

Dealing with foreign wards and their investments

by Enrique Zamora



Several issues that arise from the representation of foreign wards in Florida potentially can create problems for the attorney who represents a guardian of these foreign wards.

Where is venue?

The first question that arises when dealing with foreign wards is regarding venue. According to Chapter 744, venue lies in the county of residence of the incapacitated person or where the incapacitated person owns property. However, the issue of what constitutes residence is not clearly addressed in Chapter 744. There is one case that defines legal residence as meaning residence at a particular place, accompanied by positive or presumptive proof of intention to remain there for an indefinite time.¹

It is not unusual for a foreigner visiting Florida to be involved in an accident that causes incapacity and creates the need to appoint a guardian while the ward is being treated in Florida, thus creating a temporary residence. Also, a guardian of the property is often needed to represent the ward in a potential claim against the tortfeasor. Guardianship of minor dependents is also often required if the claim is successful, even when the minors reside in their country and have never been in Florida.

F.S. §744.384 states that if the need to establish incapacity arises while a nonresident ward is residing temporarily in Florida, then the proceeding is the same as for a resident. Therefore, it is proper for the incapacity of a foreign alleged incapacitated person (AIP) to be determined in Florida while the foreign ward resides here, albeit temporarily, as well as the appointment of a guardian.

What happens when the ward returns to his/her country?

F.S. §744.202 and §744.2025 ad-

dress changes of residency of the ward to another county or state, but not to another country. However, F.S. §744.529 and Rule 5.670 of the Florida Rules of Probate require that, before a Florida guardian can be discharged, the foreign court must appoint a guardian, and that foreign guardian must post a bond. Then and only then will the Florida guardian be able to file a final report, close the guardianship and transfer the ward's property.

What constitutes a validly appointed guardian in foreign jurisdictions is a question with an elusive answer. However, if a guardian is not appointed in the foreign jurisdiction, the Florida court must retain jurisdiction, and the property of the ward must remain in Florida. In such cases, the guardianship of the property must continue even when the ward has left the jurisdiction. A common concern among judges is the safety of the ward and the protection of the ward's property. In some jurisdictions, if the ward's property is transferred, the ward may be in danger of being kidnapped or even murdered.

Residence and the 'intent to return' syndrome

When has the ward changed residence? What if a ward has the intent to return to Florida? What if the ward returns to Florida every year for a short stay? In a case where the ward has permanently left Florida, it appears that the guardian of the person must be discharged. However, a ward that has the intent to return to Florida might not have changed his or her residence as required by the statute. The question of intent to change residence has been discussed in several Florida cases. It is questionable whether or not a ward is capable of having the requisite intent to change residence.^{2,3}

Shifting our attention to the guardian of the property, if the new jurisdiction where the ward resides lacks adequate protection for the ward's property, or no guardian of the prop-

erty has been appointed, Florida must retain the ward's property. In such cases, the guardian of the property must continue to discharge his or her duties until all of the property of the guardianship has been exhausted. (See F.S. §744.521)

What alternatives to guardianship are available to the foreign ward?

F.S. §744.462 requires the court to determine if there is an alternative to guardianship. In the case where the ward has left the jurisdiction permanently and there is only property in Florida, the court may discharge the guardian of the person and create a trust to handle the property, subject to the jurisdiction of the court. F.S. §744.41(19) allows the creation of such trust for estate planning purposes. However, the issue is whether or not creating a trust for the protection of the property of a foreign ward who has left the jurisdiction constitutes a valid estate planning purpose.

May a guardian be authorized by a Florida court to purchase real property in a foreign country?

The short answer is that it happens fairly often. It appears from a reading of F.S. §744.41(14) that the court may authorize the purchase of real property in this state and nowhere else. However, when the guardianship funds are in an account in a Florida bank or financial institution, they are subject to the jurisdiction of the Florida court under F.S. §744.102(7). Query: if the foreign real property is purchased with guardianship funds, does the court retain the power to administer it? The answer seems to be no, but this has not deterred some judges from exerting jurisdiction over real property located outside of Florida. The author has handled several cases in which a Florida court has authorized the purchase of real estate in foreign countries. The court

has retained jurisdiction over the real property, or at least attempted to retain jurisdiction, by requiring the guardian to report in the annual plan the status of all of the property owned by the ward, wherever located.

What happens when a foreign ward who has moved to his or her country of residence, but has expressed his or her desire to return to Florida, decides to marry in a foreign jurisdiction?

F.S. §744.3215(2)(a) requires that when the ward does not retain the right to enter into a contract, the right to marry is subject to the court's approval. If we agree that the Florida court has retained the jurisdiction over the person of a ward who has moved temporarily to another jurisdiction with the intent of return to Florida, then the right to marry must be authorized by the Florida court, even when the marriage is to be held in a foreign jurisdiction. There is no case law on this issue. However, the author represented a guardian in a limited guardianship in which the ward requested permission to marry in Argentina where he was residing, and it was granted subject to a pre-nuptial agreement prepared pursuant to Argentinean law.

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Endnotes:

¹ *In re: Guardianship of Florence M. Mickler* 152 So.2nd 205 (Fla 1st DCA 1963)

² *Mathews v. Mathews* 141 So.2nd 799 (Fla 1st DCA 1962)

³ *In re: Guardianship of Florence M. Mickler* 152 So.2nd 205 (Fla 1st DCA 1963)

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