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- Marc J. Soss, attorney

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OP ED

## [On Estate Planning] Revocable Trust Can Provide Protection

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Every Florida estate plan at a minimum should consist of a Last Will and Testament, Power of Attorney, Health Care Surrogate, Living Will and Pre-Need Guardianship documents. Many residents forego establishing a Revocable Trust out of the belief said document is only for very wealthy individuals. Similarly, Florida residents forego designating a Pre-Need Guardian due to a lack of understanding of how important this designation could be. However, with families spread out across the country, a Revocable Trust and Pre-Need Guardian Designation could end up being the most important documents in a Florida resident's estate plan.

As Florida's elderly population ages, residents become increasingly susceptible to dementia and incapacity. Without family around to assist them, unrelated third parties in many cases step in and commence guardianship proceedings against them. Under Florida law, once a guardianship proceeding is commenced, that individual's Power of Attorney is immediately suspended. The initiator can request that a non-related third party take control of the individual's financial and health care decisions, effectively excluding that individual's family from being involved. Where it becomes scarier is that, although required by statute, the individual's family members in many cases are never contacted or given notice of the proceedings. Even worse, the "alleged" incapacitated individual's assets will be utilized to fund the guardianship proceedings and legal fees. As a result, an existing estate plan and the best laid plans of a family may be ignored.

To combat this, an individual should include a "Pre-Need Guardian Designation" as a part of his or her Florida estate plan. Although the Florida Statutes provides that "the court may appoint any person who is fit and proper and qualified to act as guardian, whether related to the ward or not," production of the declaration will create a rebuttable presumption that the nominated preneed guardian is entitled to serve as guardian for the incapacitated individual. However, in spite of the legality of this document and the desire of a family to be involved, a Florida Probate Judge has within its discretion the ability to ignore the written wishes of the individual and select a guardian based upon what he or she believes is in that individual's "best interest." The Florida Probate Court's discretion is "without regard to any family member preference."

The Florida Statutes provide that during guardianship proceedings, a Florida Probate Court has the discretion to determine what authority a judicially appointed guardian can exercise over an existing Health Care Surrogate and Living Will. As a result, a Florida Probate Court will have the ultimate authority to void an individual's selection when making its judicial determination of who shall serve as an individual's guardian.

Utilization and funding of a Revocable Trust should protect an individual's financial assets from the guardian's control and access to the individual's financial assets. Several Florida cases have held that a Florida Probate Court does not possess the authority to require a validly appointed Trustee to use Trust assets to reimburse the individual's court-appointed guardian for guardianship administration expenses, attorney fees and other costs incurred during the guardianship proceeding. The Trustee, although allowed to pay, should not be compelled by a Florida court to make such payments. As a result, the Trustee can effectively protect the Trust assets from dissipation on unnecessary guardianship expenses and legal fees.

It is highly recommended, if not already a part of your Florida estate plan, that every Florida resident have a current Pre-Need Guardianship Designation and Revocable Trust. These documents could make the difference between a family member or independent third party making your health care and financial decisions if you should become incapacitated and in need of assistance.

*Marc J. Soss, Esq., practices in the areas of estate planning, probate administration and guardianship administration in Sarasota and Manatee County. He has published articles and been quoted in Forbes, Fox Business, The Florida Bar Journal, The Rhode Island Bar magazine and Military.Com*