Battle of the Titans: Guardians v. Trustees

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Attorney Trust Officer Liaison Conference – Palm Beach, Florida - 2019

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Introduction:

As fiduciaries, both guardians and trustees are obligated to work on behalf of their beneficiaries or wards with loyalty and to reject activities solely for their own personal or private gains. *See*, McGovern, Kurtz & Rein, *Wills, Trusts and Estates, Including Taxation and Future Interests* § 12.4 at 511 (Thomson/West 2004). Trustees and guardians are to exhibit the highest level of good faith and candor while they serve in these privileged roles. The term "fiduciary" applies not only to trustees, but to other relationships as well, such as, but not limited to, (1) a guardian and ward; (2) a personal representative of an estate and the estate beneficiaries; and (3) an agent and his or her principal. *See* Stephenson & Wiggins, *Estates and Trusts* § 185 (Prentice Hall 5th ed. 1973). "A guardian… has fiduciary duties comparable to that of a trustee…" Falk, Jr., *The Fiduciary's Lawyer-Client Privilege Does It Protect Communications from Discovery by A Beneficiary?*, Fla. B.J., March 2003, at 18, 26 (citing to Fla. Stat. § 733.602 (2002)).

While the roles of guardians and trustees have many similar duties and responsibilities, there are many grounds on which they differ. By definition, a guardianship is not a trust and although a guardian is also a fiduciary, a guardian is not a trustee. Trustees hold legal title to trust property while guardians do not hold legal title to wards' property. *See, O'Brien v. McMahon*, 44 So.3d 1273, 1280 (Fla. Dist. Ct. App. 2010) citing Restatement (Third) of Trusts § 5 cmt. c (2003). Guardians of minors or incapacitated persons do not become owners of the property which is placed under their charge. The title thereto remains in the ward's name. Guardians have only a naked power, not coupled with an interest. *Id.*

There are other differences between guardians and trustees. A trust is "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." Restatement (Third) of Trusts § 2 (2003). "A property arrangement may constitute a trust ... even though such terms as 'trust' or 'trustee' are not used.... Conversely, use of the word 'trust' or 'trustee' does not necessarily mean that a trust relationship is involved." *See,* Restatement (Third) of Trusts § 5 cmt. a (2003); *O'Brien v. McMahon*, 44 So.3d 1273, 1280 (Fla. Dist. Ct. App. 2010). The functions and duties of a guardian are "narrower than those of a trustee, are fixed by law, and do not depend, as in the case of a trust, on the manifestation of anyone's intention." Austin W. Scott, William F. Fratcher, & Mark L. Ascher, *Scott and Ascher on Trusts* § 2.33 (5th ed. 2006).

To further contrast the two roles, there are strict rules regarding who can serve as a guardian and virtually no rules on who can serve as trustee. Florida Statutes § 744.309 identifies the requirements for who can serve as a guardian of resident wards. The statute allows for the appointment of family members, trust companies, and corporate guardians but prohibits convicted felons or those otherwise unsuitable to perform the duties of a guardian. Fla. Stat. § 744.309. Meanwhile, a grantor of a trust is free to select a trustee and has virtually no restriction on that selection. A trustee, unlike a personal representative or guardian, does not have to be a Florida resident, a relative, or appointed by a court.

It is a common scenario in Florida, even where a guardian has been appointed over a ward with respect to certain delegable rights, that some or all of the ward's assets may be titled in a trust.

Consider the issues that may arise in this scenario. What impact or control (if any) does the guardian have over assets held in trust for the ward's benefit? Who receives and potentially objects to the trustee's fiduciary accountings? Is the guardian required to serve the trustee with guardianship accountings? Who ensures that the trustee is acting for the benefit of the ward and prudently administering the trust? What is a guardian to do when he or she suspects that a trustee is self-dealing and vice-versa?

In most circumstances, the probate court – which appointed the guardian – does not have jurisdiction over the trustee or the assets held in trust. Frequently, the trustee controls the assets of the trust and is not the same person as the appointed guardian. Sometimes the trustee subjects themselves to the jurisdiction of the probate court by appearing in the guardianship proceedings. Other times, a trustee avoids the probate court's jurisdiction and objects to any exercise of control by the probate court over trust assets.

These materials will address the interplay between two fiduciary titans – guardians and trustees. The materials will delve into Florida law addressing the distinctions in the two fiduciary roles, discuss jurisdictional issues, and examine the power tug of war when both roles affect a single ward/beneficiary. The following are considerations for those who represent guardians, trustees, wards, and beneficiaries.

Fiduciary Roles

Both guardians and trustees are fiduciaries with numerous obligations to their wards and beneficiaries. While similar, their fiduciary duties are not the same. Guardians are governed by statutes that grant a court the power to make the appointments and ultimately define the role, powers, and obligations of the guardian during the administration. *See* Fla. Stat. §§ 744.341 and 744.345 (2018). While there are still many statutory provisions governing the duties and powers of a trustee, a trustee's role is traditionally outlined in the trust document. *See* Fla. Stat. § 736.0105 (2018). Trustees are generally not subject to court oversight but may be brought into litigation if they fail to abide by their fiduciary duties. Both guardians and trustees may be removed for improper conduct and breaching their fiduciary obligations. Both can be surcharged for the same. *See* Fla. Stat. § 744.446 (3) ("Any activity prohibited by this section is voidable during the term of the guardianship or by the personal representative of the ward's estate, and the guardian is subject to removal and to imposition of personal liability through a proceeding for surcharge, in addition to any other remedies otherwise available.").

Trustees must follow the terms of the governing instrument that appoints them. They must do so while abiding by the statutory obligations of the Florida Trust Code and the Prudent Investor Act. Trustees must act prudently, in good faith, impartially, and administer the trust for the benefit of the beneficiaries. Fla. Stat. §§ 736.0801, 736.0802(1), 736.0803, and 736.0804 (2018). Without evidence that the trustee failed to perform, a court is without authority to remove trust assets from the trustee's control to be administered by the court or a guardian. *Cohen v. Friedland*, 450 So.2d 905 (Fla. 3d DCA 1984), *See also Guardianship of Mount*, 189 So.3d 213 (Fla. 2d DCA 2016).

The Court has numerous options when addressing a breach of trust. It can compel the trustee to perform the trustee's duties, enjoin the trustee, compel the trustee to redress a breach by

paying money or restoring property, order the trustee to account, appoint a special fiduciary, suspend the trustee, remove the trustee, reduce or deny compensation to the trustee, void an act of the trustee, or impose any other appropriate relief. Fla. Stat. § 736.1001 (2018). A trustee liable for breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. Fla. Stat. § 736.1002(1) (2018).

Florida Statutes, § 744.361(3) imposes on the guardian that the guardian shall act in good faith. Florida Statutes, § 744.361(4) explains that a guardian may not act in a manner that is contrary to the ward's best interests under the circumstances. Although Florida Statutes, §744.361(11) imposes a specific standard of care on a guardian of the property, it does not impose such a standard on a guardian of the person. *See,* Robert P. Scheb, *Florida Guardianship Practice*, Chapter 14, Guardian of the Person: Duties, Responsibilities, and Liabilities, 10th Ed., 2018. Florida Statutes, § 744.446(4) states: "In the event of a breach by the guardian of the guardian's fiduciary duty, the court shall take those necessary actions to protect the ward and the ward's assets."

Like a trustee, a guardian can be removed for numerous reasons including failure to discharge his or her duties. Fla. Stat. § 744.474 (2018). Guardians may also be removed for actions beyond breach including, but not limited to, fraud in obtaining his or her appointment, incapacity, or illness rendering the guardian incapable of discharging his or her duties, and conviction of a felony. *Id.* Both guardians and trustees may benefit from seeking court approval of a proposed course of action in order to mitigate fiduciary liability and removal.

Jurisdiction

Guardians are appointed by a court and are therefore regarded as officers of the court. Accordingly, guardians obtain court approval for their substantial actions. Trustees can, at times, be appointed by a court, although typically they obtain their position through selection by the settlor in trust instruments and therefore, are not considered officers of the court. A trustee accepts the role by substantially complying with the method for acceptance as outlined in the trust instrument or by accepting delivery of trust property or exercising powers as trustee. Fla. Stat. § 736.0701(2018). Guardianship proceedings are filed and heard by the probate court while trust proceedings are instituted in civil courts. *See, In Re Estate of Black*, 528 So.2d 1316 (Fla. 2d DCA 1988); *Manufacturers Nat'l Bank v. Moons*, 659 So.2d 474 (Fla. 4th DCA 1995); and *Beekhuis v. Morris*, 89 So.3d 1114 (Fla. 4th DCA 2012).

Florida Statutes, § 736.0201 explains that judicial proceedings concerning trusts must be commenced by the filing of a complaint in accordance with the Florida Rules of Civil Procedure and that a court must have personal jurisdiction over a trustee in order to enter a ruling affecting the corpus of the trust. *Covenant Tr. Co. v. Guardianship of Ihrman*, 45 So.3d 499 (Fla. Dist. Ct. App. 2010). Usually, a guardianship court lacks personal jurisdiction with respect to trustees. Further, a guardianship court generally does not have jurisdiction over assets titled to a trust that are directed by a trustee when the trustee is not a party before the court in the guardianship case.

For example, in *Covenant Tr. Co. v. Guardianship of Ihrman*, 45 So.3d 499, 505 (Fla. Dist. Ct. App. 2010), it was reversible error for the guardianship court to require a trustee to use trust assets to reimburse a guardian of a trust beneficiary for guardianship expenses, attorney's fees, and other costs incurred during guardianship. The *Covenant* court announced that the court must have personal jurisdiction over the trustee "in order to enter a ruling affecting the corpus of the trust." *Id.* Thus, if the trial court does not have the requisite *in personam* jurisdiction over the trustee then the trial court erred by entering an order directing the trustee to pay an additional retainer from the trust. *Id. See also*, *Giglio v. Perretta*, 493 So.2d 470 (Fla. 4th DCA 1986); *Manufacturers National Bank of Detroit v. Moons*, 659 So.2d 474 (Fla. 4th DCA 1995) (The fact that the ward in a Florida guardianship is beneficiary of a foreign trust does not give the guardianship court jurisdiction over the nonresident trustee.).

A trustee can end up voluntarily subjecting the trust to the probate court's jurisdiction if not careful to avoid doing so. A family member who is also serving as trustee may be "next of kin" in a guardianship proceeding in his or her individual capacity but not in his or her fiduciary capacity. Appearing in one's individual capacity, does not give the probate court jurisdiction over that individual as a trustee. *See e.g., Beekhuis v. Morris*, 89 So.3d 1114 (Fla. Dist. Ct. App. 2012) (Probate court, in guardianship proceeding filed by ward's son, did not have jurisdiction over ward's trust assets or ward's daughter in her capacity as trustee, where original pleadings never raised any claim over trust or its property, and ward's daughter, who made limited appearances in guardianship proceeding only in her individual capacity, continually asserted that court lacked jurisdiction over trust and trustee.) *See also*, *Harris v. Martin,* 606 So.2d 1212 (Fla. 5th DCA 1992); *In re Estate of Black*, 528 So.2d 1316 (Fla. 2d DCA 1988). A person as an individual and a person as a trustee "are as separate and distinct in law as if they were in fact two different individuals." *In Re Estate of Cleeves*, 509 So.2d 1256 (Fla. 2d DCA 1987), citing *Uhl v. Holbruner*, 200 So. 359 (Fla. 1941). However, a trustee was considered to have submitted the trust to the jurisdiction of the probate court where the trustee entered into (and benefitted from) a mediation settlement agreement with the guardians. *Sowden v. Brea*, 47 So.3d 341 (Fla. Dist. Ct. App. 2010); *See also, Inglis v. Casselberry* 137 So.3d 389 (Fla. 2d DCA 2013) (trustee voluntarily submitted to court's jurisdiction by requesting relief in post dissolution proceedings).

There may be situations where it makes sense for the trustee to submit to the guardianship court's jurisdiction. For example, if it is more cost effective to proceed in the guardianship court regarding a dispute over the ward's expenses or trust distributions, the trustee may consider addressing the issue with the guardianship court in order to avoid the additional expense of filing a separate civil lawsuit. Often, the trustee will voluntarily submit to the guardianship court's jurisdiction for an order reviewing and approving a settlement agreement among a beneficiary ward, the guardian, and the trust. While the probate court does not automatically have jurisdiction over the trust, the trustee must prudently administer the trust for the benefit of the beneficiaries which sometimes requires the most cost-effective approach to resolve a dispute.

Powers to Challenge, Modify, or Revoke a Ward's Estate Plan

Generally, when a person creates a revocable trust (as the "grantor") the grantor usually can amend or revoke the trust at any time prior to their death. But what if that grantor becomes a

ward in a guardianship and has been determined incapacitated in some sense. Do they still retain the power to amend or revoke their trust or is this power delegated to their guardian?

To answer this question, a practitioner would want to first look to the trust instrument. *See e.g., In re Guardianship of Muller,* 650 So. 2d 698 (1995) (Guardian authorized to exercise grantor/ward's power to amend trust to replace trustee where trust language read in pertinent part: "It is fully my intent that this Trust shall be a Revocable Trust. I therefore specifically reserve the right to revoke or amend this Agreement at any time in whole or in part.") The trust may have provisions addressing the powers the grantor has or doesn't have upon incapacity. If the trust allows for amendment in this scenario or is silent on this point, the practitioner must consider the Florida guardianship and trust codes. Florida Statutes, § 736.0602 (6) states that, "A guardian of the property of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only as provided in s. 744.441."

Looking then to Section 744, a guardian may have the authority to modify, amend, or revoke the ward's revocable trust in certain situations. The code includes specific statutes that address a guardian's ability to exercise the rights of a ward in relation to a ward's role as a fiduciary or holder of a power of appointment. Pursuant to Florida Statutes, § 744.441, after obtaining approval of the court pursuant to a petition for authorization to act, a plenary or limited guardian of the property, within the powers granted by the order appointing the guardian, may: "(2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release."

Normally, a court is unlikely to approve the amendment or revocation of a ward's trust as such action would essentially circumvent the ward's prior decision to implement an estate plan using a revocable trust. However, in *Cohen v. Friedland*, 450 So.2d 905 (Fla. 3d DCA 1984), a trustee was not properly using the trust assets to discharge the requirements of the trust to support and care for the ward, and the guardian was able to withdraw assets from the trust or, if necessary, revoke the trust entirely. *Id.* (Reiterating that, in the absence of proof that the trustee has failed to perform or has performed arbitrarily, a court is without authority to remove trust assets from control of trustee to be administered by court or other guardian.)

Florida Statutes, § 744.441(19) also allows a guardian to create or amend revocable trusts or create irrevocable trusts on behalf of the ward's estate in connection with estate, gift, income, or other tax planning. The court retains oversight of the assets transferred to a trust, unless otherwise ordered by the court. Fla. Stat. §§ 744.441(19), 744.368(5) (2018). However, a guardian may not create a new trust with the ward's assets changing the beneficiaries from those designated by the ward prior to the ward's incapacity where doing so was tantamount to amending the ward's will – and where changing the beneficiary had nothing to do with tax or estate planning so as to have been specifically authorized by statute. *In re Guardianship of Sherry*, 668 So.2d 659 (Fla. 4th DCA 1996) (Here, no benefits accrued to the ward's estate and authorizing such a change clearly would have been re-writing the ward's will or testamentary plan other than for the limited purposes authorized by the legislature in Section 744.441(18).).

Several courts have broadly interpreted the guardian's authority, as outlined in the guardianship statutes, to amend or modify a ward's estate plan. The Second District Court of Appeal, in *Goeke v. Goeke*, 613 So.2d 1345 (Fla. 2d DCA 1993), read subsections (17) (gifting powers), (19) (powers to create trusts), and (21) (powers to enter into contracts for the ward's benefit) of Section 744.441 in combination to expand the guardian's authority (on behalf of the ward) to update the ward's estate plan. In *Goeke*, the court allowed a guardian to create, fund, and designate beneficiaries for individual retirement accounts (IRA) when it was in the best interests of the ward.

In *In re Guardianship of Muller*, 650 So.2d 698 (Fla. 4th DCA 1995), the Fourth District Court of Appeal determined that, based on legislative history, Section 744.441(2) should not be restrictively read to limit the possible "powers" of the ward exercisable by the guardian with court approval. The Fourth District, in reversing the trial court, found that the court-appointed guardian of the property did have the authority under Section 744.441(2) (together with Section 744.441(19)) to amend the ward's revocable trust agreement by changing or replacing the appointed trustee based on conflict. The Fourth District read Section 744.441(2) and (19) together to permit the guardian to change the trustee of the ward's revocable trust from the individual the ward had actually designated as his successor trustee to another person, when it was shown that the named successor trustee potentially had a severe conflict of interest with the ward/trust beneficiary. The *Muller* Court found that the "other powers" portion of the guardianship statute permitted the guardian to obtain authority to change the successor trustee upon presentation of sufficient evidence to the court of a conflict such that the court could conclude that the ward, if competent, would likely have changed the successor trustee because of the conflict.

Occasionally, a guardian's authority to alter the ward's estate plan for limited purposes becomes a major problem for a trustee. For example, in *Reddick v. SunTrust Bank, East Central Florida*, 718 So.2d 950 (Fla. 5th DCA 1998), a wife, in her capacity as plenary guardian of her husband's property, unsuccessfully petitioned the court to amend her incapacitated husband's trust under Section 744.441(2) to substitute herself as trustee in place of the bank. Both the trial court and the appellate court found that because her husband regularly used a corporate trustee, his best interest was served by continuing to use the bank as trustee. The court recognized that Section 744.441(2) authorized the guardian, with court approval, to exercise any powers that the ward could lawfully exercise, when competent, if the best interest of the ward required such exercise. However, in this case, the court found that the ward's wife, even where she was willing to serve as an uncompensated trustee, failed to show any overruling benefit to her husband's trust by the substituting herself for the bank (which was certainly a compensated corporate trustee). The court found that the wife was well-intentioned, but due to the size of the trust ($2.8 million) and that the ward had always previously used or indicated a preference for a bank or a corporate entity as trustee or successor trustee, it disallowed the modification.

Similarly, in *Rene v. Sykes-Kennedy*, 156 So.3d 518 (Fla. 5th DCA 2015), the court-appointed guardian, Sykes-Kennedy, sought to amend the ward's trust to appoint herself as trustee instead of the ward's granddaughter. Sykes-Kennedy filed a petition in the guardianship court requesting that the trial court authorize her to amend the trust. She argued it was necessary for her, as guardian, to be able to access the trust assets to care for the ward and provided evidence that she had the education, experience, and relationship to the ward to act as trustee. The trial court

granted Sykes-Kennedy's petition and concluded that it was in the ward's best interests to have her serve as trustee despite no finding of wrongdoing by the granddaughter. Citing to Fla. Stat. §§ 736.0201(1), 736.0602(6), and 744.441, the Fifth Circuit held that the Guardianship court had authority to enter order allowing the guardian to amend the ward's revocable trust so as to appoint herself as the trustee, despite contention that Trust Code required a proceeding concerning a trust to be commenced by filing a complaint. The court looked to the Trust Code which specifically allows a guardian of the property of a settlor to exercise the settlor's power to amend a trust. The ward would have had the power, if not incapacitated, to amend the trust and appoint the guardian as the new trustee and as such, it was permitted in this case. (The Court here specifically stated in footnote 2 that this ruling should not be construed to suggest that the trial court may authorize Sykes-Kennedy to amend the trust's provisions regarding the trust beneficiaries.)

Bear in mind that Florida Statutes, § 736.0207 provides that an action to contest the validity of a revocable trust may not be commenced until the trust becomes irrevocable by the settlor's death or by other trust terms, except by the guardian of an incapacitated settlor's property. Prior to the Trust Code provision, no one had the authority to contest the validity of a revocable trust prior to the settlor's death, but this statute opens the door for a guardian to bring a pre-death trust contest. If the guardian is concerned that the trust was created during a time when the settlor lacked capacity or was subject to undue influence, the guardian may be one of the only people that can contest the trust during the life of the incapacitated settlor. The guardian's authority is also included in the Guardianship Code, but there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relates solely to a devise. Fla. Stat. § 744.441(11). The rights of the guardian to challenge a revocable trust while the settlor is alive do not preclude a challenge upon the death of the settlor. A will executed by a ward before the ward's incapacity cannot be revoked later by the ward's guardian. *Whitley v. Craig*, 710 So.2d 1375 (Fla. 5th DCA 1998).

In sum, a guardian takes a risk in attempting to modify a trust under the "other powers" provisions of the Guardianship Code. Trust modifications, in general, are complex and require a lot of analysis under both the Florida Trust Code, Guardianship Code, and case law. A guardian should tread lightly before attempting to modify a trust on behalf of a ward and must ensure always that any action is taken in the best interests of the ward/beneficiary.

Expenses

A guardianship court generally cannot compel the trustee to pay various guardianship expenses or transfer trust funds to the guardianship, without a trust provision directing to do so. *See, Florida Guardianship Practice*, Chapter 7, Use of Trusts, James A. Herb and Rhonda D. Gluck, 10th ed. 2018; *In re Guardianship of Mount*, 189 So.3d 213 (Fla. 2d DCA 2016) (court reversed order that compelled co-trustees to return trust funds held in escrow account to trust's primary bank account). "In the absence of proof that the trustee has failed to perform, or has performed arbitrarily, a court is without authority to remove trust assets from control of the trustee to be administered by the court or other guardian." *See, Cohen v. Friedland*, 450 So.2d 905, 906 (Fla. 3d DCA 1984); *See e.g., Johnson v. Guardianship of Singleton,* 743 So. 2d 1152 (1999) (disallowing guardianship expenses being ordered to pay from the ward's trust).

For example, where the payment of such fees is not mandated by the provisions of the trust, a court has no authority to compel a trustee to use trust funds to pay for the fees of the court-appointed guardian of the beneficiary/ward. *Barnett Banks Tr. Co. v. Hyman*, 504 So.2d 791 (Fla. Dist. Ct. App. 1987). A guardianship court may not order a trustee to pay the ward's creditors or the guardian's legal fees from trust assets. *In re Guardianship of Gneiser*, 873 So.2d 573 (Fla. 2d DCA 2004).

Although, as in many areas of law, there are exceptions to the general rule. In *Sowden v. Brea*, 47 So.3d 341 (Fla. 5th DCA 2010), the trial court in a guardianship proceeding found personal jurisdiction over the trustee of the ward's trust when the trustee submitted to the court's jurisdiction by entering into and benefiting from a settlement agreement with the guardians. The court held that the trial court had authority to enforce its prior order requiring parties to comply with court-approved mediation agreement that allowed trust assets to be used to pay certain costs and fees of the guardians' attorneys.

A trustee has flexibility in paying amounts to or for the benefit of a beneficiary when the beneficiary is incapacitated, unless limited by the provisions of the trust. Fla. Stat. §§736.0816(21) and 736.0815(1) (2018). The trustee can agree to utilize trust assets to pay for the beneficiary's expenses if it is in line with the trustee's authority under the trust agreement or the Florida Trust Code. *See*, *Administration of Trusts*, Chapter 17 (Fla. Bar CLE 9th ed. 2017); James A. Herb and Rhonda D. Gluck*, Florida Guardianship Practice*, Chapter 7, Use of Trusts (Fla. Bar CLE 10th ed. 2018).

Nevertheless, a problem may arise when there is a disagreement between the guardian and the trustee over, for example, a discretionary distribution under a health, education, maintenance and support or other standard. In those situations, the prudent course may be for the trustee to get court approval for a particular distribution pursuant to Fla. Stat. § 736.0201(4)(e) (2018). Recall, however, that this action would typically be a separate civil proceeding and not a guardianship proceeding in the probate court. It is usually a good idea for the trustee and the guardian to communicate early after the guardian's appointment to decipher what expenses have been paid pursuant to the trust and will continue to be paid from trust assets and what will not. Guardians and their counsel should review the terms of the ward's trust to ensure the trustee is properly fulfilling all the distribution provisions of the governing document.

Inventories and Accountings

A guardian is held to the strictest accountability for the funds of his ward. 28 C.J. 1145, Section 244; Firmin v. Sandborn, 119 Fla. 396, 161 So 555. Pursuant to Florida Statutes, § 744.365, a guardian of the property shall file a verified inventory of the ward's property and the verified inventory must include any trusts of which the ward is a beneficiary. This statute does not, however, require that the guardian list the amount or specific beneficial interest in the trust. The guardian should carefully consider how much information should be placed in the inventory, which to some extent is governed by local practice. Lance McKinney, *Florida Guardianship Practice, Special Property Problems of Guardianships*, Chapter 17, Tenth Edition (2018).

Pursuant to Florida Statutes, § 744.3678(2), each guardian of the property must also file an annual accounting with the court. The accounting need not include "any property or any trust of which the ward is a beneficiary but which is not under the control or administration of the guardian." *Id.* Although, some Florida courts have inferred from this language that if the trust is controlled or administered by the guardian, then it may need to be included in the annual accounting. Although, there is scant to no case law to support this position, a guardian is advised to carefully consider what financial information of the ward should be included and disclosed in the guardianship accounting.

Under Florida Statute § 736.0603 the trustee has exclusive fiduciary obligations to the settlor of a revocable trust, while it is revocable. Similarly, the duty to inform and account during the tenure of a revocable trust is only to the settlor of that trust. There are no statutes that address accounting to incapacitated beneficiaries who are also the settlors of revocable trusts and subject to guardianship. There is, however, a representation statute that allows a person who represents a settlor lacking capacity to receive notice and give binding consent on the settlor's behalf. Fla. Stat. § 736.0301(3).

The prudent course for a trustee who administers a revocable trust for the benefit of an incapacitated ward/beneficiary is likely to provide a trust accounting to both the guardian and ward for review and approval. The trustee may also include the six-month statutory notice pursuant to Florida Statutes, § 736.1008 in order to shorten the time that the beneficiary ward or guardian must bring a claim for breach of trust. The guardian may also have the authority to waive the right to an accounting and request bank account statements or other regular information regarding the trust's administration and assets.

If an accounting reveals imprudent administration on the part of a trustee, the guardian may be forced to bring a lawsuit on behalf of the ward. Upon court approval, the guardian has the authority to prosecute or defend claims for the protection of the ward's estate. Fla. Stat. § 744.441(11). The guardian should request and review accountings on at least an annual basis to ensure the trustee is abiding its fiduciary obligations and be prepared to protect the rights of a ward who is a beneficiary. The trustee should adequately disclose all trust information to the qualified beneficiaries and their legal representatives, including guardians.

When a trustee of the ward's trust is also acting as a guardian, there is little authority on who, if anyone, should be provided accountings or trust information during the life of the beneficiary/ward. Next of kin may have the ability to review the management of the ward's estate through the guardianship proceedings but not the management of the ward's trust assets. *See, In re Guardianship of Trost*, 100 So.3d 1205, 1210 (Fla. 2d DCA 2012); *Beekhuis v. Morris,* 89 So. 3d 1114 (2012)(Probate court, in a guardianship proceeding, did not have jurisdiction over ward's trust assets or ward's daughter as trustee, where no claim raised over trust or it's property.) An agent under a durable power of attorney with the appropriate language may have that authority but otherwise, it is unclear. To avoid liability, the guardian/trustee should identify any potential parties that could receive notice on behalf of the settlor/ward/beneficiary and notify them, when appropriate. Counsel for the guardian/trustee may consider the appointment of an administrator ad litem solely to review and approve of accountings.

Summary

When there are both a court-appointed guardian and a trustee involved in the same account or case, there can be a difference of opinion on what is in the best interests of the ward/beneficiary. While the best approach is for the guardian and trustee to work together to identify those interests it is rarely an easy partnership. Counsel for guardians, trustees, and wards should be careful to identify the authority outlined in the Florida Guardianship and Trust Codes, as well as the common law that controls the relationship, and utilize it to assist the ward/beneficiary and to avoid liability for failing to get along with a fellow fiduciary.