FREE GUIDE

# The Power of Attorney That Keeps Your Family Out of Guardianship Court

How a Florida durable power of attorney, a health care surrogate, and a preneed guardian designation protect the people you love, and what a family faces when nobody signed one.

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*Florida law described here was verified against the Florida Statutes on August 18, 2026. Guardianship fees are set case by case by the judge and change over time, so this guide explains who pays rather than quoting a price. Ask us for a current estimate for your county.*

KEY TAKEAWAYS

- Only the person themselves can sign, and only while they still have capacity. Once capacity is gone, the family's only path is guardianship court.
- Florida requires the principal's signature, two witnesses, and a notary. Since October 1, 2011, a new Florida power of attorney takes effect the day it is signed, and one written to spring into effect later is ineffective.
- Seven powers exist only if the principal signed or initialed next to each one. They are the exact tools an elder law attorney needs in a crisis.
- A power of attorney does not cover health care. That takes a health care surrogate designation and a living will under chapter 765.
- Without these, a family files a petition to determine incapacity, a three member examining committee examines your parent, a judge decides which rights come off, and a guardian reports to the court every year.

If you are the one your family calls when something goes wrong, you have already pictured the phone call. A parent falls. A diagnosis lands. Someone has to reach the bank, the insurer, and the hospital, and everyone looks at you.

The document that lets you step in has to be signed **before** your parent loses the ability to understand it. Signed in time, it is private and inexpensive. Signed too late, it cannot be signed at all, and the problem becomes a public court case called guardianship.

## Capacity is the door, and it only locks one way

Capacity means your parent understands what the document does and what they are handing over. Florida law defines incapacity as the inability to take the actions needed to manage property and benefits. Someone can need help with bills and still have capacity. Someone else can be warm, social, well dressed, and no longer have it. It is a judgment about one decision on one day, not a diagnosis.

**There is no signing it later**

A spouse cannot sign for a spouse, a child cannot sign for a parent, and no notary can fix it. Once capacity is gone, the only path left is a guardianship proceeding under chapter 744. It is the most common regret we hear in a first consultation.

## What Florida requires to sign one

- **Two witnesses and a notary.** Fla. Stat. 709.2105 requires the principal's signature, two subscribing witnesses, and acknowledgment before a notary public. Miss one and a bank can refuse the document.
- **The word durable.** It has to say the authority survives the principal's later incapacity, which is exactly when the family needs it.
- **Effective the day it is signed.** Since October 1, 2011, a Florida power of attorney cannot spring into effect on a later date or event (Fla. Stat. 709.2108). An older instrument conditioned on incapacity can still be activated, but only by the affidavit of the physician primarily responsible for the principal's care.
- **Specific grants only.** Under Fla. Stat. 709.2201, language like "all powers I could exercise myself" grants nothing. That is why online forms fail here.

### The seven powers that exist only if your parent initials next to them

Fla. Stat. 709.2202 requires the principal to sign or initial next to each of these individually. Without the initials, the agent does not have the power:

- Create a trust that operates during their lifetime
- Amend, revoke, or terminate a trust, if the trust allows it
- Make a gift, capped by statute at the annual federal gift tax exclusion per person
- Create or change rights of survivorship
- Create or change a beneficiary designation

- Waive the right to be beneficiary of a joint and survivor annuity or a retirement plan survivor benefit
- Disclaim property or a power of appointment

**Look for the initials before anything else**

These seven are the tools an elder law attorney reaches for in a Medicaid or crisis planning emergency. Without them your family has an agent who can pay the electric bill but cannot protect the house.

## What a power of attorney cannot do

- Make health care decisions. That takes the separate documents below.
- Make or revoke a will, vote, swear to facts only the principal knows, or act as trustee (Fla. Stat. 709.2201).
- Work after death. Authority ends when the principal dies, and only the personal representative of the estate can act after that.
- Stand untouched in a court fight. Under Fla. Stat. 709.2109, a petition to determine incapacity suspends the agent's authority, unless the agent is a parent, spouse, child, or grandchild.

## Health care takes its own two documents

- **Health care surrogate designation** (Fla. Stat. 765.202). Two adult witnesses. The surrogate cannot be one, and at least one cannot be a spouse or blood relative. No notary needed. Your parent can also authorize the surrogate to decide immediately, without the finding of incapacity Fla. Stat. 765.204 otherwise requires from two physicians. Name an alternate.
- **Living will** (Fla. Stat. 765.302). Written instructions about life prolonging procedures, two witnesses, at least one not a spouse or blood relative. It spares the family from guessing.
- **Authority to receive health information**, usually built into the surrogate designation. Without a surrogate, the decision falls to a statutory list of proxies, and a family that disagrees ends up in court.

## Name the guardian before a judge has to guess

Even a prepared family can land in guardianship court after a stroke. A preneed guardian designation lets a competent adult tell the judge in advance who to appoint (Fla. Stat. 744.3045). It answers the question that tears families apart in a courtroom.

- A written declaration naming the declarant and the guardian they want, signed before two witnesses present at the same time
- Deposited with the clerk of the court, who produces it once a petition is filed
- It creates a rebuttable presumption in favor of the person named. Name an alternate too.

## What happens when nobody signed anything

Guardianship is a circuit court case. For Orange and Osceola families that is the Ninth Judicial Circuit. Chapter 744 sets the sequence:

1. Any adult files a verified petition naming the rights your parent can no longer exercise (Fla. Stat. 744.3201). It becomes a public court file.
2. The court appoints an attorney for your parent, who cannot later be the guardian or the guardian's lawyer.
3. Within five days the court appoints a three member examining committee, one a psychiatrist or other physician. Each examines your parent and reports within fifteen days (Fla. Stat. 744.331).
4. A hearing follows, at least ten and no more than thirty days after the last report. Incapacity must be proven by clear and convincing evidence.
5. If the judge finds incapacity, rights come off. Some pass to the guardian: contracting, managing property, consenting to medical treatment. Others are removed but never delegated: voting, driving, working (Fla. Stat. 744.3215).
6. Then it repeats yearly: an annual guardianship plan from the guardian of the person, and an annual accounting from the guardian of the property by April 1 (Fla. Stat. 744.367).

**Who pays for all of this**

Your parent does. The examining committee and the court appointed attorney receive fees set by the judge and paid from the ward's property, or by the state if the ward is indigent (Fla. Stat. 744.331). The guardian's fees and the guardian's attorney's fees come from the same estate (Fla. Stat. 744.108), as does every year of reporting.

## When guardianship is still the right answer

Florida judges have to look for something gentler first. Under Fla. Stat. 744.331 a guardian may not be appointed if an alternative will sufficiently address the person's problems. Sometimes there is none, and that is not a failure:

- Capacity is gone and no power of attorney or surrogate exists
- Someone is financially exploiting your parent, and court supervision is the protection
- The agent is the problem: misusing funds, refusing to account, shutting out siblings
- An adult who never had capacity to sign, such as an adult child with a developmental disability, where Florida offers the narrower guardian advocate path
- A verified statement questioning whether the power of attorney is valid, which under Fla. Stat. 744.331 stops it counting as an alternative
- A true emergency, where a judge may appoint an emergency temporary guardian for ninety days (Fla. Stat. 744.3031)

## The conversation with your parents

You do not have to say the word dementia to start. Try: I want to know what you would want, and I want to help without asking a judge. Print this page and work down the list.

- [ ] Pick a week that is not a holiday and not a crisis. Say why: their wishes, not yours
- [ ] Ask who they would want handling money, and who making medical decisions. It need not be the same person
- [ ] Ask whether documents already exist and where the originals are. Anything signed before October 1, 2011, or in another state, should be reviewed
- [ ] Confirm it says durable, then look for the initials next to the seven special powers
- [ ] Ask about a health care surrogate designation and a living will, and whether the surrogate can act immediately
- [ ] Ask who they would want as guardian if a court ever had to appoint one, and name an alternate
- [ ] List the accounts, insurance, mortgage, safe deposit box, deed, and named beneficiaries
- [ ] Agree on one point of contact, then book a consultation and go together. Your parent is the one who signs

## Questions families ask

### Can I sign a power of attorney for my mother if she already has dementia?

No. Only she can sign, and only while she can understand it. A diagnosis by itself does not end capacity, so ask an attorney to evaluate quickly rather than assuming the window closed.

### My father's power of attorney takes effect only when two doctors declare him incapacitated. Does that work?

It depends on the date. Signed before October 1, 2011, it can still be activated by the affidavit of the physician primarily responsible for his care (Fla. Stat. 709.2108). Signed on or after, the springing condition is ineffective, and the document should be replaced while he can still sign.

### Is the durable power of attorney I signed in another state valid in Florida?

Often it is recognized, but recognized and useful are different things. Out of state forms rarely carry the Florida initialing that unlocks the seven special powers, so bring it in for review.

### Will a power of attorney keep my family out of probate?

No. The agent's authority ends the moment the principal dies. Avoiding probate is a separate conversation about beneficiary designations, how the deed is titled, and whether a revocable living trust fits.

## Bring us what you have, even the documents you are unsure about

Estate & Elder Law Counsel is a Board Certified elder law firm in Orlando, and we work in English and Spanish. A consultation costs you nothing, and we will tell you honestly whether your family needs one document or five. Call (407) 610-5595. This guide is general information about Florida law, not legal advice, and reading it does not create an attorney client relationship.

**BOOK YOUR FREE CONSULTATION**

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This guide is general legal information for Florida families, not legal advice. Every situation is different; talk with an attorney before you act.

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SOURCES


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16. Fla. Stat. 744.108, Guardian's and attorney's fees and expenses: https://www.flsenate.gov/Laws/Statutes/2025/744.108