

# **Florida's Guardianship Laws: A License to Exploit the Elderly and Disabled**

It happens frequently and often in Florida. A middle aged man in great health suddenly suffers a stroke incapacitating him and requiring physical therapy for the rest of his life. An elderly woman is found unable to care for herself. Their conditions have deteriorated to the point that a person is unable to manage his or her own affairs. As a result, someone – a family member or another person – has to end up taking charge of the person's affairs. This process is known as guardianship, and guardianship is supposed to take care of a person's affairs when he or she cannot due to a disabling physical or mental condition.

Unfortunately, guardianships in Florida can become difficult. For instance, a family member petitions the court for guardianship but the court ends up handing guardianship to a total stranger. Or, your loved one had to go to the hospital and the hospital's social worker ends up filing an emergency guardianship petition. As a result, a total stranger is in control of your loved one's affairs and the guardianship was not the guardianship you hoped for. With this in mind, this is what this white paper is all about.

## **Disclaimer**

While I may have an Associate in Science degree in Legal Assisting, it needs to be emphasized that none of what is presented in this white paper is to be construed or taken as legal advice. In other words, this white paper is not legal advice and, not being an attorney, I am not allowed to do so.

In any guardianship case, consultation with an attorney that is licensed by the Florida Bar and is certified in Probate Law and/or Elder Law is highly recommended. You can find an attorney that specializes in Probate Law in many ways, including the Internet as well as the telephone book. Most attorneys will give you a consultation ranging from 30 minutes to an hour, either over the telephone or in person, free of charge. Take the time to check the attorney's qualifications and experience and find out what the fees are going to be before you sign the retainer contract.

## **Guardianship Defined**

The Pinellas County Clerk of the Circuit Court defines guardianship as "a legal arrangement under which a person (the guardian) has the legal right and duty to care for another (the ward) and his or her property".

In a guardianship, there are two key players: The Guardian and the Ward. It is the Guardian who oversees the legal, financial and other affairs over a person who is the subject of a guardianship called the Ward, which is always under the supervision of the Probate Court. On the other hand, the Ward is the incapacitated person who, by reason of physical or mental disability, is incapable of managing his or her own affairs.

Guardianships are always under the supervision of the Probate Court which is responsible for seeing that the affairs of the Ward is being managed properly and within the law. Attorneys represent both the Guardian and the Ward, and it is the attorneys that are the interface between the Guardian/Ward and the court. It is the attorney for the Guardian that conducts the required accountings and reports to the court, while the attorney for the Ward represents the Ward's best interest, especially if something goes wrong.

## How a Guardianship is Created

In order to explain how a guardianship is created let's go through an example of which guardianship is justified. The law and procedure are governed by [Chapter 744 of the Florida Statutes](#).

Here is a 33 year old man, in great health, has a great job, and he works out regularly at the gym. He has a wife and one daughter as his family. So far, things have been on the up and up for the family: The daughter is in private school making excellent grades, the man just received a promotion at work, and the wife works part time with an eBay related business out of home.

Until one day at work, right after the 12 Noon to 1 PM lunch break. The man is settling in back at his desk going over the contracts that have to be done. All of a sudden – with little warning – the man has the worst headache of his life and he ponders leaving for the day. As the headache worsens, the man gets up from his desk to take some medicine and – just after getting up – he falls down to the floor. His co-workers rush to his aid and call 911 for medical assistance. Paramedics show up within minutes of the 911 call.

The paramedics evaluate the condition of the man and, after careful checking, determine that he needs to be transported to the hospital with an advanced stroke unit, as the man may have suffered a stroke so severe that extensive rehabilitation will become the norm. At the hospital, the physicians do their evaluations and administer emergency treatment for the stroke; the man is taken to the hospital's intensive care unit.

The man's supervisor calls the man's wife at home and explains what happened. The wife rushes to the hospital and sees her husband – this time, in the intensive care unit hooked up to many machines. The physicians take the wife to the side in a side room not too far from where the husband is and give the bad news:

*Your husband has had a severe stroke at work. The good news is that we were able to save your husband. However, the bad news is that, based on the damage done the stroke your husband suffered is so advanced that he is going to need extensive rehabilitation and assisted living for the rest of his life.*

This is no news one has to hear. In fact, receiving this kind of news is very painful and depressing.

A day later the wife makes an appointment with and meets with the family attorney. The wife explains what happened at work and what happened in the hospital with the not-so-good prognosis that he will need specialized nursing care for the rest of his life. Being sympathetic, the family attorney refers her to an attorney who he knows specializes in Probate Law including guardianships. So, the wife makes an appointment with and meets with the probate law attorney. After a good hour and a half meeting it is decided that guardianship would be the way to go, given what happened.

Before we go on further, in Florida the paperwork for initiating a guardianship case can only be filed by an attorney, not the person seeking guardianship. This acts as a safeguard to prevent a person who is not an attorney from filing a frivolous guardianship; that is, to try to get access to substantial amounts of money and/or property.

The attorney will file two petitions along with the filing fee as prescribed by the Clerk of the Circuit Court: A Petition to Determine Incapacity and a Petition for Appointment of Guardian.

First will be the Petition to Determine Incapacity. This is a petition to the court that the petitioner has reason to believe that the respondent – called the alleged incapacitated person – is incompetent to handle his or her own affairs. The petition contains the name of the petitioner, the name of the alleged

incapacitated person along with the factual information giving rise to the petition, the names and addresses of witnesses that know the facts surrounding the case, a list of activities of which the alleged incapacitated person is incapable of, the fact that the petitioner is seeking a plenary guardianship, the names and address of the alleged incapacitated person's next of kin and the name of the alleged incapacitated person's own doctor.

Let's stop here for a moment. Guardianships are of two types in Florida, a plenary and a limited guardianship. A plenary guardianship is a guardianship where the ward is completely stripped of his or her civil rights, while a limited guardianship is a guardianship where certain rights are retained by the ward. We'll get into the rights of a ward later.

Second will be the Petition for Appointment of Guardian. This is a petition to the court that if in the event the alleged incapacitated person is adjudged incapacitated, the person listed on this petition should be appointed guardian. Depending on the circumstances, there can be a guardian for the person, a guardian for the property of a person or a guardian for both the person and his or her property.

Once the paperwork is filed, a formal notice – called a Formal Notice of Petition to Determine Incapacity – is served upon the alleged incapacitated person by the sheriff. This notice informs the alleged incapacitated person of the date and time a hearing will be held as to the person's alleged capacity to exercise his or her rights as far as day to day living is concerned.

At the same time, the judge will issue an order establishing an examining committee that will be charged with examining the alleged incapacitated person and making the findings to the court. By Florida law, three persons serve on this committee: A physician, a psychiatrist, and a lay person. In order to be impartial, no one that knows the alleged incapacitated person – such as the person's own doctor – may serve on the committee. However, the person's own doctor may offer evidence to the examining committee for their review.

In our case, the husband with the severe stroke is given the mandatory examination done by the committee in the hospital. Medical and mental assessments are performed within strict guidelines laid down by the medical profession, and this is why a lay person is involved. The scope of the assessment involves discussions with doctors including the ER doctors that stabilized the husband upon arrival.

Once the assessments are completed, they are summarized into a report that will be given to the judge in making the decision that a person is indeed incompetent. The report will contain, among other things, a list of capacities that the person is capable or incapable of. The judge will go over the report and make a decision as to whether the alleged incapacitated person is incapacitated or not. A hearing is scheduled to make this decision.

At this point, the outcome can be one of two orders made by the judge: The alleged incapacitated person does not meet the criteria for guardianship or the alleged incapacitated person is indeed incapacitated and a guardian is necessary.

If it is ruled that the alleged incapacitated person is not incapacitated, the judge will issue an order that the petition to determine incapacity and appointing a guardian is denied, and everything is over with then and there. This can happen, especially if the judge finds that there is a less restrictive alternative to guardianship such as a durable power of attorney. Probate judges will not approve of a guardianship unless it is absolutely necessary.

On the other hand, if it is ruled that the alleged incapacitated person is indeed incapacitated and incapable of handling his or own affairs, the judge will rule that the person is incapacitated and move forward with the appointment of the guardian as shown in the Petition for Appointment of Guardian. At this point, the alleged incapacitated person's legal status changed from an adult to a ward.

Going back to our case here, the husband is declared incapacitated due to the nature of his illness being the severe stroke he suffered at work. There was no durable power of attorney found, as one was never executed. As a result, the wife is appointed the husband's guardian for both the person and the property.

The judge will issue Letters of Guardianship that give the guardian exclusive authority over the affairs of the ward. But that's not over, as guardianships are supervised by the court after they are initiated.

### **Responsibilities of a Guardian**

Once appointed, the guardian has a fiduciary responsibility to the ward. This responsibility extends to the property of the ward as well as the ward himself or herself.

Guardians that are family members have less onerous requirements such as bonding. However, if the guardian is a person that makes a living from managing a person's affairs, this would be a professional guardian and professional guardians are subject to rigorous background checks as well as having to post a bond.

A background check for any guardian – regardless if it's a personal or a professional guardian – is not just querying the database of the Florida Department of Law Enforcement's (FDLE) public criminal history site. Fingerprints have to be taken and are sent or electronically transmitted not only to FDLE but to the FBI for a national criminal history check (to see if there are any offenses committed outside Florida) as well as the Florida Department of Children and Families to see if the proposed guardian is on Florida's abuse registry.

A guardian's responsibility does not stop when the judge issues the order appointing a guardian for an incapacitated person. The court requires initial and annual accountings of property that belongs to the ward, plus care plans and anything else that the court may require. For this reason, bank accounts would have to be re-titled or opened and maintained separately from the guardian's own personal bank account; this prevents any commingling of funds. Furthermore, the guardian is responsible for the welfare of the ward the guardian is entrusted to, which includes medical care, assistance with everyday living, and more. After all, everyday living is what you and I take for granted.

### **Rights of the Ward**

Once a person's legal status changes from that of a free person to that of a ward under guardianship, the rights of a ward can be summed up in just one sentence: *A ward has much less legal rights than a convicted felon.*

Here is a list of the rights that are taken away from a person once a judge declares an alleged incapacitated person incapacitated and a guardian is appointed. Note that this list is not all inclusive; limited guardianships may involve just a few rights taken away. When all rights are taken away, the guardianship is a plenary guardianship.

- Marriage
- Voting
- Right to Travel
- To contract
- To sue and be sued
- Possession of a Florida Driver License
- Where the ward may live
- To look for or keep a job
- To consent to medical treatment
- To personally apply for government benefits

To manage property or to make any gift or disposition of property  
To make decisions about his or her social environment or other social aspects of his or her life  
The right to own or possess a firearm

And the list goes on and on...

In other words, guardianship changes a person's civil rights in a heartbeat. This means, among other things, the loss of a Florida driver license, the loss of the right to vote, the loss of a United States Passport, the loss of where one determines where to live, and the loss of a job.

Should guardianship be ordered and the person's guardian turns out to be a professional guardian, then the professional guardian can do anything he or she wants as far as the ward's best interest is concerned. For instance, a professional guardian can cut off all contact with the ward's family and relatives and mandate placement in an institution, as what happened to a Clearwater Beach woman.

### **Carol Kinnear: A Case of Guardianship Gone Wrong**

Here is a story of a Clearwater Beach woman who was stricken with Alzheimer's Disease and wanted to live out her last days in the comfort and security of her own home. I know, it is very heart breaking when your loved one has a terminal illness such as Alzheimer's and you want to provide the best possible so that when the time comes that your loved one passes away, at least your loved one got his or her wishes.

In a *St. Petersburg Times* article<sup>1</sup>, Carol Kinnear owned a multi-million dollar home out on Clearwater Beach where she wanted to live out her last days. After all, when the home that you lived in happens to be the home you grew up in or lived there a long time, it takes on a special meaning not only for you but for your relatives as well.

Carol had a trust drawn up earlier and she had it amended so that she can live out her last days at home. However, Carol's relatives wanted to make sure that the estate was preserved. As such, papers were filed for a member of the family to become Carol's legal guardian; however, once the court approved the guardianship the legal guardian for Carol was none of her relatives – instead, it turned out to be total strangers. According to the *Times* article, Carol's legal guardian – a professional legal guardian whose name is Teri St. Hilaire – had her removed from her home and taken to a facility, all against Carol's wishes. To make matters worse, Carol's legal guardian even barred her relatives from even seeing her.

*Imagine this: An American native born citizen kidnapped on American soil by agents of a foreign country for no reason (for instance, let's say the Democratic People's Republic of Korea, commonly known as North Korea). The agents end up flying the American to North Korea, a country where entry by foreigners is difficult if yet impossible for Americans. If you are an American wanting to plan a trip into the virtually closed prison-like authoritarian dictatorship of North Korea, good luck on getting a North Korean visa – the US State Department considers travel to North Korea by American citizens non-routine.<sup>2</sup> Besides, you have to end up flying to China and getting your North Korean visa at their embassy in Beijing.*

*Sound scary? Well, this is what happens in a Florida guardianship case in which a professional legal guardian is appointed against the family's wishes. The "agents" here are not representatives of a foreign country – instead, it is a total stranger appointed by the court. This is legalized kidnapping by the State of Florida in the name of guardianship.*

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<sup>1</sup> [Legal Guardian denies Alzheimer's patient her home and family contact](#), St. Petersburg Times article written by Drew Harwell, 20 August 2009.

<sup>2</sup> US State Department Travel Information Sheet for North Korea, retrieved 11 October 2010.

## **How Guardianship can become a hassle in Florida**

Guardianship in Florida can become a complete nightmare once you file the petition to have someone declared incompetent in court. In Carol Kinnear's case when the capacity hearing was held apparently a professional guardian - waiting to find their next "victim" - exploited a loophole and questioned the proposed guardian for Carol by filing an objection to the proposed guardian, which was supposed to be a family member according to the *St. Petersburg Times* article.

Having a clean criminal record is not just enough: Other obvious reasons can range from being on Florida's abuse registry maintained by the Department of Children and Families to civil actions such as divorces and being the recipient of a domestic violence restraining order. In other words, these professional guardians look for anything and everything to keep that family member from being appointed guardian.

Moreover, if you have ever been arrested, a criminal record is started on you as far as Florida is concerned. This will stay with you the rest of your life, even if the state attorney drops the charges, the court finds you not guilty, or you plead guilty or no contest with adjudication withheld. Even if you go through the hoops with the Florida Department of Law Enforcement to seal and/or expunge your criminal history, that sealed and/or expunged record will still be available somehow. Again, one blip on your criminal history is good enough to keep you from being appointed guardian.

If you were Baker Acted for any reason, don't believe that your stay in a treatment facility under the mandatory up to 72 hour hold pursuant to the Baker Act is confidential. Certain aspects of what happened can turn up in a background check. Additionally, if you were ever given a trespass warning, that information is maintained on you as law enforcement can check using the computer and find out within seconds. After all, trespass warnings are convictions for trespassing in Florida without the benefit of due process and trial.<sup>3</sup>

*Did I mention the Florida Department of Children and Families? Or the Florida Department of Complete Failure? Well, I got bad news for you parents out there that got arrested on an allegation of child abuse: Even if the state attorney drops the charges against you, you, my friend, are still on the Florida DCF's radar as far as abuse, neglect or exploitation is concerned. Your name is still on the Florida abuse registry even though the criminal charges are over and your name can come up in a background check if a background check including the Florida abuse registry is ordered.*

*Speaking of the Florida abuse registry, good luck trying to get your name expunged. It is almost impossible.*

*If you get called to your child's school and you are met by Florida DCF investigators and law enforcement in your school's conference room along with the school principal, welcome to a lifetime of harassment and intimidation by DCF. After all, it takes just one report of suspected child abuse for a lifetime of DCF harassment which can impact you later on in life.*

Now we have a professional guardian involved: A complete and total stranger; someone that you do not know. Contrary to popular belief, professional guardians seldom express an interest in caring for the ward that the guardian is supposed to protect. Professional guardians do it for the money; a ward with plenty of assets - upscale home, tons of money in banks - is fertile ground for a professional guardian.

Once the professional guardian finds out the exquisite assets of the ward, bingo - the professional guardian struck a gold mine. As soon as the judge signs the guardianship papers the professional

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<sup>3</sup> See my companion white paper on Florida's Trespassing Laws at <http://www.edwardringwald.com/FlaTrespassLaws.htm>

guardian can go on a asset wasting spree, using the assets fraudulently obtained for the professional guardian's own benefit:

1. Removal of the ward from the home that he or she has lived in for many years, perhaps all of his or her life. The ward is then placed in an institution located far away from where the ward's relatives live, perhaps some kind of institution where it is more like a prison or even a mental hospital.
2. Once the ward is placed somewhere far away, the professional guardian sells the house right under the ward. Proceeds from the sale pay off the mortgage (if there is one) and the remainder of the proceeds go to the professional guardian for his or her own personal benefit.
3. Next, the bank accounts. Go to every bank or credit union where the ward had an account and loot the money. Once you got everything deposit it in your own personal bank account.
4. Spend down as much of the ward's assets as you can on the prison-like institution. At some point the ward will become indigent and the ward will end up being pushed around the state of Florida going from one institution to the next, not to mention ending up on Medicaid. Collect as professional guardian fees enough money to pay your mortgage and your luxurious style of living.
5. Professional guardians (as well as regular guardians) have to file initial and annual accountings with the court. Just falsify the paperwork to make it look good - perjury is common in guardianships, especially guardianships run by professional guardians. Besides, professional guardians and their attorneys work together as a team.
6. If the ward passes away, the guardianship is over. As the ward now has no assets for funeral expenses, the state takes care of the funeral arrangements. The family of the ward is kept in the dark until many years later, if ever.

A guardianship can be commenced against anyone without any warning. This has happened to unsuspecting people, especially the elderly and the disabled as well as anyone who has been in the United States Armed Forces that honorably served America<sup>4</sup>. For instance, a person could be transported to the hospital for even a minor condition and the hospital's social worker gets involved. The hospital social worker, knowing the patient's condition, brings in a charitable social services organization – such as a religious affiliated social services organization – and that organization based on the findings of the hospital social worker files both the regular Petition to Determine Incapacity and Petition for Appointment of a Guardian but – due to the lead time between filing the petition and the court hearing – a Petition for Appointment of an Emergency Guardian is filed. It basically contains the same information as the regular Petition to Determine Incapacity but the petition states that a regular petition was filed but a guardian was not appointed yet. Moreover, the petition states that immediate danger to the respondent will result unless action is taken and where the information is coming from.

Unfortunately, the Petition for Appointment of an Emergency Guardian is most of the time perjured due to facts that are made up either by the staff of the social services organization in concert with the hospital social worker. These emergency petitions are a fast track to guardianship, with a professional guardian standing ready to find out what kind of assets the respondent has and what kind of family the respondent has as well. Once the orders are signed by the judge it gives the professional guardian free rein on practically everything while waiting for the regular guardianship petitions to be heard.

If you look on a Petition for Appointment of an Emergency Guardian, there is a paragraph that is quite disturbing: ***Petitioner is an adult interested in the welfare of the alleged incapacitated person.*** That means anyone – even a social worker from a social services organization – can file an emergency petition based on perjured facts.

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<sup>4</sup> [Vets lose benefits as VA covers up mistake](#), 10 News (WTSP-TV) story by Mike Deeson, 29 April 2011

Emergency guardianships are supposed to last for 60 days, pending the outcome of the competency hearing. This 60 day window gives guardians – especially professional guardians – a jump start on looting the finances of the incapacitated person. However, if the guardianship transitions from the temporary 60-day emergency guardianship to a regular guardianship, things can change in a heartbeat as we will discuss in the next section.

### **How Long do Guardianships Last?**

It can be summed up in one word, especially if a professional guardian is involved: **FOREVER.**

A ward has the right to petition the court for review of competency if the ward has recovered to the point that the ward can manage his or her own affairs once again. In reality, it does not happen as professional guardians – along with their attorneys – have at their disposal a psychiatrist that will give perjured testimony that the ward cannot manage his or her own affairs. After all, a ward with significant assets is a professional guardian's working cow, managed for the professional guardian's own personal benefit.

Once the ward passes away, the professional guardian goes to work on finding his or her next victim. And the cycle keeps going and going, all legalized and sanctioned by the State of Florida under the guise of Florida's guardianship laws.

Same thing with Baker Act patients too. Towards the end of the 72 hour mandatory hold period, the administrator of the facility where the patient is committed will, along with the facility's psychiatrists, give perjured testimony that will keep a patient in the facility at least six months, if not indefinitely. The reason? Do it to collect the insurance and wipe the patient's lifetime maximum out. Just do it for the money.

### **What you can do to see that your loved one gets his or her wishes?**

First, and most importantly: **KEEP YOUR LOVED ONE OUT OF PROBATE COURT!** Probate court is when your loved one passes away and does not have a will. Of course if your loved one has a will it will make things much easier in probate court – a will determines who you say will get your property, not the State of Florida or your home state.

Second, you and your loved one should have a conversation with your attorney, one that is licensed by the Florida Bar and that specializes in elder law as well as wills, trusts and probate. There are many ways that you can provide for your loved one without having to resort to the court system, and your attorney can help you in that regard.

Third, unfortunately there are attorneys out there that say that guardianship will preserve the assets. If your attorney says so, *find another attorney immediately.* Guardianship is not the cure-all for asset preservation; instead, guardianship is for people who have lost the ability to manage his or her own affairs by reason of illness, whether it may be physical, mental or a combination of the two.

Again, I am going to say this: **KEEP YOUR LOVED ONE OUT OF PROBATE COURT!** Once a petition to determine capacity is filed with the court it is really the end of your loved one's relationship.

Besides, people who got served with papers determining a person's capacity to manage his or her own affairs have gone to major extremes to save their dignity and respect such as leaving the United States and renouncing American citizenship. Renunciation of American citizenship is a gravely serious matter.

*Did I mention renunciation of American citizenship? The major reason Americans renounce their citizenship is because of tax concerns as the United States taxes you, Mr. and Mrs. American Citizen, on your worldwide income, not just income earned in the United States. There are other reasons Americans go overseas and give*



*up their citizenship; one person involved in a child custody dispute as a result of a bitter divorce ended up renouncing his American citizenship in New Zealand when he tried to renew his American passport only to find out that, due to warrants out for his arrest on contempt charges related to the divorce, he would be issued a limited validity passport that would only be valid for the immediate return to the United States.<sup>5</sup>*

*In theory, a person served with a formal Notice of Petition to Determine Incapacity and for the Appointment of a Guardian could escape the wrath of the court and the examining committee by purchasing a round trip airline ticket to a location overseas, preferably Europe, and renouncing American citizenship (and get a refund on the return leg of the airline ticket) once there.*

After all, there are alternatives to guardianship out there – such as a durable power of attorney and a delegation of a health care surrogate, not to mention a living will – that can be considered. As such, consultation with an attorney is highly recommended and encouraged to see what can be done for your loved one. And if the ultimate happens and someone files a Petition to Determine Incapacity – a regular petition or an emergency petition – against your loved one, get an attorney fast as time is working against you.

### **Epilogue**

Guardianships are meant for people who have lost the ability to manage their personal and financial affairs due to a physical and/or mental incapacity. Guardianships are not meant for people to exert personal and/or financial control over a person, especially a person who is of sound health. Guardianships are not the cure-all for the person who spends money on items he or she does not need; however, if the activities cause a concern for the person's welfare the attorney can look into options other than guardianship that will still maintain a person's dignity and well being.

Unfortunately, Florida's guardianship laws allow for the legalized exploitation of the elderly and disabled by legally taking the property of a person and misappropriating the property, especially to a professional guardian's benefit. Loopholes allow total strangers to take charge of your loved one's affairs, like in the case of Carol Kinnear who ended up with a professional guardian, not the family member that was supposed to be appointed. Once a total stranger is in charge of your loved one's affairs, that stranger can go in and legally abduct your loved one from his or her home and place your loved one in an institution. Furthermore, a loved one's assets are sold right under the rug for the benefit of a professional guardian.

Our legislators need to go back and revisit Florida's guardianship laws and rewrite them in a way that preserves the dignity of a person. At the same time criminal penalties for exploitation of the elderly and disabled as well as kidnapping should be severely enhanced if the person that committed the act is a professional guardian, as well as a permanent bar on the professional guardian's activities in Florida.

After all, a person should live out his last days in the most familiar surroundings around: A person's home. Placing persons in an institution where there is no justified need defeats the purpose of guardianship.

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<sup>5</sup> See Harmon Wilfred's web site, LuminaDiem.com, at <http://www.luminadiem.com> – this is the story of a whistleblower who exposed corruption within the US Government which resulted in an incredible hardship on Harmon's personal and professional life, and went to New Zealand in order to begin rebuilding his life including renouncing his American citizenship when he ran into problems with the US State Department regarding renewing his passport.