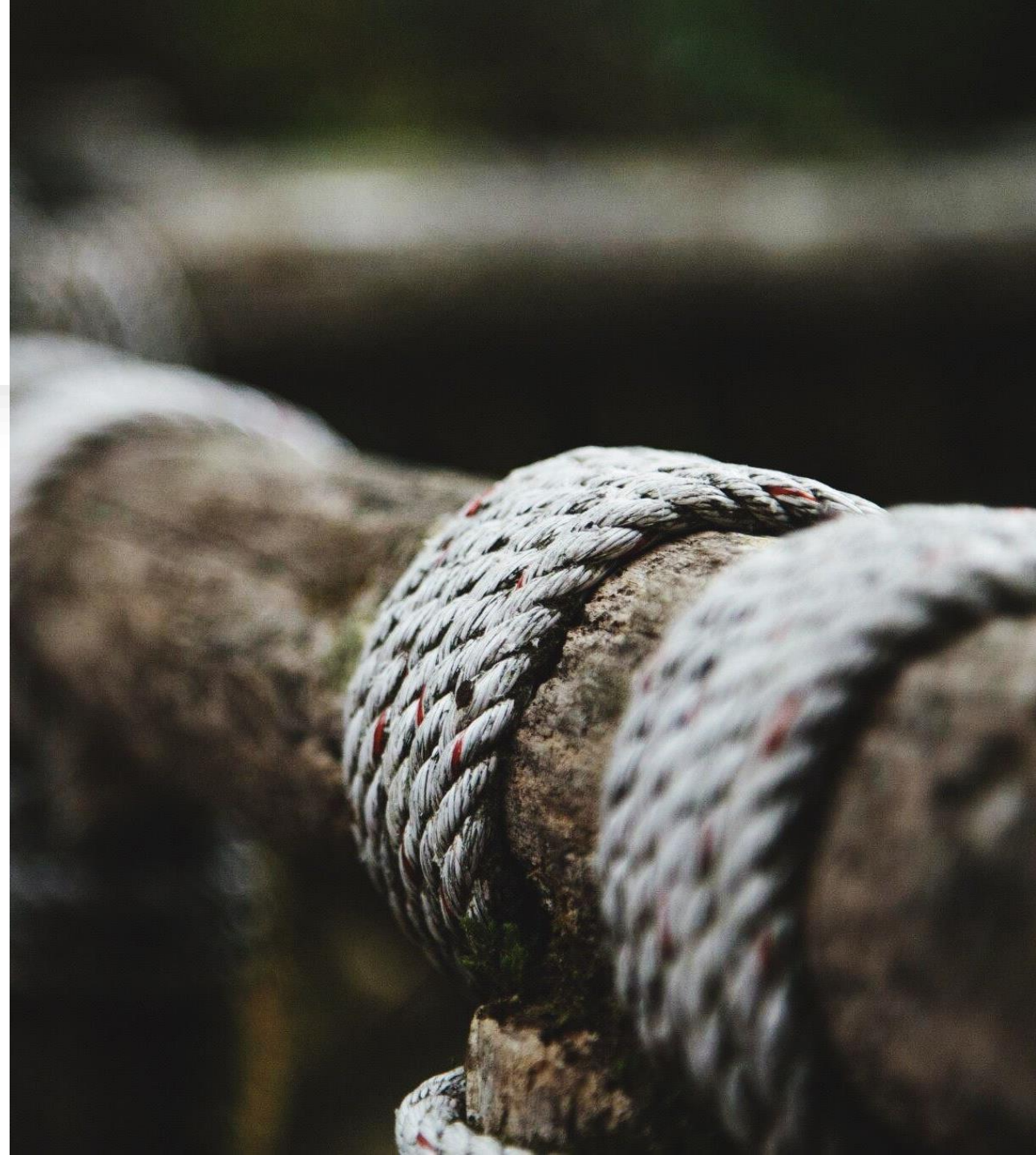
Annual Plan & Annual Accounting

- Every year, and depending on the type of guardianship you have, you must submit an annual plan and/or an annual accounting.
- An annual plan is straightforward. It's an update to the court about the Ward's wellbeing and how the guardian is ensuring that their needs are being met.
 - Must be accompanied by a physician's note stating that the Ward remains incapacitated and if capacity can be regained.
- An annual accounting is a yearly audit as to the Ward's finances.
- All income, assets, liabilities, expenditures, etc. must be divulged to the Court. Statements must be attached to support your calculations.



To Do or Not to Do: Wait, What CAN I Do??

- **744.441 - Powers of guardian upon court approval**
 - Move Ward, open accounts, sign contracts, sell property, etc.
- **744.444 - Power of guardian without court approval**
 - Retain assets, pay property taxes, living expenses, etc.
- When in doubt, talk to your Attorney and get Court permission!





Thank You For Sharing Your Time!
If we can be of assistance, please
feel free to contact us at:

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