



Lighting the Way to Guardianship

and Other Decision- Making Alternatives

A Manual for Individuals and Families



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Preface

The Florida Developmental Disabilities Council, Inc. (FDDC), recognizes that making legal decisions with and for individuals with developmental disabilities can be challenging. The Council believes it is important for individuals with disabilities and their families to have information that will empower them to manage all aspects of their daily affairs to the best of their abilities.

The primary purpose of *Lighting the Way to Guardianship and other Decision-Making Alternatives: A Manual for Individuals and Families* is to increase the knowledge of individuals with disabilities and their families about the various ways under Florida law to provide decision-making assistance, including guardian advocacy and guardianship.

Experts in various subject areas developed the original content of this manual using a rigorous process that included an assessment of the needs of persons with disabilities, families and attorneys and the development of specific training objectives. The content of this edition has been reviewed for accuracy and updated as of April 2017. The manual includes reference materials noted throughout with an appendix of additional resources and forms. As in previous editions, words or phrases in **bold** are defined in the Glossary.





Section 1

Introduction



Overview

This manual is designed to provide information to individuals with developmental disabilities, their families and other interested persons about the various ways to provide decision-making assistance under Florida law, including information about guardian advocacy and guardianship. Topics included are:

- A description of different types of disabilities and some of their common characteristics.
- A discussion of our fundamental freedoms and legal rights.
- Foundational concepts of self-determination and decision-making principles.
- Options for providing decision-making assistance.
- Legal processes for establishing guardian advocacy and guardianship.
- Termination of guardian advocacy and guardianship, including the restoration of rights process.
- Ways to access legal resources.
- A glossary of key terms, and an appendix of related information.

Learning activities are also included throughout the manual to help apply the concepts and information presented in this manual.

This manual is also available as a self-paced, interactive, online training course on the Florida Developmental Disabilities Council's website. Go to: www.fddc.org, Council Resources, Legal and Reference, to access this course.

Types of Disabilities

A general understanding of the underlying conditions and characteristics of different types of disabilities is important because they may affect an individual's **capacity** and ability to make decisions. However, a diagnosis of a disability alone is not sufficient to determine whether an individual possesses the necessary level of capacity or understanding to make a particular decision. It is important to consider the individual's ability to make meaningful choices as well as any information from formal assessments of capacity. The following descriptions are provided for general information purposes.

Developmental Disabilities

Federal and state laws defining developmental disabilities vary greatly. For federal purposes, a **developmental disability** may be any significant physical or mental impairment that occurs before the age of twenty-two. In Florida, a developmental disability is defined as a "disorder or syndrome that is attributable to **intellectual disability, cerebral palsy, autism, spina bifida**,



Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely" (Sec. 393.063(12), Florida Statutes). General descriptions of Florida's seven developmental disabilities are:

1. Intellectual Disability

An intellectual disability is characterized by significant limitations in both **intellectual functioning** and in **adaptive behavior**, which covers many everyday social and practical skills.

One way to measure intellectual functioning is with an IQ test. Generally speaking, an IQ score of 70 or below indicates a limitation in intellectual functioning. Adaptive behavior is the collection of conceptional, social and practical skills that are learned and performed by people in their everyday lives.

- Conceptual skills - language and literacy; money, time, and number concepts; and self-direction.
- Social skills - interpersonal skills, social responsibility, self-esteem, gullibility, naïveté, social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.
- Practical skills - activities of daily living (personal care), occupational skills, health care, travel/transportation, schedules/routines, safety, use of money, use of the telephone.

People with an intellectual disability:

- May need more time to learn.
- May have difficulty remembering things that are learned.
- May have difficulty using what is learned in a new situation.
- May think about things in more real-life or concrete ways.
- Will keep learning and developing throughout life, like all of us!

People with an intellectual disability may have other disabilities as well. Examples of these coexisting conditions may include other developmental disabilities, seizure disorders, vision impairment, hearing loss, and attention-deficit/hyperactivity disorder (ADHD).

2. Cerebral Palsy

Cerebral palsy is characterized by a group of disabling symptoms of extended duration which results from damage to the developing brain that may occur before, during, or after birth and that results in the loss or impairment of control over voluntary muscles. Potential sources of brain damage after birth could be a head injury resulting from an accident, fall, brain infection or child abuse.





Each person with cerebral palsy has different abilities and challenges. The effect of cerebral palsy on functional abilities varies greatly. Some people are able to walk while others are not. Some individuals show normal to near normal intellectual ability, but others may have intellectual disabilities. Epilepsy, blindness or deafness also may be present.

Persons with cerebral palsy may exhibit the following characteristics:

- Awkward or involuntary movements
- Poor balance
- Unusual walk
- Poor motor coordination
- Speech difficulties

3. Autism

Autism, more commonly referred to as Autism Spectrum Disorder (ASD), is a developmental disability that can cause significant social, communication and behavioral challenges. Autism Spectrum Disorder is characterized by several conditions that used to be diagnosed separately: autistic disorder, pervasive developmental disorder not otherwise specified (PDD-NOS) and Asperger syndrome.

There is often nothing about how individuals with ASD look that sets them apart from other individuals, but people with ASD may communicate, interact, behave, and learn in ways that are different from most other people. The learning, thinking, and problem-solving abilities of people with ASD can range from gifted to severely-challenged. Some people with ASD need a lot of assistance in their daily lives; others need less.

Characteristics of autism may include:

- Avoidance of or not paying attention to others
- Difficulty relating to other people
- Difficulty communicating
- Repetitive behavior
- Possible **cognitive impairment**
- Behavior problems that include resistance to change and emotional responses

People with autism may have sensitivity to stimulation of their senses. They can be overwhelmed by ordinary sights, sounds, smells and touches. The symptoms vary greatly, ranging from a very limited disability to the lack of ability to speak or live independently.



4. Spina Bifida

Spina bifida literally means “split spine” and is defined as a condition of the skin, spinal column, and spinal cord, in which the spinal cord fails to close. The causes are not known, but women who take folic acid before and during pregnancy have dramatically decreased the risk of having a child with spina bifida (but that does not always prevent the disorder).

Spina bifida does not get worse over time; however, secondary problems can worsen and require intensive management. Some of the health problems associated with spina bifida may include:

- Not having a sense of touch or pain in the legs
- Paralysis of bladder or bowels that interferes with the control of bodily functions
- Possible curvature of the spine
- Pressure sores
- Hydrocephalus
- “Club foot”

The extent of these problems varies with the location of the defect along the spine and the effectiveness of early medical intervention. Some people with spina bifida have relatively few of the problems listed above. Others require on-going medical care in one or more specialized areas. Although many people with spina bifida have average intelligence, there are some learning disabilities and cognitive impairments that can be associated with hydrocephalus.

5. Down Syndrome

Down syndrome is a condition in which a person has an extra chromosome. Typically, a baby is born with 46 chromosomes. Babies with Down syndrome have an extra copy of one of these chromosomes, chromosome 21. A medical term for having an extra copy of a chromosome is "trisomy." Down syndrome is also referred to as Trisomy 21. This extra copy changes how the baby's body and brain develop, which can cause both intellectual and physical challenges.

Even though people with Down syndrome might act and look similar, each person has different abilities. People with Down syndrome usually have an IQ (a measure of intelligence) in the mildly-to-moderately low range and are slower to speak than other children.

Some common physical features of Down syndrome include:

- A flattened face, especially the bridge of the nose
- Almond-shaped eyes that slant up
- A short neck



- Small ears
- A tongue that tends to stick out of the mouth
- Tiny white spots on the iris of the eye
- Small hands and feet
- A single line across the palm of the hand (palmar crease)
- Small pinky fingers that sometimes curve toward the thumb
- Poor muscle tone or loose joints
- Shorter in height as children and adults

Many people with Down syndrome have common facial features and no other major birth defects. However, some people with Down syndrome might have one or more major birth defects or other medical problems. Some of the more common health problems with Down syndrome are:

- Hearing loss
- Obstructive sleep apnea (a condition where the person's breathing temporarily stops while asleep)
- Ear infections
- Eye diseases (like cataracts and eye issues requiring glasses)
- Heart defects present at birth
- Early onset Alzheimer's Disease

Other less common health problems among people with Down syndrome include:

- Intestinal blockage at birth requiring surgery
- Hip dislocation
- Thyroid disease
- Anemia and iron deficiency
- Leukemia in infancy or early childhood
- Hirschsprung disease (a condition that affects the large intestine)

6. Phelan-McDermid Syndrome

Phelan-McDermid syndrome (also known as 22q13.3 deletion syndrome) is a rare chromosomal disorder caused by the loss of a small piece of chromosome 22. The deletion occurs near the end of the chromosome at a location designated q13.3.

The features of Phelan-McDermid syndrome vary widely and involve many parts of the body. Characteristic signs and symptoms include:



- Developmental delay
- Moderate to profound intellectual disability
- Decreased muscle tone (hypotonia)
- Absent or delayed speech

Some people with this condition also have autism or autistic-like behavior that affects communication and social interaction, such as poor eye contact, sensitivity to touch, and aggressive behaviors. They may also chew on non-food items such as clothing. Less frequently, people with this condition have seizures.

Individuals with Phelan-McDermid syndrome tend to have a decreased sensitivity to pain. Many also have a reduced ability to sweat, which can lead to a greater risk of overheating and dehydration. Some people with this condition have episodes of frequent vomiting and nausea (cyclic vomiting) and backflow of stomach acids into the esophagus (gastroesophageal reflux).

People with this syndrome typically have common physical features that include:

- Distinctive facial features (long, narrow head; prominent ears; a pointed chin; droopy eyelids; and deep-set eyes)
- Large and fleshy hands and/or feet
- A fusion of the second and third toes (syndactyly), and small or abnormal toenails
- Rapid (accelerated) growth

7. Prader-Willi Syndrome

Prader-Willi syndrome, also known as PWS, is a complex genetic disorder. It is usually associated with failure to thrive or an excessive drive to eat. The disorder can lead to obesity, hypogonadism, short stature or mild facial dysmorphism. Most people with PWS also have some degree of intellectual disability. Some cognitive difficulties are usually present even when intelligence is at normal level.

There are two distinct stages of Prader-Willi syndrome in the development of a child:

1. "Stage One" occurs during infancy. Infants have low muscle tone and are often characterized as "floppy babies" and may result in feeding and swallowing difficulties.
2. "Stage Two" occurs between the ages of one and two years and is characterized by an obsession to eat resulting in excessive weight gain that can persist through adulthood.

Personality difficulties may emerge between three and five years of age and include the following:





- Temper tantrums
- Stubbornness
- Acts of violence

Other characteristics include the following:

- Trouble pronouncing words
- Excessive sleepiness
- Decreased pain sensitivity
- Skin-picking habits
- Slowed growth

Age-related Disability

An age-related disability can occur as a natural progression of the aging process. Disabilities associated with aging may be related to cognitive limitations or may be related to physical limitations.

Neurocognitive disorders (also known as dementia) may occur at a greater incidence among older people, for example, Alzheimer's disease. Other causes of neurocognitive disorders may be completely unrelated to the aging process, such as vascular or alcohol-induced neurocognitive disorders. A person diagnosed with a neurocognitive disorder should be seen by a geriatrician or neurologist to rule out reversible causes for the disorder, such as the effects of medication or an untreated medical illness.

Some of the characteristics of neurocognitive disorders are:

- Difficulty in communicating, reasoning and problem solving
- Difficulty in handling complex tasks, such as planning and organizing
- Difficulty with coordination and motor functions
- Confusion and disorientation
- Personality changes, paranoia and agitation
- Depression and anxiety
- Inappropriate behavior

Physical limitations may prevent an individual from performing **activities of daily living (ADLs)**, such as bathing, dressing, eating, ambulating, toileting and general hygiene. Older persons may also experience an inability to perform **instrumental activities of daily living (IADLs)**, such as medication administration or managing finances.



The aging process may also see an increase in chronic conditions, including cardiovascular diseases, hypertension, stroke, cancer, chronic obstructive pulmonary disease, diabetes, arthritis, osteoporosis, and hearing and visual impairments.

Mental Health Conditions

Mental health conditions are characterized by alterations in thinking, mood or behavior resulting in distressed or impaired functioning. According to the U.S. Department of Health and Human Services, mental health problems are generally categorized into types of disorders. Four of those disorders are:

1. Personality Disorders – characterized by extreme and inflexible personality traits that are distressing to the person and may cause problems with interpersonal relationships. Examples of personality disorders include antisocial personality disorder and borderline personality disorder.
2. Anxiety Disorders – people with anxiety disorders respond to ordinary situations with fear and dread. Examples of anxiety disorders include post-traumatic stress disorder (PTSD), obsessive-compulsive disorder and phobias.
3. Mood Disorders – characterized by feelings of extreme sadness, happiness or fluctuations between the two. Examples of mood disorders include bipolar disorders, depression and self-harm.
4. Psychotic Disorders – characterized by a range of symptoms, such as delusions and hallucinations. An example of a psychotic disorder is schizophrenia.

Acquired Disability

An **acquired disability** may occur at any age as a result of injuries or disease after birth. Some examples of acquired disabilities are:

- A traumatic brain injury (a complex injury with a broad spectrum of symptoms and refers to any type of brain damage that happens after birth)
- A spinal cord injury (an injury that refers to any damage to the spinal cord that may occur because of an industrial or vehicular accident or violent crime resulting in partial or complete paralysis)
- Diseases, such as Muscular Dystrophy or Multiple Sclerosis





Common Misconceptions Surrounding Disabilities

As stated earlier, a diagnosis of a disability alone is not sufficient to determine whether an individual possesses capacity or understanding to make a particular decision. There are some common misconceptions surrounding disabilities that may lead to inappropriate guardian advocacy or guardianship.

- It should never be assumed that a person with a disability cannot have an opinion, make a decision, or function in ways that add meaning and dignity to life.
- A physical disability does not always mean that a person has an intellectual disability, and the presence of an intellectual disability does not mean that an individual cannot make selections among choices.
- An intellectual disability does not mean that a person cannot have meaningful or intimate personal relationships.
- An intellectual disability does not mean that a person cannot be a productive member of the community, a religious group, or achieve academically or professionally.
- Not every person with an intellectual disability is **incapacitated** and needs a **guardian**.
- Not every person who does not use words to communicate (non-verbal) must have a guardian.
- It should not be assumed that every person receiving support services or living in a licensed facility is incapacitated.

Civil Rights

In the United States, a civil (or legal) right is a freedom or privilege protected by either federal or state law. To protect and enforce the freedom and privileges of persons with disabilities, there are federal and state laws that contain broad legal safeguards. However, Florida law also provides a mechanism for certain rights to be removed through the court process of guardian advocacy and guardianship.

Federal Laws Protecting Civil Rights for Persons with Disabilities

Some of the most important federal laws ensuring the **civil rights** of people with disabilities are outlined below:

- Section 504 of the Rehabilitation Act and the Fair Housing Act passed in 1968, prohibits discrimination based on disability in programs and activities operated by any employer or organization that receives federal assistance from any federal agency.



- **The Americans with Disabilities Act (ADA)**, passed in 1990, prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunication. This comprehensive civil rights law requires that, among other things, state and local governments provide people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (such as public education, employment, transportation, recreation, health care, social services, courts, voting and town meetings).
- **The Individuals with Disabilities Education Act (IDEA)**, passed in 1997, requires every state to have in effect policies and procedures to ensure a free appropriate public education to meet the unique needs of students with disabilities. It requires the development of an **Individual Education Plan (IEP)** which is a written individualized education program detailing expected outcomes and special education services and supports for the student.

Summaries of additional federal laws that protect the civil rights of people with disabilities can be found on the Americans with Disabilities Act website. For more information, go to: www.ada.gov.

Florida Laws Protecting Civil Rights for Persons with Disabilities

The Florida Legislature has enacted laws that protect the rights of persons with disabilities, and include:

- The Florida Human Relations Act (Chapter 760, Florida Statutes) protects Floridians with disabilities against discrimination in employment and housing, or refusal to serve or accommodate because of a physical disability.
- Chapter 393, Florida Statutes, defines state programs for the treatment of individuals with developmental disabilities as well as addresses guardian advocacy and Florida's Bill of Rights of Persons with Disabilities.
Sec. 393.13(3), Florida Statutes, protects the rights of all persons with developmental disabilities. These persons shall:
 - (a) have the right to dignity, privacy, and humane care, including the right to be free from sexual abuse in residential facilities.
 - (b) have the right to religious freedom and practice.
 - (c) have the right to receive services, within available sources, which protect the personal liberty of the individual and which are provided in the least restrictive conditions necessary to achieve the purpose of treatment.





- (d) have a right to participate in an appropriate program of quality education and training services, within available resources, regardless of chronological age or degree of disability. Such persons may be provided with instruction in sex education, marriage, and family planning.
- (e) have a right to social interaction and to participate in community activities.
- (f) have a right to physical exercise and recreational opportunities.
- (g) have a right to be free from harm, including unnecessary physical, chemical, or mechanical restraint, isolation, excessive medication, abuse, or neglect.
- (h) have a right to consent to or refuse treatment, subject to the powers of a guardian advocate appointed pursuant to Sec. 393.12, Florida Statutes, or a guardian appointed pursuant to Chapter 744 of the Florida Statutes.
- (i) by reason of having a developmental disability, not be excluded from participation in, or be denied the benefits of, or be subject to discrimination under any program or activity which receives public funds, and all prohibitions set forth under any other statute shall be actionable under this statute.
- (j) by reason of having a developmental disability, not be denied the right to vote in public elections.

- Chapter 744, Florida Statutes, sets forth the provisions that govern guardianship as well as the duties and responsibilities of guardians.

Sec. 744.3215(1), Florida Statutes, protects the rights of persons who have been determined incapacitated. These persons retain the right:

1. To have an annual review of the guardianship reports.
2. To have a continuing review of the need for restriction of rights.
3. To be restored to capacity at the earliest possible time.
4. To be treated humanely with dignity and respect and to be protected against abuse, neglect and exploitation.
5. To have a qualified guardian.
6. To remain as independent as possible, including having the ward's preference as to a place and standard of living in keeping with his or her financial, physical and mental capabilities.
7. To be properly educated.



8. To receive prudent financial management for the ward's **property** and to be informed how the property is being managed.
9. To receive necessary services and rehabilitation.
10. To be free from discrimination because of **incapacity**.
11. To have access to the court.
12. To have access to legal counsel.
13. To receive visitors and communicate with others.
14. To have notice of all proceedings related to guardianship.
15. To have privacy.



Civil Rights under Guardianship

Regardless of ability, every adult automatically acquires certain legal rights at the age of 18 which cannot be taken away except through a legal process in court called guardianship. Even then, there is a constitutional guarantee of **due process** which requires a person be given notice and an opportunity to be heard before a court declares the person incapacitated and removes the person's legal rights.





Rights that May be Removed by a Court under Guardianship Proceedings

1. Right to apply for government benefits
2. Right to manage money and property or make dispositions of property
3. Right to determine residence
4. Right to consent to medical and mental health treatments
5. Right to make decisions about social environment or social aspects of the person's life
6. Right to contract
7. Right to sue and defend lawsuits
8. Right to marry (if the right to enter into a contract has been removed, the right to marry is subject to court approval as marriage is a contractual right under Florida law)
9. Right to vote
10. Right to have a driver's license
11. Right to travel
12. Right to seek or retain employment

Civil Rights under Guardian Advocacy

Guardian Advocacy is a legal process where someone obtains the legal authority to act on behalf of an individual with a developmental disability. Unlike guardianship, a court does not declare the person with a developmental disability incapacitated.

A person with a developmental disability for whom a **guardian advocate** has been appointed by the court retains all legal rights except those that have been specifically granted to a guardian advocate. The rights that can be granted to a guardian advocate are not specifically identified in statute (Sec. 393.12(9), Florida Statutes), but can include applying for government benefits, managing money and property, determining residence, consenting to medical treatment, making social decisions, contracting, and suing and defending lawsuits.

Guardian advocacy and guardianship are considered the most restrictive options for providing decision-making assistance to an individual. There are other less restrictive alternatives available to help with decision-making that should be



explored before a person is placed under guardian advocacy or guardianship. More information on guardian advocacy and guardianship as well as other available less restrictive options is provided in Sections 2 and 3 of this manual.

Sometimes parents and caregivers of individuals with a disability believe the responsibility and decision-making authority they exercised when a person was a **minor** extends past the age of 18 because they believe the person may still require assistance. But regardless of the person's functional or cognitive ability, legally, that person has the same legal rights as anyone else. This could mean that an individual with profound cognitive difficulties possesses all of his or her legal rights, but cannot actually make decisions to exercise or protect those rights. For those persons, decision-making assistance is important to ensure their legal rights are protected and exercised for their benefit.

Self-Determination

A fundamental freedom for all individuals is to live as independently as possible. With independence comes responsibilities – to the person, to his or her community and to society at large.

The right to **self-determination** is the foundation for creating the opportunity to participate in the decision-making process related to all aspects of one's life. The "decision maker" is always the person with a disability unless he or she has given permission to someone else or a court has taken away his or her civil or legal rights.

- At a practical level, self-determination involves giving people with disabilities greater control. This allows them to achieve their goals and acquire skills and resources necessary to participate fully and meaningfully in society. It also allows for learning from one's mistakes.
- Self-determination is also a philosophy that recognizes that people with disabilities are valuable, capable people and deserve to be treated with respect and with the same consideration that we all expect. Having the right, opportunity, and power to make meaningful choices is key to self-determination.
- Often, people with disabilities face limitations on their choices about where to live, whom to live with, how to spend their time and money and even what to eat. Real choice is about being able to choose from the same wide variety of lifestyles, goals, and preferences that others have. To achieve self-determination, people with disabilities must have ownership over their lives.

To move toward self-determination, the individual may need to rely on the support of others when decisions are being made and to understand and deal with the





consequences. The opportunity to expand one's experiences, make decisions and deal with the results ultimately helps the individual grow and develop in ways he or she never could if all the choices were safe and made by someone else.

For persons receiving decision-making assistance, that person must have the final say over the decisions that are made, and must ultimately be allowed to face the consequences of those decisions. Even for people under guardian advocacy or guardianship, the person with a disability should be meaningfully involved in making decisions.



Learning Activity #1

(Answer Key, page 101)

Ann is an 18 year old woman who is deaf, mildly autistic and has a seizure disorder. Ann wants to move out of the family home and attend a local community college. Ann's mother thinks Ann should move into a group home for young adults with developmental disabilities who need support services. Ann is currently receiving waiver services from the **Agency for Persons with Disabilities (APD)**. Her APD **support coordinator** agrees with Ann's mother.

Ann is on the APD **Medicaid waiver** and receives **Social Security Disability Insurance (SSDI)**. Ann's mother is her **representative payee**. Ann asked her parents, support coordinator, and a high school guidance counselor with whom she remains friends to attend a meeting to make some decisions about what she should do next and how the funding and services she receives should be applied.

Which of the following is an example of self-determination?

- The support coordinator gives Ann a list of group homes to choose from.
- Ann asks the support coordinator, her mother and guidance counselor to help her prepare a budget and research the options available for on-campus housing.

Why is your answer an example of self-determination?



Principles Underlying Decision-Making

Based on the concept of self-determination, the following principles should be understood in order to protect the civil rights of a person with a disability: **person-centered planning, least restrictive alternative, informed consent, substituted judgment and best interest.**

Principle #1 – Person-Centered Planning

When making short-term or long-term plans, the person leading the planning process should be the person affected, and all planning should involve that person to the fullest extent possible. Person-centered planning is based on the values of human rights, independence, choice and social inclusion, and is designed to enable people to direct their own services and supports.

The table below shows how person-centered planning is more desirable than a program-centered approach as it values the individual's right of independence through choice and social inclusion. The program-centered approach focuses more on organizations or the services they provide.

From Program-Centered	To Person-Centered
Plan a lifetime of programs.	Craft a desirable lifestyle.
Offer a limited number of usually segregated program options.	Design an unlimited number of desirable experiences.
Base options on stereotypes about persons with disabilities.	Find new possibilities for each person.
Focus on filling slots, beds, placements, closures.	Focus on quality of life.
Overemphasis on technologies and clinical strategies.	Emphasize dreams, desires, and meaningful experiences.
Organize to please funders, regulators, policies and rules.	Organize to respond to the individual.

The Council on Quality and Leadership, a non-profit organization recognized as a leader in person-centered planning, developed and defined three critical terms related to person-centered planning:

1. Person-centered planning – working with the person who is the focus of the plan to ensure that plans are based on an understanding of the person's unique priorities and desires.
2. Person-defined planning – an individualized approach to human services; the recognition that the measure of quality is not the delivery of a service or support, but the results that are defined by the person.





3. Person-driven planning – in addition to being person-centered in nature, services and supports are determined and controlled by the person to the degree the person chooses.

The Council on Quality and Leadership assists communities, systems and organizations to help people discover and define their own quality of life, and improve the quality of life for people with disabilities, people with mental illness and older adults. For more information on person-centered planning, go to: www.c-q-l.com.

PATH (Planning Alternative Tomorrows with Hope) and MAPS (Making Action Plans) are examples of person-centered planning resources that provide effective tools to use particularly with people who do not read. The end product is a picture or diagram that shows a person's current situation and the steps to follow in order to achieve the outcome(s) the person chooses. Either of these would be appropriate to use when making a particular decision or whether planning five years into the future.

- PATH training video is available at Inclusion Press. For more information, go to: <http://www.inclusion.com/vdpathtraining.html>.
- Introduction to the MAPS process is available at Inclusion Press. For videos and books, go to: www.inclusion.com/bkactionforinclusion.html.

Principle #2 – Least Restrictive Alternatives and Environments

In Florida, the legislative intent for the developmental disabilities statute is that "the greatest priority shall be given to the development and implementation of community-based services that will enable individuals with developmental disabilities to achieve their greatest potential for independent and productive living, enable them to live in their own homes or in residences located in their own communities, and permit them to be diverted or removed from unnecessary institutional placements." (Sec. 393.062, Florida Statutes)

Least restrictive alternative refers to the way an individual makes decisions that affects his or her life, to the services the person receives, or to the environment where the person lives, works, and plays. The act of defining the least restrictive alternative involves matching the individual's preferences, needs, skills and abilities with the available options. Consideration must be given to the person's freedoms, choices and liberty and deciding to what degree those freedoms, choices, and liberties will be restricted, as well as maintaining the person's dignity, protection and safety.



The key point in applying the least restrictive principle is to use a person's skills and abilities to the fullest extent when providing decision-making assistance. Family, friends, professional caregivers, attorneys and the judiciary should apply this principle whenever helping someone. When considering decision-making options, in particular, it is critical to identify the least restrictive option that protects the person's right to make his or her own decisions. Choosing the least restrictive alternative varies from person to person and can vary from civil right to civil right.

Many states have included the least restrictive concept in the laws governing decision-making alternatives. Florida's guardianship law requires a court to determine the validity of any lesser restrictive decision-making alternatives in use prior to the guardianship, such as **durable powers of attorney (DPOA)** or **trusts**. Additionally, a petition may be filed at any time during guardian advocacy or guardianship to determine whether a less restrictive option can meet the person's decision-making needs. If so, the continued need for the guardian advocacy or guardianship is determined. Some courts (such as those in Broward County, Florida) require the annual report to comment on whether a less restrictive option can now meet the person's decision-making needs. If the answer to the question is yes, the guardian advocate or guardian must explain what legal action has been taken to put the less restrictive option into place.

Principle #3 – Informed Consent

The three critical elements of the informed consent principle are:

- The person understands all relevant information related to the decision to be made (including the risks and benefits).
- The person has the ability to make and communicate a decision.
- The person volunteers his or her choice in an independent way (not coerced).

Informed consent is used most commonly when seeking medical or dental treatment. However, it can be applied whenever a person has to communicate a choice. Decision-making requires the ability to select from among alternatives and to know the consequences of each alternative.

It is critical that individuals have access to accurate information when making decisions. Developing a list of advantages and disadvantages may be helpful so that a quick decision based on emotions is avoided. Gather information from trustworthy individuals who are educated about the particular area.

Communicating decisions does not necessarily mean communicating orally. There are many devices that have been developed that a person can use to express his or her decisions, if necessary.



Principle #4 – Substituted Judgment

The principle of substituted judgment is based on a determination of what the individual would choose if he or she were able to make a choice. Substituted judgment is based on what is known about the values and preferences of the person. It is as if the caregiver or guardian is standing in the person's shoes or looking at life through the eyes of the person. Stated differently, what would the person decide to do if he or she could make the decision? Previous statements, lifestyle, enduring characteristics, and behaviors are used to reconstruct the person's values and preferences. Sources for such information include conversations with the person, family members, friends, or other reliable sources.

The only time that substituted judgment is exercised is when an individual has given another person the right to make decisions for him or her or when a court has given that right to a guardian advocate or guardian. For example, an individual may give someone he or she trusts a durable power of attorney (DPOA) or the court may appoint a guardian advocate or guardian.

A **legal representative** should not use substituted judgment if the preferences of the person are unknown or substantial harm would occur. According to the Standards of Practice from the National Guardianship Association, substituted judgment “promotes the underlying values of self-determination and well-being of the person [and] is not used when following the person’s wishes would cause substantial harm to the person or when the guardian cannot establish the person’s goals and preferences even with support.”

Principle #5 – Best Interest

When a legal representative uses the best interest principle, the person's needs, safety, health and welfare are the primary factors to consider. The legal representative's decision should be the same as the decision a reasonable person would make in a similar situation.

This principle is used when a person under guardianship never had capacity or when the person's wishes cannot be determined. It is also used when following the wishes of an individual would cause substantial harm to the person, or when it is not possible to establish the prior or current wishes of the individual. It is important under any situation when best interest principle is used that the least intrusive, most normalizing and least restrictive course of action possible is considered.

Many people think the best interest principle is the preferred principle to use in most instances. However, that is not the case. The best interest principle should be used only as a last resort because it completely replaces the person's input. Although the person's preferences are to be considered, the legal representative is making the decision for the person, with the least amount of involvement from the person.

A good understanding of these five principles is important in assuring that a person's rights are protected, and considering each of these principles will promote a better outcome.





Learning Activity #2

(Answer Key, page 101)

Aunt Susie is 80 years old and lives alone. She cooks her own meals and takes her own medications. She has burned a couple of pots in the last couple of months. It is unclear whether Aunt Susie always takes her medicine on time.

Aunt Susie's doctor says that she is no longer able to take care of herself. Family members met with Aunt Susie and together they came up with the following available options for her to choose from:

- A. Ignore the doctor's advice and continue her current lifestyle and living arrangement
- B. Move to a nursing home
- C. Move in with a relative or friend
- D. Stay at home and arrange for someone to help her do certain tasks.
- E. Move to an **assisted living facility (ALF)**

Apply the "least restrictive" concept to the five options (A-E) noted above. Think about Aunt Susie's abilities, her needs, and the options she developed. Put the options in order from least restrictive to most restrictive, by placing the letter of the option beside the appropriate number.

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____

Least Restrictive
↓
Most Restrictive



Learning Activity #3

(Answer Key, page 102)

Uncle John smokes, and his doctor says he has to stop for health reasons. Should the guardian use the best interest or substituted judgment principle in deciding whether cigarettes should be withheld from Uncle John in this situation?





Learning Activity #4

(Answer Key, page 102)

Mary L. is a 49-year-old resident of a state institution. Her current diagnosis is an intellectual disability with a convulsive disorder. At the age of four, Mary struck her head falling down stairs. Shortly thereafter she had a seizure. Seizure medications were administered; however, she failed to tolerate them. Due to the high degree of care needed, the constant monitoring of her blood levels, and subsequent adjustments in type and dosage of medication, Mary was placed in an institution at the age of five by her family. There has been no family contact since Mary's placement in the institution. At the present time, Mary can indicate certain preferences for various types of food, but has demonstrated no ability to communicate preferences relating to more complex decisions. Which decision-making principle should be used in this situation? Best interest or substituted judgment?



Learning Activity #5

(Answer Key, page 102)

Alice H. is a 94-year-old resident of a nursing home. She raised a family of four children and was an active and vocal participant in community projects. Four years ago, prior to being admitted to the nursing home, Alice fell and suffered a broken hip. She refused all treatment for her condition and consequently became bedridden. Friends and various social **service providers** ensured Alice's well-being until the combination of her physical and mental conditions made this task overwhelming. Soon after her admission to the nursing home, she began to suffer memory loss and was eventually diagnosed as having Alzheimer's disease. She is now in the latter stages of the disease and has virtually no ability to make decisions for herself. Which decision-making principle should be used in this situation? Best interest or substituted judgment?



Transitional Stages of Life

All factors mentioned in the previous section are principles that guide decision-making and planning efforts over time. There may be special issues related to decision-making and planning during different stages of life, and this section will focus on three groups who may experience these transitions:

1. Adolescents with a disability in the school system transitioning into adulthood.
2. Adolescents with a disability in foster care transitioning into adulthood.
3. Adults who acquire a disability.

1. Adolescents with a Disability in the School System

Moving from adolescence to adulthood involves many biological, social, emotional, and legal changes. This lifespan transition includes the biological changes of puberty, the increased emphasis on social relationships with peers, the emotional stress of developing one's personal identity, and the legal ramifications of reaching the age of majority. Given all these changes, adolescence can be a difficult time for all people, but for individuals with disabilities there are unique issues that must be carefully addressed.

Four issues that impact an adolescent's future quality of life that must be considered are:

- The need to plan for assuming rights and responsibilities of adulthood.
- The reality that decision-making responsibility transfers from parent to 18-year-old young adult.
- Whether decision-making assistance is needed and what options are available.
- The decision to remain in school until the age of twenty-two (22).

One way to prepare for the critical transition to adulthood is by focusing on an adolescent's educational program. Public schools provide early intervention, special education and related services to eligible infants, toddlers, children and youth with disabilities. Under the Individuals with Disabilities Education Act (IDEA), an Individual Education Plan (IEP) is required for each eligible student and reviewed annually to determine the student's progress. While developing and following an IEP is not required of students who are home-schooled or who attend a private school not receiving federal funding, following a similar process would certainly result in preparing a child with a disability to be as independent as possible.

The IEP annually addresses and documents the student's level of educational performance, including how the disability affects the student's involvement and progress in the general curriculum. The effect of the disability may then become





the priority educational need of the student. The corresponding measurable annual goals, including benchmarks or short-term objectives, are developed to address the needs of the student.

If a child is in public school, beginning at age 16, the student's IEP must include post-school goals and a statement of needed transition services. Transition planning can begin earlier, so that the major focus of the IEP during adolescence is developing goals and implementing a plan to prepare the student with a disability for adult living. It is critical that transition from adolescence to adulthood becomes the driving force in planning and provision of educational services during this time in a student's life.

Whenever the IEP review discusses transition, the student must be invited to attend the meeting. A student can participate in a transition IEP meeting with support from family, teachers, and anyone else the legal representative invites to attend, including agencies providing services to the student. In order for the student's participation to be meaningful, school district personnel are strongly encouraged to provide an orientation to the IEP transition process and provide instruction for students and their families in self-determination skills (skills, including self-awareness, self-advocacy, making choices, setting goals, solving problems, and taking action). Involving the student in each step of transition planning is critical, and his or her interests, preferences, needs and abilities must be taken into consideration (person-centered planning).

- There are other resources available, in addition to the IEP, to help with transitional planning, including PATH and MAPS (see reference under Principle #1 – Person-Centered Planning on Page 17).
- See additional Education Resources in the Appendix.

The IEP transition planning process presents the perfect opportunity to discuss decision-making assistance the student may need upon reaching the age of 18, as well as educational areas on which to focus so that the student will be prepared to participate in decisions as much as possible.

The Individuals with Disabilities Education Act (IDEA) includes a special provision that can assist students with disabilities and their families when making decisions about the legal implications of reaching the age of majority. The IDEA states that before a child reaches the age of majority, the child must be informed of any rights that transfer to the child on reaching the age of majority. This requirement provides an opportunity to have an informed discussion about abilities, building independence, the need for supported decision-making, and the legal processes of guardian advocacy and guardianship.

Parents and children should not wait until the child's 18th birthday to prepare for legal independence. When an adolescent turns age 18, the parents no longer have the right to attend IEP meetings without their child's consent. Additionally, after age 18, the young adult decides whether he or she will remain in school - not the parent. Students with disabilities are allowed to remain in school until



they reach the age of 22. That is why it is so important to establish, implement, and revise as necessary the student's IEP. By doing so, parents will increase the opportunity for their child's successful transition to adulthood by planning for the eventual independence of their children.

If a parent is concerned about educational situations, the adult student may consider using an educational **power of attorney**. An educational power of attorney allows an adult student to authorize another person to participate in education decisions, such as requesting accommodations, access to records and attendance at IEP meetings. The adult student needs to understand that he or she is giving authority to make educational decisions to someone else. When considering an educational power of attorney, consulting with an attorney is recommended. (For more details, see Section 2, Power of Attorney/Durable Power of Attorney and the Sample Educational Power of Attorney in the Appendix.)

Family members may receive erroneous information from a school official or others that an adolescent approaching his or her 18th birthday should be placed under guardianship of a parent, and that the family member should contact an attorney. Furthermore, the family member may mistakenly believe that the granting of guardianship is an automatic process and is accomplished by simply completing a form, such as a durable power of attorney.

A diagnosis of a disability is not, by and of itself, grounds for guardian advocacy or guardianship. Even when it is clear that a person is functionally impaired and needs decision-making assistance, guardian advocacy or guardianship may still not be appropriate. Decision-making assistance may be addressed by less costly and less intrusive measures. (See Section 2, Options for Providing Decision-Making Alternatives Other than Guardian Advocacy or Guardianship.)



- Local school districts and individual schools in Florida vary in terms of how they comply with federal and state requirements. What is consistent, however, is that the transition planning requirements of IDEA provide a natural opportunity to involve students and families in a discussion about the skills needed to make decisions, how to exercise rights responsibly, exercise self-advocacy, and become self-determined. Use this opportunity wisely!
- It is important to keep copies of IEPs and any other evaluative assessments conducted over the school life of a child. These documents:
 - May be useful in accessing services and benefits.
 - Can be helpful when working through identifying what tools to use for decision-making assistance.
 - Can be useful if seeking legal advice from an attorney.
 - May be used as **evidence** in a judicial proceeding to determine guardian advocacy or guardianship.
- If a student is receiving services from the Agency for Persons with Disabilities, the support plan should address services and supports to maximize the attainment of educational and habilitative goals of the student.

2. Adolescents with a Disability in Foster Care

Young adults transitioning out of foster care face the same challenges and opportunities as other adolescents transitioning into adulthood. They may also face additional challenges preparing for independent living as an adult. Many of these young adults are not ready to live independently, and family supports may not be present.

Chapter 39, Florida Statutes, requires the foster care system, also known as the "dependency system," to consider whether children with disabilities who are approaching the age of 18 will need decision-making supports beyond the child's 18th birthday. The law:

- Requires the Department of Children and Families (DCF) to develop an updated case plan for any child in foster care 17 years of age or older who may require the assistance of a guardian advocate, **limited guardian**, or **plenary guardian**.
- Requires that upon a judge's finding that no lesser restrictive decision-making assistance will meet the child's needs, DCF must complete a report and identify individuals who are willing to serve as a guardian advocate or as a limited or plenary guardian. Sometimes, the foster parent or **guardian ad litem** may be willing to accept that role.
- Allows guardianship courts to exercise jurisdiction over dependent children who are 17 ½ years of age for the purpose of appointing a



guardian advocate, limited guardian, or plenary guardian and requires that the minor receive all the due process rights of an adult during the guardianship proceeding. This provision intends to ensure there is no time gap between the care of a foster parent and the care of a guardian or guardian advocate.

- Allows the child's parents to remain the child's natural guardians unless the parents' rights have been terminated.

Extended Foster Care is a program offered by the Florida Department of Children and Families and is designed to support young people with a disability transitioning from foster care to independent living. This program offers support with living arrangements, as well as postsecondary education services; it also provides temporary financial services that include rent payments, car repairs, employment assistance, and mental health or substance abuse services. Young adults, ages 18-22, are eligible for the Extended Foster Care Program.

For more information, go to: <http://www.myflfamilies.com/service-programs/independent-living/extended-foster-care>.

3. Adults Who Acquire a Disability

As we all age, we may have situations occur when we may not be able to manage at least some of our property or meet some of our health and safety needs. Examples of these situations include:

- A change in circumstances for a person with an existing disability (for example, Down syndrome with early onset of Alzheimer's disease).
- An acquired disability (for example, traumatic brain injury, spinal cord injury, age-related dementia, etc.).
- An individual with mental health issues (for example, depression, schizophrenia) or other severe mental illness.
- An individual whose capacity is affected due to the natural progression of the aging process.

If a loved one is exhibiting any cognitive impairment, consider an evaluation by a qualified medical professional to determine if the impairment is treatable before addressing if any decision-making assistance is needed. It is important to constantly monitor the person's health for signs of improvement.

Medical professionals and psychologists have many tools to assess functional, cognitive and neuropsychological symptoms and disorders. The use of these tools should be considered to assess a person's functional capacities prior to implementing restrictive decision-making options.





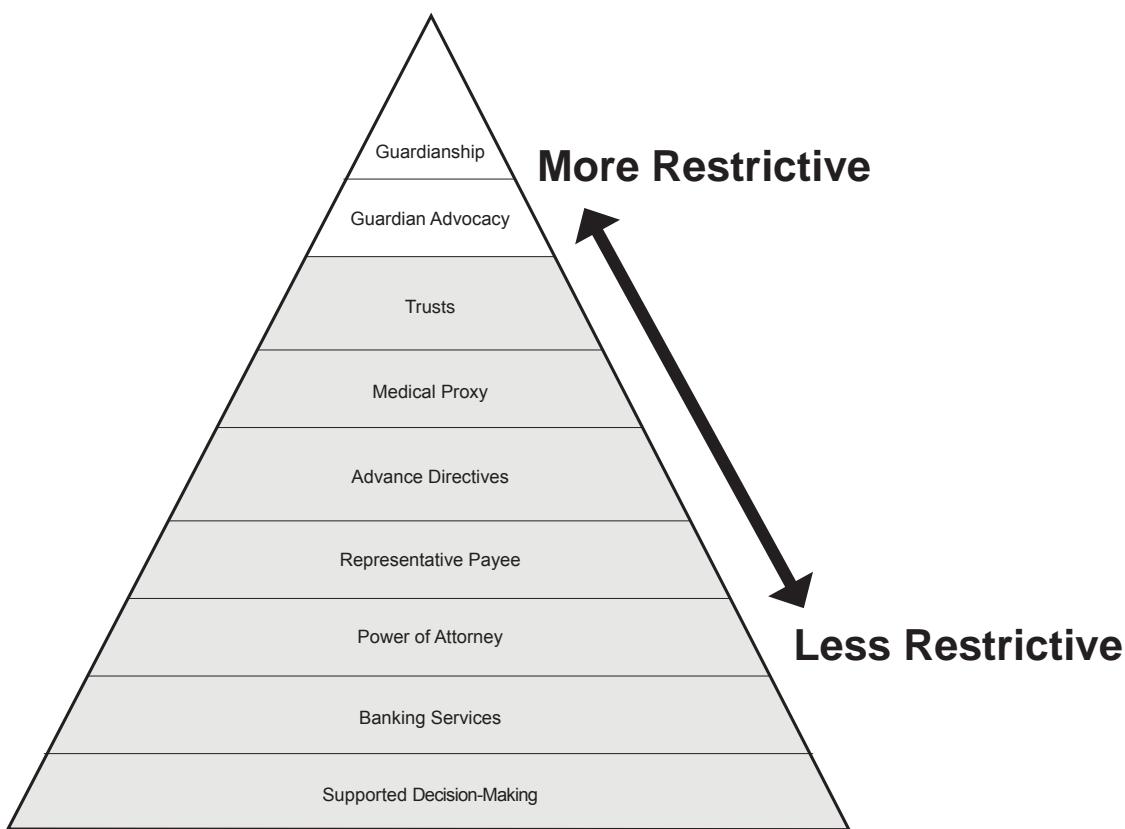
Section 2

Options for Providing Decision-Making
Assistance Other Than Guardian
Advocacy or Guardianship



Every adult has the authority to make his or her own decisions, and may or may not ask for the assistance of others. If someone needs assistance, the seven options presented in this section may be used to provide assistance with decision-making and are alternatives to guardian advocacy and guardianship. These options will be explained by beginning with the least restrictive option and ending with the more restrictive option.

The following diagram shows the options which are discussed in this section, as well as guardian advocacy and guardianship which are addressed in Section 3.



With the exception of Medical Proxy, the overall theme of the options shaded in the diagram all share the same focus:

- The person decides who will assist him or her in making decisions (the legal representative).
- The person decides how the legal representative assists him or her.
- The person decides when the legal representative assists him or her.
- The person decides when the legal representative will no longer represent him or her.

As long as a person can understand the nature of the decision at hand; the risks and benefits associated with available options and the potential consequences of his or her choice; then it is generally understood the person has capacity to make



that decision. For example, the person must understand the difference between living in an apartment versus a group home (the decision); be able to consider that an apartment may be more expensive than a group home, but an apartment may afford greater freedom (risks and benefits); and, understand that if he or she chooses an apartment be able to identify what additional supports may be needed (consequences). If there is a question about a person's ability to make a decision, a court may have to decide the person's capacity to make decisions and whether guardian advocacy or guardianship would be a more appropriate way to provide decision-making assistance.

The following options will provide strategies, tools and instruments to consider when looking at ways to help provide that assistance. While there may be multiple tools to address a specific need, there are many factors that should be considered before making a decision on using any particular tool. These factors can include the individual's abilities, preferences, **circle of support**, available services and resources.

Decision-making capacity does not require a person to understand every sentence in a legal document, but does require the person to understand the nature of the decisions, the risks and benefits, and potential consequences.

Option 1 - Supported Decision-Making

We all rely on assistance in making decisions in our lives on a daily basis: choosing a new doctor, buying a new car, deciding where and with whom to live. This assistance may come from our family, friends or other people we value in our lives (circle of support), or it may come from professionals in a specific area. Support and assistance can come from governmental and non-governmental programs, as well. Supports may be publicly funded or can be paid for privately. Depending on our skills, knowledge and ability, we rely on these people to varying degrees for assistance.

Using our circle of support is one of the least considered ways to provide decision-making assistance for persons with disabilities. Why is this? For younger people with disabilities, many believe it is because learning to make decisions and participating in the decision-making process is not emphasized enough, particularly during the transition years of 16 through 18 years of age. Making bad decisions or not having opportunities to learn how to make decisions should not be the basis for deciding that someone needs a legal representative.

Supported decision-making is a new term used to identify the process described above. The individual providing assistance is sometimes referred to as a supporter. The arrangements between supporters and people who use their assistance can be an informal arrangement or can be formalized in a written agreement.



The National Resource Center for Supported Decision-Making assists people with disabilities to exercise their right to make their own decisions and direct their own lives. Resources include state comparisons; research and resource library; educational and training resources; personal stories and examples of self-determination and supported decision-making plans. For more information, go to: <http://supporteddecisionmaking.org/>.

We all make good choices and bad choices. We have the right to make our own decisions regardless of the quality of our decisions. Supported decision-making is the least restrictive option and allows us to decide when we will consult others for advice and assistance. Supported decision-making can be used for assistance in exercising any legal rights.

Depending on the circumstances and needs, an individual may decide that he or she needs assistance with decision-making or wants to **delegate** some authority to someone else using more formal options. The following options will present some strategies, tools and instruments that can be used to provide more formal options to those needing help with decision-making.

Option 2 - Banking Services

Formal decision-making assistance may be provided for money management using banking services. Banks and credit unions assist in managing money through checking and savings accounts. It is critical that if the right to manage money is shared with another, the person selected is a trusted person.

The following list shows the various ways money and property can be managed:

- Creating a joint bank account that has two or more persons depositing or writing checks. While there is no real legal protection, a person with limited banking ability may willingly use a joint account and accept help from the other signee(s) who manages and pays the bills.
- Establishing direct deposit/direct payment to facilitate simple banking procedures. In fact, Social Security requires this method because it is simple, safe and secure.
- Using the internet for online banking, for example, to pay monthly bills if someone has difficulty writing checks.
- Obtaining a prepaid reloadable debit card which manages spending through customized settings; allows a person to spend what is needed; can also be designed to limit fraud, exploitation or overspending.
- Assigning someone as power of attorney (POA) to officially act for the owner of the account (Chapter 709, Florida Statutes). The power of attorney has no ownership in the account, but can access, withdraw or deposit funds in the account.



Option 3 - Power of Attorney (POA) and Durable Power of Attorney (DPOA)

A Power of Attorney (POA) is a legal instrument that gives one adult legal authority to act for another adult. The person giving the authority is called the “principal.” The person who is given the authority to act for the principal is called the “agent.” A Durable Power of Attorney (DPOA) specifically provides that it will remain in force even if a person becomes incapacitated at a later time. POAs and DPOAs are very flexible and can be drafted to address a person’s specific decision-making needs.

Example of the Difference between POA and DPOA

You have purchased a new car and decided that you can get more money selling your old car rather than trading it in. You are going on a two-week vacation, and your cousin has offered to advertise the car for you and sell it if he can. You give him a POA to sell your car, the time frame for which he can do this, as well as a minimum price you are willing to accept. Five days into your vacation, your cousin finds a buyer. Because he has your POA, he can accept the money from the buyer and sign the title for transfer from you to the new buyer.

However, change the facts in the above scenario. After you and your cousin talk about the sale, you are in a serious accident and are admitted into a hospital in a coma. Because the POA you gave your cousin was not a “durable” POA, the POA is no longer effective now that you are incapacitated, and your cousin is no longer able to sell your car.

POAs and DPOAs can cover simple tasks like writing or endorsing checks. They can also involve more complex matters like selling real estate or establishing a trust. They can be very specific or very general. They can authorize just one task, like selling a car, or, it can give an agent the power to do almost everything an individual can do for themselves. The authority to do certain tasks must be specifically outlined in the POA or DPOA and initialed by the principal.

An attorney should draft a POA or DPOA. “Over the counter” forms may not meet Florida’s legal requirements. An attorney will also be able to help a person understand how to tailor the powers of these instruments to the person’s wishes and needs.





Some general rights and other specific authority that can be delegated to another individual using these instruments are:

- To apply for government benefits.
- To decide living arrangements.
- Consent to medical and mental health treatments (a specific authority can allow an agent to access medical records and make health care decisions; an individual can waive HIPAA protection - **Health Insurance Portability and Accountability Act**, and allow someone access to the individual's medical records and/or medical information).
- To manage money and property.
- To contract.
- To sue and defend lawsuits.
- To authorize someone to make educational decisions for an adult student, such as requesting accommodations or accessing educational records.

When someone signs a POA or a DPOA, he or she delegates decision-making authority to another, but does not lose the right to continue to make his or her own decisions.

There are potential challenges with giving someone a POA or DPOA that should be considered:

- Will service providers accept the POA or DPOA? Banks, doctors and others may question whether the principal has the capacity to give someone else the authority to exercise the right(s). This is a particular challenge for persons with intellectual disabilities, like persons who have an acquired brain injury and persons whose abilities are declining with age. There are penalty provisions in the statute in the event a bank or financial institution unreasonably refuses to honor a POA/ DPOA, but this can take time and incur expense in enforcing these laws. If a POA/DPOA is challenged, ask for a manager. A bank's legal department will review the documents.
- It is extremely important to choose an agent who is trustworthy to avoid abuse, exploitation, or coercion by the agent.
- The authority of a POA/DPOA may be suspended upon the filing of a Petition to Appoint a Guardian Advocate or a Petition to Determine Incapacity.

A person may revoke (cancel) the authority given to another by providing written notice to the agent and to anyone who reasonably relied on the POA or DPOA and has received a copy. A good recordkeeping practice is to keep a list of the people to whom a copy of the POA or DPOA is given so there is a complete and updated notification list when revocation occurs. The ways to revoke or terminate a POA and DPOA are:



1. Revocation:
 - a. Expressing the revocation in a subsequently executed power of attorney.
 - b. Expressing the revocation in another writing signed by the Principal.
 - c. Physical revocation which means the person physically destroys the document with the intent of revoking the POA/DPOA.
2. Specific events, such as time specified has expired, the agent dies, or the task(s) accomplished.
3. Death of the Principal.

For banks and other financial institutions, there are additional rules to provide notice of revocation.

The Florida Bar provides additional information regarding POAs and DPOAs. For more information, go to: www.floridabar.org.

Option 4 - Health Care Advance Directives

An **advance directive** instructs others how health care rights are handled and delegates who will make health care decisions when someone is unable to make those decisions.

Documenting and delegating a person's wishes today means the family will not have to make heart-wrenching decisions later. Everyone should have an advance directive unless he or she lacks the capacity to make those decisions. The term "advance" is used because the directions are given before they are needed. The term "advance directive" applies to several different legal options, including a living will and **health care surrogate** designation.

A living will is an oral statement, or a written statement signed in the presence of two witnesses that expresses instructions on life-prolonging procedures, such as cardiac resuscitation or artificial feeding. It also allows a person to express spiritual, personal or emotional wishes. A living will comes into effect when the person loses capacity or the ability to express a decision and one of these three conditions exists:

- End-stage condition of a disease
- Terminal illness
- Persistent vegetative state

A health care surrogate designation names a surrogate to make health care decisions when an individual becomes incapacitated. The health care surrogate



designation must be signed by the individual in front of two witnesses. It allows the surrogate to make health care decisions, apply for public benefits and access medical records. The surrogate is named in advance, but the surrogate designation does not take effect until the primary or **attending physician** determines the individual is incapacitated, unless the document states the surrogate can act immediately. The authority of a health care surrogate may be suspended upon the filing of a Petition to Appoint a Guardian Advocate or a Petition to Determine Incapacity.

The health care surrogate's scope of authority includes:

- Applying for public benefits, such as Medicare, Medicaid and veterans' benefits.
- Providing informed consent for all medical and mental health treatments, including preventive, diagnostic, therapeutic, rehabilitative and palliative care.
- Accessing and releasing medical records and information.
- Authorizing the admission, transfer or discharge from health care facilities.
- Authorizing end-of-life decisions under certain conditions, like a terminal illness.
- Donating organs.

- The Florida Agency for Health Care Administration (AHCA) website provides health care information and addresses common questions and answers related to living wills and health care surrogate designations. For more information, go to: www.floridahealthfinder.org.
- Aging with Dignity is an organization that publishes the document "Five Wishes." This is an easy-to-use document to plan how someone would want to be cared for should he or she become seriously ill. Knowing directions will be followed will not only give someone peace of mind, but will also help family members make decisions. Go to: www.agingwithdignity.org/5wishes.html or call toll free, 1-888-5WISHES (1-888-594-7437) to obtain copies (see Appendix).

Option 5 - Representative Payee

A representative payee is an individual or agency appointed by the Social Security Administration (SSA) to receive and manage SSA federal benefits only. These benefits can include **Supplemental Security Income (SSI)**, Social Security Disability Insurance (SSDI), and retirement benefits from the Social Security Administration (SSA). To become a representative payee, a person or agency must apply for and be appointed a representative payee by the Social Security Administration. The representative payee's main duty is to use the beneficiary's benefits to pay for the current and future needs of the beneficiary, and to properly save any benefits not used for current needs.



SSA takes the position that being a legal representative through a power of attorney, joint owner on a bank account or a guardian advocate/guardian is not automatic grounds to allow you to be a representative payee.

Representative payee is another formal decision-making tool that may be used for delegating money management to someone else.

For additional information from the federal government about representative payees, go to: www.ssa.gov/pubs/10076.html.

Option 6 - Medical Proxy

A medical proxy is an option that can be used when someone has not designated an advance directive and needs medical decision-making assistance.

The person must have a developmental disability or lack clinical capacity as determined by the primary or attending physician. Unlike an advance directive, the person needing assistance does not choose who will make his or her health care decisions.

Florida law lists the order of priority of persons who can make health care decisions:

1. A legal guardian or guardian advocate
2. A spouse
3. An adult child or a majority of adult children
4. A parent
5. An adult sibling or a majority of adult siblings
6. Any other adult relative
7. A close friend
8. A licensed clinical social worker who meets certain criteria

A medical proxy has the same authority as a health care surrogate. A medical proxy can:

- Apply for public benefits, such as Medicare, Medicaid and veterans' benefits.
- Provide informed consent for all medical and mental health treatments, including preventive, diagnostic, therapeutic, rehabilitative and palliative care.
- Access and release medical records and information.
- Authorize the admission, transfer or discharge from health care facilities.



- Authorize end-of-life decisions under certain conditions, like a terminal illness.
- Donate organs.

See Appendix for specific language found in Section 765.401, Florida Statutes, regarding medical proxies, and a sample medical proxy form.

Option 7 - Trusts

A trust is a legal relationship where a person has a legal obligation to **manage property** for the benefit of another person. “Property” can include cash, real estate, stocks, jewelry or anything of value.

The three basic parties in all trusts are: settlor, trustee and beneficiary.

1. The settlor (sometimes referred to as the “grantor”) is the person who initially sets up the trust.
2. The trustee is the person who manages the property.
3. The beneficiary is the person who gets the benefit of the property.

These three parties can all be the same person or different people.

The settlor directs how the trustee manages the trust assets in the trust document. Trustees can be individuals or institutions (for example, banks, trust companies or not-for-profit corporations). There will likely be successor trustees which will step in if something happens to the first trustee.

The trustee manages the trust for the benefit of the beneficiary. There can be more than one beneficiary. Future beneficiaries are usually named to receive the funds of the trust upon some event occurring, such as the death of the current beneficiary.

Trusts can be revocable (changeable) or irrevocable (not changeable).

Revocable Trusts

A “living trust,” also known as a “revocable trust,” supplements a **Last Will and Testament** and when properly funded can allow a complete or partial avoidance of the time and expense involved in probate proceedings after death. A living or revocable trust can also provide an alternative to guardianship should the beneficiary become incapacitated.

During the settlor’s lifetime, the trust is revocable, meaning it can be terminated by the settlor, property can be transferred into and out of the trust by the owner, and amendable, so that the terms of the trust relating to distributions, naming of



trustees and other provisions can be altered. However, at the time of the settlor's death or incapacity, the trust becomes irrevocable.

There is no magic dollar value which determines whether or not to set up a revocable trust. Instead, it is the type of assets and the circumstances of the individual and his or her family which will often dictate the most appropriate trusts for the individual's personalized plan.

Revocable trusts do not allow someone to keep his or her own funds while still qualifying for or maintaining public benefits.

Irrevocable Trusts

Irrevocable trusts are trusts which cannot be changed once the trust is established (however, under Florida's Trust Code there are ways to modify irrevocable trusts, if necessary). Generally, irrevocable trusts are used for estate tax planning purposes and occasionally, in protecting assets to pay for long-term care. Because irrevocable trusts may lack flexibility, an irrevocable trust will only be used to address specific needs.

Special needs trusts, which are irrevocable, are used to protect eligibility for public (government funded) benefits for persons with disabilities.

Special Needs Trusts

The terms "special needs," "supplemental needs," and "supplemental care" trusts refer to trusts which allow someone to keep his or her own funds while still qualifying for or maintaining public benefits programs. The public benefits most often needing protection are Medicaid, Supplemental Security Income (SSI), food assistance and public housing. The funds in a special needs trust are intended to improve the quality of life for a beneficiary and may be used to pay for items not provided for by public benefits programs.

Without a special needs trust, assets belonging to, or left for the benefit of, a person with a disability could easily be exhausted on basic medical essentials therefore leaving no funds for other necessities of life, such as housing, food, clothing, transportation, entertainment and non-essential medical care. If there are financial resources available to help the individual, those resources need to be used wisely to last for the individual's lifetime. Public benefits programs can provide income streams or basic medical coverage thus allowing the special needs trust to purchase items not covered by governmental benefits.

Generally, special needs trusts are funded two ways: self-settled (using the individual's own funds) or third party (funded with assets belonging to someone other than the individual).



1. Self-Settled Special Needs Trusts

Self-settled special needs trusts are established with the individual's personal assets (not other family members' assets). For an individual with a disability, there are three common circumstances under which he or she will have money of his or her own:

- a. A personal injury settlement where funds are directly received by the person with a disability, or his or her guardian.
- b. An inheritance.
- c. Accumulated assets, such as wages or gifts.

Types of Self-Settled Special Needs Trusts

- **Under Age 65 Disabled Trust (d4A):**

In this type of self-settled trust, the person with a disability has his or her own trust and trustee. The individual is the sole beneficiary of this trust. As the name implies, the beneficiary must be under age 65 to fund one of these trusts.

These trusts can only be established by the beneficiary's parent, grandparent, legal guardian or by a court order. The beneficiary cannot currently establish this type of special needs trust for himself or herself.

Ideally, the funds in this trust should be used during the lifetime of the beneficiary to enhance his or her quality of life. If all the funds are not used, the remaining funds in the trust, upon the death of the beneficiary, must pay back the state for medical benefits received through any state Medicaid program during the lifetime of the beneficiary.

- **Income Trust (d4B):**

Income trusts are used to qualify for Medicaid funded home and community based waivers and skilled nursing care programs when an applicant for the program has monthly income in excess of the annual income limit.

These trusts can be established by the Medicaid applicant's parent, grandparent, legal guardian, the court or by the applicant himself or herself. This trust does not allow the applicant to qualify for SSI, food assistance, subsidized housing or other Medicaid programs.

The remaining funds in the trust, upon the death of the beneficiary, must pay back each state for medical benefits received through the state's Medicaid program during the lifetime of the beneficiary.



- Pooled Trust (d4C):

In a pooled trust or pooled special needs trust, the person with a disability joins an existing trust that already has a trustee and other beneficiaries. These trusts are established and maintained by a non-profit organization. Pooled trusts often have attorneys and other professionals who are familiar with these specialized laws to administer them. Funds remaining in these pooled trusts upon the death of a beneficiary must also be used to pay back Medicaid unless they are retained by the trust.

Pooled trusts are helpful when there are no readily available trustees or when an individual trust would be cost prohibitive. Also, because pooled trusts are already up and running, it is much easier to join these trusts than to establish new ones.

Two examples of pooled trusts are:

- Guardian Trust; for more information, go to: www.guardiantrusts.org,
- Foundation for Indigent Guardianship Pooled Trust; for more information, call (850)907-1299.

2. Third Party Special Needs Trusts

Third party special needs trusts are set up by others (family members, friends or other interested parties) for the benefit of a person with a disability. Often these trusts are set up by parents for their children with disabilities. In some cases, children can set up a third party trust for the benefit of their parents. Funds cannot consist of the beneficiary's personal assets, only assets of the individual establishing the trust for the benefit of the individual with a disability.

- If the trust is irrevocable and has the proper language, the trust assets are not considered in determining eligibility for most public assistance programs.
- The third party trust can be established as a separate, stand-alone irrevocable trust under the third party's will, or within another trust, such as a typical revocable trust that becomes irrevocable upon the death of the Settlor.
- Anyone can be appointed as the trustee except the person with a disability or his or her spouse.
- There can be several layers of beneficiaries. Alternate beneficiaries can be named to receive any remaining funds of the trust after the death of the primary beneficiary.
- A third party special needs trust does not require pay-back to Medicaid upon the death of the primary beneficiary receiving public benefits.



Sometimes a well-intentioned relative may not understand the problems he or she can cause by leaving assets directly to a person with a disability when an unexpected death occurs or there has been no estate planning. Many public assistance programs have very low asset limitations and a gift as small as \$2,000 can cause a person to lose Medicaid coverage or SSI benefits. Additionally, individuals with disabilities are often unable to manage and handle money. A third party special needs trust would be the appropriate vehicle for family members, friends or other interested parties to use when desiring to leave an inheritance to an individual with a disability.

Distributions from All Special Needs Trusts

Proper handling of distributions in a special needs trust is crucial in preserving public benefits. Improper distributions can cause the loss of public benefits to the beneficiary of a special needs trust. Generally speaking, distributions should be made in such a manner that they are not considered to be income to the beneficiary. For example, the trustee may not provide cash directly to the beneficiary. Any cash paid directly to the beneficiary will be counted as income and could affect eligibility for public benefits. Instead, payments from the trust should be made directly to providers of goods and services. Also, if the trustee provides "in-kind support and maintenance," which is providing food or paying for shelter expenses for a beneficiary, then SSI benefits may be reduced (but oftentimes not lost).

Here are some examples of permissible expenditures:

- Entertainment
- Professional guardian services
- Non-refundable airline tickets
- Stereo system, TV or computers
- Telephone and cellular phone bills
- Furniture
- Travel expenses of the person with a disability
- Movies
- Tax payments
- Medical treatment for which public funds are not available, such as alternative health procedures or alternative medications and medical insurance
- Memberships in clubs, such as recreational clubs
- Subscriptions to magazines, newspapers and book clubs
- Adapted van
- Difference between a private and semiprivate room in an institution
- Services of a care manager
- Legal services



Although there are always exceptions, a trustee generally should NOT:

- Pay cash to the beneficiary.
- Pay cash to the family of the beneficiary who is under the age of 18.
- Make payments of rent, mortgage, real estate taxes, homeowners insurance, utilities, food and shelter (this will be counted as income) without knowing exactly how such payments might affect SSI eligibility.
- Buy or give groceries to the beneficiary without knowing exactly how such payments might affect SSI eligibility.

Trusts can seem intimidating, particularly when first introduced to them. The truth is, trusts are not as complicated as one may think. It is important to seek an attorney who specializes in this area. Trusts can greatly help individuals with disabilities. Education and knowledge are the tools to feeling comfortable and confident in the use of trusts.

Decision-making capacity can change over time. As a person learns, acquires new skills and is exposed to new opportunities and experiences, decision-making capacity can improve.

See the *Developing Abilities and Restoring Rights* publication series for tools and strategies on how to develop abilities and improve capacity. These publications are available from the Florida Developmental Disabilities Council. For more information, go to: www.fddc.org.





Learning Activity #6

(Answer Key, page 103)

The legal rights that can be delegated to someone else are listed below. Using the information discussed in this section, identify those tools and instruments that can be used to provide decision-making assistance.

The answer to the first right listed is provided as an example.

Legal Rights that can be Delegated to Someone Else	Tools and Instruments
Right to Apply for Government Benefits	<i>Supported Decision-Making POA/Durable POA Representative Payee Health Care Surrogate (medical benefits only) Medical Proxy (medical benefits only)</i>
Right to Manage Money and Property	
Right to Determine Residence	
Right to Consent to Medical and Mental Health Treatments	
Right to Make Decisions about Social Environment	
Right to Contract	
Right to Sue and Defend Lawsuits	





Learning Activity #7

(Answer Key, page 104)

The following scenarios highlight the materials presented in Sections 1 & 2 of the manual. None of the scenarios have enough information for you to decide specifically what is the most appropriate, but there is enough information to make recommendations for each person. Be certain to consider the principles underlying decision-making, as well as the decision-making options available for each person.

1. James is 19 years old and has a checking account. James works part-time and deposits all his earnings in his account. He still lives at home and mainly uses this money for entertainment and clothing. His parents help him manage the account by looking over the bank reconciliations every three to four months. However, in the last two months James has had four overdrafts. What actions could help James learn how to better manage his money?

2. Bobby is a 30 year-old man with Down syndrome, who currently lives in his own apartment in the same town as his parents. His parents are in their 60s. His parents and brothers and sister form a good circle of support. Bobby has worked for 10 years and handles his own money. Which of the options previously discussed should Bobby consider?





3. Kelly who attends high school will turn 18 years old in a few months. The school says the parents need to place Kelly under guardianship to continue being involved in her education (such as talk to the teacher, obtain a copy of grades and other paperwork, and participate in the IEP process). Also, Kelly needs a medical procedure performed and her doctor says a guardian is needed to consent to the procedure. Kelly is receiving services from the Agency for Persons with Disabilities and the support coordinator also says guardianship is needed for her parents to be able to coordinate and consent to services. Kelly has no real or personal property in her name alone (no bank accounts, no home, etc.) She receives SSI benefits and a small amount of income from a part time job. What are the options that Kelly and her parents can consider as alternatives to guardian advocacy or guardianship?

4. Lou Ann was 45, divorced with three children when she was in a car wreck and sustained a traumatic brain injury. After a year in rehab, she moved back home. Her 24 year old daughter took care of her younger siblings while Lou Ann was recovering and helped her pay bills. However, her daughter has graduated from college, and now wants to buy her own home. Lou Ann also has a son who is 18, just graduated from high school, and is going to college in the fall in another town. Her youngest child is a 13 year old daughter, who is starting high school next year. What actions should Lou Ann and her family explore and which of the options previously discussed should be considered?

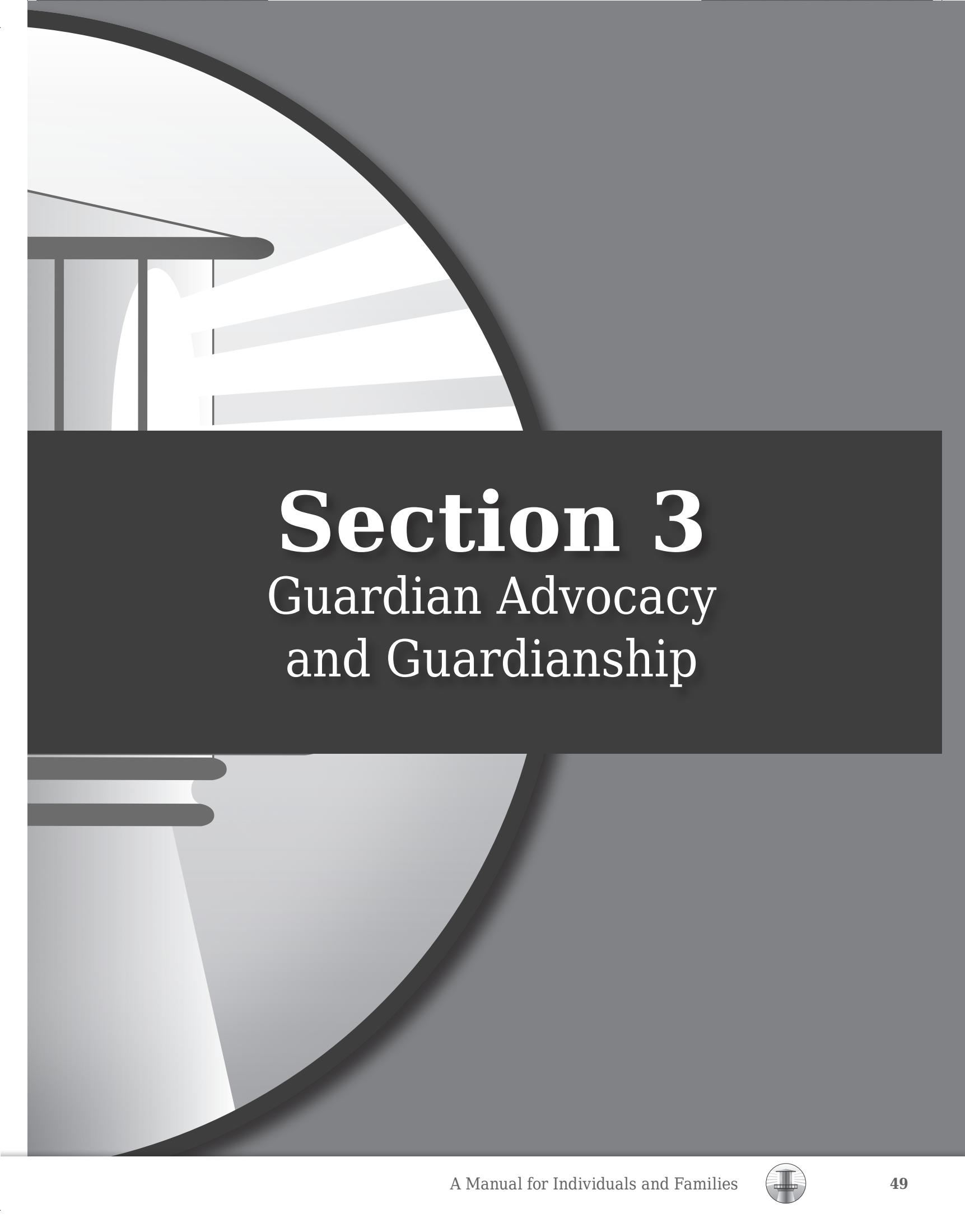


5. Florence is 81. She was married and raised two children following graduation from college in 1933. Her husband of 47 years handled all the couple's financial dealings, but died five years ago. Immediately upon his death, Florence added her older daughter as a co-signer on her checking account. Florence has transitioned well to paying all her bills, but her daughter helps her reconcile her accounts. Florence is considering moving closer to her older daughter which will mean changing to a new doctor and dentist, deciding where to live, as well as changing banks. To complicate matters, Florence was recently diagnosed with early onset dementia. What actions should Florence and her family explore and which of the options previously discussed should be considered?

6. Jack is 53 years old, lives in a group home and receives services from the Agency for Persons with Disabilities. His parents have recently died. His younger brother and older sister had become more involved in his life as their families grew and their parents aged. His brother lives about 45 miles from his group home and his sister lives in another state. Jack's mom was his durable power of attorney, but since her death, he has not established someone else as his agent. What are the available options discussed in the previous section that he should consider?







Section 3

Guardian Advocacy and Guardianship



Section 2 discussed the options available to persons who have the capacity to decide who will act for them and under what circumstances. This section will discuss the more restrictive options: guardianship and guardian advocacy. Guardianship is used if a person's capacity to make decisions is questioned. Guardian advocacy is used as an alternative to guardianship for persons with developmental disabilities.

Do not confuse the Guardian Ad Litem program with guardian advocacy or guardianship. The Guardian Ad Litem program is designed to advocate for abused, abandoned and neglected children.

Guardian Advocacy (Sec. 393.12, Florida Statutes)

Florida is one of a few states that has developed a process specifically designed to meet the needs of persons with developmental disabilities - in Florida that process is guardian advocacy. An appointment of a guardian advocate is made by a court to make decisions for a person after determining the person is not able to make those decisions for himself or herself.

While there are a few differences between guardian advocacy and guardianship, the authority given by the court to the guardian or the guardian advocate is the same. So what are the differences? Basically, the differences are in the legal process of obtaining a guardian advocate or a guardian.

- First, guardian advocacy is only available to individuals with at least one of the seven developmental disabilities defined by Florida Statutes. Also, an individual must also lack the decision-making ability to perform some, but not all of the tasks necessary to care for his or her person, property, or estate. This may limit the use of this option for persons with significant disabilities.
- Second, in order to appoint a guardian advocate, the statutes do not require a determination of incapacity. This is one of the reasons people believe guardian advocacy is less restrictive than guardianship. Rather than have an **examining committee** evaluate the person and make a written report to the judge, the judge can use educational evaluations, individual education plans, support plans, and habilitation plans to address the area(s) where the person lacks decision-making ability to determine whether guardian advocacy is appropriate.
- The third difference is that a guardian advocate need not be represented by an attorney unless required by the court or if the guardian advocate is delegated any rights regarding property other than the right to be the representative payee for government benefits. However, during the process of appointing a guardian advocate, the court will appoint an attorney for the person with a developmental disability.



For these reasons, guardian advocacy is usually considered to be less expensive, less intrusive and easier to implement than guardianship.

Rights that a Court May Consider Granting or Delegating to a Guardian Advocate

Right to apply for government benefits

Right to manage money and property

Right to determine residence

Right to consent to medical and mental health treatments

Right to make decisions about social environment

Right to contract

Right to sue and defend lawsuits

The process for appointing a guardian advocate is as follows:

- I. A petition to appoint a guardian advocate can be filed by any adult (the **petitioner**). The petition must:
 - a. State the petitioner's name, age, present address and nature of relationship with the person with a disability. The petition must also state the name, age, county of residence and present address of the person with a disability.
 - b. Explain the type of disability the person has, identify the areas where the person needs decision-making assistance and explain why the person needs a guardian advocate.
 - c. Name the person to be appointed guardian advocate, explain the proposed guardian advocate's relationship to the person with a disability and the proposed guardian advocate's relationship to any service providers of the person with a disability.
- II. A copy of the petition and notice of the hearing is given to the person with a disability, the person's **next of kin**, the proposed guardian advocate and anyone else the court directs. The person with a disability can attend the hearing.





- III. The court will automatically appoint an attorney to represent the person with a disability regardless of the person's ability to pay. The person with a disability may ask the judge to use his or her own attorney instead.
- IV. A hearing is held and the court will decide whether a guardian advocate is appointed.
 - a. Educational documents and other records, like support and care plans, that document the condition and needs of the person should be made available at the hearing.
 - b. The judge must consider whether an executed advance directive or a durable power of attorney sufficiently addresses the needs of the person before appointing a guardian advocate.
 - b. The judge will make a decision in a written court order and if the judge appoints a guardian advocate, will issue **Letters of Guardian Advocacy** that names the guardian advocate and specifies the areas where the guardian advocate can make decisions on behalf of the person with a disability. Once the guardian advocate is appointed, the guardian advocate has the same duties and responsibilities of a guardian under Chapter 744, Florida Statutes.
- VI. At any time the person with a disability regains the ability to make decisions on his or her own, a Suggestion of Restoration of Rights can be filed with the court and the judge can make a decision to change or terminate the guardian advocate appointment.

In order to ensure that the guardian advocate is completing his or her lawful duties and responsibilities, the guardian advocate is required to follow certain statutory requirements regarding the filing of reports to the court. Failure to comply with any of the reporting requirements may result in the guardian advocate having to appear before the court and the imposition of civil and/or criminal penalties. (See Roles and Responsibilities of Guardian Advocates and Guardians)

The Ninth Judicial Circuit has developed downloadable sample guardian advocate forms for use by the general public. For more information, go to: <http://www.ninthcircuit.org/research/court-forms/probate-guardian-advocate>.

If the requirements for guardian advocacy cannot be met and no other appropriate alternative exists, then the guardianship process addressed in Chapter 744, Florida Statutes, should be followed.



Guardianship (Chapter 744, Florida Statutes)

Guardianship describes a legal relationship between the guardian and the **"ward."** The term "ward" is the person whom the court has declared legally incapacitated and has had some or all of his or her rights removed (for this material, we refer to a "ward" as a "person under guardianship").

Adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary. It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed. By recognizing that every individual has unique needs and differing abilities, it is the purpose of this act to promote the public welfare by establishing a system that permits **incapacitated persons** to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose. (Sec. 744.1012(1)-(3), Florida Statutes)

Guardianship is the process designed to protect and to exercise the legal rights of individuals whose functional limitations prevent them from being able to make their own decisions and have not made plans for this time in their lives (such as a health care surrogate designation and durable power of attorney). People who need guardianship may have dementia, Alzheimer's disease, a developmental disability, chronic illness or other such conditions that generally cause functional limitations. Before a guardianship is established, it must be determined that the individual lacks capacity. Again, guardianship should always be considered as the last resort because it is the most restrictive option available.

The following chart lists those rights that can be taken by the Court and delegated to a guardian and those rights that cannot be delegated to a guardian:





Civil Rights	Rights that Can Be Taken by a Court and Delegated to a Guardian	Rights that Can Be Taken by a Court and NOT delegated to a Guardian
Right to apply for government benefits	X	
Right to manage money and property	X	
Right to determine residence	X	
Right to consent to medical and mental health treatments	X	
Right to make decisions about social environment	X	
Right to contract	X	
Right to sue and defend lawsuits	X	
Right to marry		X
Right to vote		X
Right to apply for a driver's license		X
Right to travel		X
Right to seek and retain employment		X

The process for establishing a guardianship is as follows:

- I. A petition to determine incapacity and a petition to appoint a guardian is filed.

Any **competent adult** (the petitioner) may file with the court a petition to determine another person's incapacity.

- The petition to determine incapacity must be a **verified** petition that includes the name, age, primary language of the **alleged incapacitated person (AIP)**, and address of the petitioner, as well as his or her relationship to the AIP.



- The petition must state next of kin, the name of the AIP's attending physician along with the factual information on which the incapacity petition is based. The petition must be filed in the county where the incapacitated person resides at the same time as the petition for appointment of a guardian, and it must include those rights that the AIP is incapable of exercising, to the best of the petitioner's knowledge.
- The fees generally associated with guardianship include filing fees, examining committee fees and attorney's fees. If the person under guardianship has assets, the fees may be paid from the person's assets. If the person is indigent, the fees may be paid by the state.

When the court receives the petition for an incapacity determination and the petition for the appointment of a guardian, three separate actions are taken:

1. The court appoints an attorney to represent the AIP. The AIP can substitute the court-appointed attorney with his or her own counsel. This attorney will represent the person under guardianship until the **initial guardianship report** has been reviewed and accepted by the court.
2. The AIP must be given notice of the petition to determine incapacity and petition for the appointment of a guardian. It must also be served upon the court-appointed attorney for the AIP and any of the AIP's next of kin identified in the petition. The petitions must be read to the AIP in his or her primary language.
3. A three-member examining committee is appointed (consisting of a physician, psychiatrist, and either another physician, psychiatrist, gerontologist, registered nurse, nurse practitioner, or licensed social worker or a lay person who, by knowledge, skill, experience, training or education, may advise the court in the form of an expert opinion) to evaluate and report on the AIP. Even though the examining committee consults the AIP's attending physician, the attending physician may not serve on the examining committee. Members must have the required four-hour examining committee member training as mandated by Florida law and the required continuing education hours. (No examining committee is appointed in guardian advocacy proceedings.)
 - In some cases, the AIP cannot be transported to each of the offices of the examining committee members for the examination. In those cases, members of the examining committee may travel to the AIP's home, hospital or nursing home to perform the evaluation.
 - Each member of the examining committee reports on the physical, mental and functional condition of the individual and includes in the signed report a diagnosis, prognosis, and recommended course of treatment.



- Each member of the committee indicates which rights the AIP should retain and which rights should be removed. The signed report must be served upon the attorney of record for the petitioner and the attorney for the AIP within three days after the report is filed with the court and at least five days before the hearing.

II. A hearing is held.

The court will hold a hearing to review all relevant evidence, including the reports of the examining committee. If the court finds the AIP to be incapacitated, the court must then determine if there is a less restrictive alternative to guardianship. The hearing on the petition to determine incapacity and for appointment of guardian is set by the court within 14 days after the examining committee's report is filed unless good cause is shown.

The AIP must attend the hearing unless the judge waives the AIP's attendance or good cause is shown for his or her absence. The attorney for the AIP, the petitioner, the prospective guardian, the attorney for the guardian, the judge and any witnesses deemed necessary may be present at the hearing. The judge will ask the petitioner to explain the reason for the petition, as well as the petitioner's relationship to the AIP. The judge may also ask the attorney for the AIP to make any objections and provide additional insight into the circumstances surrounding the petition along with any additional information on the condition of the AIP. The judge will ask whether there are lesser restrictive alternatives to guardianship available.

As a safeguard against frivolous, self-serving or vindictive petitions, if the petition to determine incapacity is dismissed, the cost of the proceeding may be charged to the petitioner if the court finds that the petition was filed in bad faith.

III. A guardian will be appointed, if necessary.

If the court determines that the AIP is incapacitated and in need of a guardian, the guardianship begins when the judge signs the order of incapacity, the order appointing a guardian, and the **Letters of Guardianship**. At the time of the appointment and throughout the guardianship, the guardian must be represented by an attorney.

A guardian's attorney may be paid from the assets of the person under guardianship. Even though the attorney represents the guardian, it is important to remember the attorney maintains a duty of loyalty to the person under guardianship.



When a guardianship is established, certain rights are removed from the person under guardianship and delegated to the guardian. In order to ensure that the guardian is completing his or her lawful duties and responsibilities, the guardian is required to follow certain statutory requirements regarding the filing of reports to the court. Failure to comply with any of the reporting requirements may result in the guardian having to appear before the court and the imposition of civil and/or criminal penalties. (See Roles and Responsibilities of Guardian Advocates and Guardians)

The Florida Developmental Disabilities Council's *Planning Ahead* guide, Chapter 7, provides additional information on guardian advocacy and guardianship. For a copy of this guide, go to: www.fddc.org/sites/default/files/file/publications/PlanningAheadFinal.pdf.

Roles and Responsibilities of Guardian Advocates and Guardians

The roles and responsibilities of guardian advocates and guardians are the same and can be found in Chapter 744, Florida Statutes. For this reason, and for purposes of this section, the term "guardian" refers to both guardian advocates and guardians.

The authority that may be granted by the court, the ethical standards commonly applied, and the duties related to the authority delegated to guardian advocates and guardians are as follows:

Authority

A guardian's specific authority comes from the Order Appointing a Guardian and the Letters of Guardianship (or Letters of Guardian Advocacy) which lists the specific rights which have been delegated to the guardian. When the court appoints a guardian to exercise all the rights that can be delegated, the guardian is designated as a plenary guardian. If the court appoints a guardian to exercise only some of the rights that can be delegated, the guardian is designated as a limited guardian.

Depending on the determination of the court and what will best serve the needs of that person, the court may appoint a **guardian of the person** only, a **guardian of the property** only, or a guardian of the person and property.

Guardian of the Person

The guardian of the person has the authority to exercise only the personal rights that have been removed from the person by the court and delegated to the guardian.





The rights that may be removed from an individual and delegated to a guardian of the person generally include the rights to determine his or her residence, to consent to medical or mental health treatments, and to make decisions concerning his or her social environment.

Guardian of the Property

The guardian of the property has the authority to exercise only the property rights that have been removed from the person by the court and delegated to the guardian.

The rights that may be removed from an individual and may be delegated to a guardian of the property generally include the rights to contract, to apply for government benefits, to sue and defend lawsuits, to manage money and property, or to gift or dispose of assets.

Guardians act in a representative capacity only and do not have personal liability for costs or expenses associated with the person under guardianship.

Guardian of the Person and Property

A guardian of the person and property has the authority to exercise the personal and property rights that have been removed from the person by the court and delegated to the guardian.

Ethics and Standards

A guardian is given an important and sometimes overwhelming responsibility to act on behalf of a person under guardianship. Guardians must act ethically and the failure to fulfill guardian responsibilities could result in removal by the court and/or imposition of civil and criminal penalties.

The National Guardianship Association has published Standards of Practice as well as a statement of Ethical Principles to guide all guardians.

Some of the broad guidelines include:

1. A guardian treats the person with dignity.
2. A guardian involves the person to the greatest extent possible in all decision-making.
3. A guardian selects the option that places the least restrictions on the person's freedom and rights.
4. A guardian identifies and advocates for the person's goals, needs, and preferences.
5. A guardian maximizes the self-reliance and independence of the person.



6. A guardian keeps confidential the affairs of the person.
7. A guardian is a **fiduciary** and must avoid conflicts of interest and self-dealing.
8. A guardian complies with all laws and court orders.
9. A guardian manages all financial matters carefully.
10. A guardian respects that the money and property being managed belongs to the person.

The National Guardian Association's Standards of Practice and Ethical Principles are available free of charge. To download a free copy, go to: http://www.guardianship.org/documents/Standards_of_Practice.pdf.

The Florida State Guardianship Association has also published standards of practice for Florida guardians. To download a free copy, go to: <https://www.floridaguardians.com/wp-content/uploads/2016/05/Standards-of-Practice-Final.pdf>.

Duties

A court will specify through the Letters of Guardianship which rights the guardian can exercise on behalf of the person under guardianship. Each of those rights removed require certain duties to be performed by the guardian to protect the health and safety of the person or the person's property. Certain actions by a guardian need extra court approval (see Actions of Guardians/Guardian Advocates That Need Extra Court Approval in the Appendix).

Depending on the authority delegated, a guardian may need to be available to the person under guardianship at all times, or if the guardian is not available at all times, there are ways to establish alternative plans to meet obligations and to take care of any emergency situations.

A Guardian of the Person is responsible for assessing and managing the social, medical, and residential and personal needs of the person under guardianship. Some of the key duties of a Guardian of the Person may include:

- Developing the abilities of a person under guardianship to increase or maintain level of independence by implementing activities to enhance capacity.
- Preparing and submitting to the court initial and **annual plans** (see Reporting Requirements in this section).
- Arranging for necessary rehabilitation, treatment and services.
- Determining the most appropriate and least restrictive living situation.
- Obtaining (or providing) clothing, personal care and other daily necessities.



- Coordinating travel needs.
- Making life decisions regarding social environment (recreation and hobbies), and education.
- Visiting the person under guardianship to ensure needs are met.
- Making end of life decisions.
- Protecting from abuse, neglect and exploitation.
- Documenting guardian activity.
- Maintaining recording keeping system.

A Guardian of the Property is responsible for managing the property and financial assets of the person under guardianship. Some of the key duties of a Guardian of the Property may include:

- Developing the abilities of a person under guardianship to increase or maintain level of independence by implementing activities to enhance capacity.
- Preparing and submitting to the court initial inventory and **annual accountings** (see Reporting Requirements in this section).
- Identifying and locating assets.
 - Real and personal property:
 - Inventory and maintain list of assets.
 - Manage and preserve assets (insure assets).
 - Bank accounts, brokerage or investment accounts:
 - Inventory and maintain list of accounts.
 - Manage and preserve accounts.
- Managing income, including applying for and maintaining public benefits.
- Documenting guardian activity.
- Maintaining record keeping system.

Once a Guardian of the Property has been appointed, property belonging to the person under guardianship (bank accounts, investment accounts, automobiles, homes, etc.) may need to be retitled or registered in the name of the guardianship, but NOT in the guardian's name only. For example, a bank account or deed may read "John Doe, Guardian for Jane Smith." The guardian of the property must never mix the person's funds with the guardian's personal assets.



Reporting Requirements

When a guardianship is established, certain rights are removed from the person under guardianship and designated to the guardian. In order to ensure that the guardian is completing his or her lawful duties and responsibilities, the guardian is required to follow certain statutory requirements regarding the filing of reports to the court. Failure to comply with any of the reporting requirements may result in the guardian having to appear before the court and the imposition of civil and/or criminal penalties.

These reports include:

1. Initial Report

Each guardian shall file with the court an initial guardianship report within 60 days after his or her letters of guardianship are signed. The initial guardianship report consists of an **initial guardianship plan** or a **verified inventory**, or both, depending on the rights delegated to the guardian.

A. Initial Guardianship Plan

All guardians of the person are required to submit an initial guardianship plan as a component of the initial guardianship report. The initial guardianship plan must be based on the recommendations of the examining committee and may need to include provisions for medical, mental health, and personal care services and the type of residential setting best suited for the welfare of the person under guardianship. The initial guardianship plan becomes the basis for the annual plan.

B. Verified Inventory

All guardians of the property are required to submit a verified inventory as a component of the initial guardianship report. The verified inventory must include a list of all the known assets and property belonging to the person under guardianship, the location of the assets and a list of any sources of income (for example, social security, pension, rental income, etc.). The verified inventory becomes the basis for the annual accounting.

2. Annual Guardianship Report

The annual report of a guardian of the person must consist of an annual guardianship plan. The annual report of a guardian of the property must consist of an annual accounting. The annual report shall be served on the person under guardianship, unless that person is a minor or is totally incapacitated, and on the attorney for the person under guardianship, if any. The guardian shall provide a copy to any other person as the court may direct.





A. Annual Plan

A guardian of the person is required to complete and submit to the court the annual plan. Unless the court requires filing on a calendar-year basis, each guardian of the person shall file with the court an annual guardianship plan at least 60 days, but no more than 90 days, before the last day of the anniversary month that the letters of guardianship were signed and the plan must cover the coming fiscal year, ending on the last day in such anniversary month. If the court requires calendar-year filing, the guardianship plan for the forthcoming calendar year must be filed on or after September 1, but no later than December 1 of the current year.

The annual plan uses the initial guardianship plan as its basis and therefore must include the current location of the person under guardianship, the condition of the person under guardianship, the needs of the person under guardianship, and whether there are any changes expected in the upcoming year. The annual plan must also include a report by the physician of the person under guardianship that should include an evaluation of the condition of the person under guardianship and a statement of the current level of capacity, in addition to any rehabilitative services planned for the upcoming year.

B. Annual Accounting

A guardian of the property is required to file an annual accounting and uses the verified inventory as its basis. Unless the court requires or authorizes filing on a fiscal-year basis, each guardian of the property shall file with the court an annual accounting on or before April 1 of each year. The annual accounting must cover the preceding calendar year. If the court authorizes or directs filing on a fiscal-year basis, the annual accounting must be filed on or before the first day of the fourth month after the end of the fiscal year.

The annual accounting must include a complete and accurate account of all receipts and disbursements of the property of the person under guardianship made during the previous year. It shall also include a year-end statement of all accounts of the person under guardianship from each financial institution where assets are being held.

The filing of the annual accounting may be waived by the court if the person receives income only from social security benefits and the guardian is the person's representative payee for the benefits.



C. Simplified Annual Accounting

A guardian of the property may file a **simplified annual accounting** if all the assets are maintained in a restricted account with a designated depository and the only transactions that occur in the account are interest accrual, deposits pursuant to a settlement, or financial institution service charges. The simplified annual accounting must also include a year-end statement from the financial institution.

The clerk of the court is required by Florida Statutes to review the accountings. Once the accountings are audited by the clerk of the court, they are forwarded to the court for review and approval.

3. Final Report

A **final report** consists of a **final accounting** and must be filed under certain situations. Some of those situations include the following:

- Resignation of Guardian

Before entering an order discharging a guardian of the property, the court shall require the guardian to file a true and correct final report of his or her guardianship and to deliver to the **successor guardian** all property of the person under guardianship, all records concerning the property of the person under guardianship or of the guardianship, and all money due to the person under guardianship from the guardian.

- Removal of Guardian

A removed guardian shall file with the court a true, complete, and final report of his or her guardianship within 20 days after removal.

- Death of the Person Under Guardianship

If the person under guardianship has died, the guardian of the property must file a final report with the court no later than 45 days after he or she has been served with letters of administration or letters of curatorship. A guardian of the person is discharged without further proceeding upon filing a certified copy of the death certificate.

A guardian of the property may deliver property of the person under guardianship to the person entitled, such as a personal representative of the estate. If there is no personal representative, the guardian may institute an estate proceeding or deliver the cash assets to the clerk of the court.



- Restoration of Rights

If only some rights are restored to the person under guardianship, the court's order must state which rights are restored, and the guardian shall prepare a new guardianship report which addresses only the remaining rights retained by the guardian. The guardian must file a copy of the new report with the court within 60 days after the entry of the order.

If all rights are restored to the person under guardianship, the same process would be followed by the guardian as if the guardian resigned. However, instead of providing all the information to the successor guardian, it would be provided to the former person under guardianship, as well as the final report being provided to the court within 45 days of the restoration.

- Property Subject of the Guardianship is Exhausted

For guardian of the property, when the property of the guardianship is exhausted, the guardian shall file a final report within 45 days and receive his or her discharge.

- Change of Domicile

If the person under guardianship moves to another state and another guardian is named in that state, and the new guardianship is in place, the Florida guardian may file a final report related to his or her activities in Florida.

Related Topics

Non-Professional/Family Guardians, Professional Guardians and Public Guardians

Generally, there are three basic types of guardians in Florida: non-professional/family, professional and **public guardians**. If a court determines a person needs a guardian and that person has family or friends who can serve, then the court usually appoints a **non-professional guardian**. This non-professional guardian is often referred to as a **family guardian**. If the incapacitated person does not have a loved one who can and will serve, but has assets, the court may appoint a **professional guardian** to be paid from the person's assets. If the incapacitated person does not have family or friends who are willing to serve and is of limited financial means, then the court may appoint a public guardian.



There are basic requirements for all guardians under Florida Statutes:

- Any competent adult who is a resident of Florida may serve as guardian.
- Individuals are prohibited from serving as guardian if they have been convicted of a felony, judicially determined to have committed abuse, abandonment or neglect against a vulnerable person or have been found guilty, regardless of adjudication, in certain other offenses.
- A person who is unable to perform his or her duties due to illness or incapacity may not be appointed.
- Florida Probate Rules require that every guardian be represented by an attorney admitted to practice in Florida.

There are additional statutory requirements relating to all non-professional, professional and public guardians:

Non-Professional/Family Guardians

- A non-resident of Florida may be appointed by the court as a non-professional guardian if he or she is a qualifying relative to the person with a disability.
- The court may require a non-professional guardian to submit, at his or her own expense, to a background investigation, which may include criminal and credit history checks. If the court determines that a criminal history and credit investigation is required, then the results of the investigations will be considered when the court appoints the guardian.
- A non-professional guardian (and guardian advocate) is required to satisfactorily complete an eight-hour training and instruction course within four months of appointment. A guardian of the property for a minor is only required to complete four hours of training and instruction. (Contact the local clerk of court's office or check with an attorney for a listing of the available training courses.)

A family member is not a guardian of a person over 18 years of age unless appointed by the court.

A non-professional guardian is entitled to reasonable fees for services and costs incurred while providing services on behalf of the person under guardianship. The court will review the fee petition and consider the amount of time involved and the labor required to provide the services prior to any fees being paid from the assets of the person. The non-professional guardian must provide to the court an itemized description of the services performed for any fees he or she seeks. A non-professional guardian can choose not to be compensated.



Professional Guardians

- Register with the **Office of Public and Professional Guardians (OPPG)** and pay the required registration fee. A professional guardian is required to register annually with the OPPG no later than 30 days prior to his or her bond anniversary date.
- Complete a minimum of 40 hours of instruction and training prior to becoming a professional guardian. A professional guardian must also provide proof of completion of 16 hours of continuing education requirements every two years after becoming a professional guardian.
- Successfully pass the Florida Professional Guardian Examination.
- Undergo credit and criminal history checks. A professional guardian and employees of a professional guardian who have a fiduciary responsibility to a person under guardianship are required by Florida Statutes to submit to a credit history check at least every two years and a Florida Department of Law Enforcement (FDLE) criminal history check every two years unless completed electronically. If completed electronically, FDLE will automatically update the clerk of any changes and the clerk must notify the OPPG. Also, a FBI criminal history check is required every five years unless completed electronically. If completed electronically, FDLE will automatically update the clerk of any changes and the clerk must notify the OPPG. The criminal and credit background checks are a part of the annual professional guardian registration process.
- Obtain a \$50,000 Blanket Bond. Florida Statutes require a professional guardian to post a blanket fiduciary bond with the clerk of the court within the local judicial circuit. The bond must be maintained by the professional guardian in an amount of at least \$50,000 and must cover all individuals that the guardian has been appointed to represent.

A professional guardian is any guardian who has at any time rendered services to three (3) or more individuals under guardianship.

A professional guardian is entitled to reasonable fees for services and costs incurred while providing services on behalf of the person under guardianship. The court will review the fee petition and consider the amount of time involved and the labor required to provide the services prior to any fees being paid from the assets of the person. The professional guardian must provide to the court an itemized description of the services performed for any fees he or she seeks.



For more information about registering as a professional guardian, go to:
<http://elderaffairs.state.fl.us/doea/spgo.php>.

- OPPG must approve all training courses for professional guardians. A complete list of training courses for professional guardians is available at www.cebroker.com.
- To register online for The Florida Professional Guardian Examination, go to: <http://guardianship.usf.edu>.
- A current list of professional guardians can be found on the OPPG website. To obtain this list, go to: <http://elderaffairs.state.fl.us/doea/spgo.php>.

Public Guardians

In Florida, the Office of Public and Professional Guardians designates Offices of Public Guardian. Public guardianship offices exist in all counties throughout the State of Florida with some of the offices providing services to more than one county.

- A public guardian acts as guardian for an incapacitated person who lacks a willing and qualified family member or friend to serve as his or her guardian and who does not have adequate income or assets for the compensation of a professional guardian.
- The public guardian is vested with all the powers and duties as any other guardian.

Public guardians may not charge fees from the assets of the person under guardianship for their services.

A current list of local public guardian offices can be found on the Office of Public and Professional Guardians website. For more information, go to:
<http://elderaffairs.state.fl.us/doea/spgo.php>.

For more information about public or professional guardians, contact the OPPG at (850) 414-2381, or write to: Office of Public and Professional Guardians, 4040 Esplanade Way, Tallahassee, FL 32399-7000.



Categories of Guardians

Emergency Temporary Guardian

After a petition for determination of incapacity has been filed, but before appointing a permanent guardian, a court may appoint an **emergency temporary guardian (ETG)** for a person, for a person's property, or both, even though the person has not been adjudicated incapacitated. The court must specifically find that unless immediate action is taken, the person is in imminent danger of being physically or mentally harmed, or the person's property is in danger of being wasted, misappropriated, or lost.

- The court may appoint an ETG, on its own, if no petition for appointment of guardian has been filed at the time of an order determining incapacity. The authority of an ETG expires after 90 days or when a guardian is appointed, whichever occurs first.
- The authority of the ETG may be extended for an additional 90 days upon a showing that the emergency conditions still exist. Usually, any need for guardianship that goes beyond the initial 90 days would not be considered an emergency.

An emergency temporary guardian shall file an ETG final report no later than 30 days after the expiration of the emergency temporary guardianship.

- If an ETG is a guardian for the property, the final report must consist of a verified inventory of the property as of the date the letters of emergency temporary guardianship were issued, a final accounting that gives a full and correct account of the receipts and disbursements of all the property of the person under guardianship over which the temporary guardian had control, and a statement of the property of the person under guardianship on hand at the end of the emergency temporary guardianship.
- If the ETG is a guardian of the person, the final report must satisfy the requirement of the initial guardianship plan and summarize the activities of the temporary guardian with regard to residential placement, medical condition, mental health and rehabilitative services, and the social condition of the person under guardianship to the extent of the authority granted to the temporary guardian in the letters of guardianship.

A professional guardian serving as an ETG cannot serve as permanent guardian.



Foreign Guardian

A **foreign guardian** is appointed in another state or country. Within 60 days of moving the person under guardianship to Florida, a foreign guardian must file the order of his or her appointment with the clerk of the court in the county where the person under guardianship resides. Once the order is filed and recognized by the court, the foreign guardianship is established. Such order is given full faith and credit in Florida which means that the Florida court will recognize the foreign order as it was written.

Standby Guardian

A **standby guardian** is appointed by the court to assume the guardianship duties upon the death or incapacity of the natural or appointed guardian. While the law does not require a guardian to name a standby guardian, serious consideration should be given to recommending to the court who should assume guardianship duties upon death or incapacity of the natural or appointed guardian. The court does not have to name the suggested person, but due consideration will be given to the guardian's wishes. When suggesting a person or agency, the statutory requirements related to the qualification of a guardian should be considered.

Surrogate Guardian

A guardian may request permission from the court to designate a professional guardian to exercise the rights of the person under guardianship in the event the guardian is temporarily unavailable to act. The court's designation cannot exceed 30 days.

Veteran Guardian

A **veteran guardian** is designated to veterans and other persons who are entitled to receive benefits from the United States Department of Veterans Affairs. "Benefits" are arrears of pay, bonus, pension, compensation, insurance, and all other moneys paid or payable by the United States, through the United States Department of Veterans Affairs, by reason of service in the Armed Forces of the United States. It does not replace the general law relating to guardianship except where an inconsistency occurs. Any conflict is to be resolved in favor of the Veterans Guardianship Law found in Sec. 744.602, Florida Statutes.

Guardian of Minor

Guardian of a minor may be appointed if the minor's parents become seriously injured or incapacitated. A guardian of a minor may also be appointed in circumstances where a single parent is healthy, but unavailable to provide for the minor, such as when a single parent is called to active duty in the military. Parents, siblings, next of kin, or other persons interested in the welfare of a minor may petition the court for guardianship. The court, without the necessity of adjudication, may appoint a guardian of a minor. A guardian appointed for a minor, whether of the person or property, has the authority of a plenary guardian. The minor is not required to attend the hearing on the petition for appointment of a guardian, unless otherwise directed by the court.





When the amount of any claim, or cause of action, due the minor child for damages to his or her person or property is less than \$15,000, the natural guardian(s) is authorized, on behalf of a minor child, to settle the claim or cause of action. A legal guardianship is required when the amount of the net settlement to the child exceeds \$15,000.

No incapacity petition is filed for the guardianship of a minor, even if an accident has rendered the minor disabled. If a minor has a disability, incapacity proceedings may be initiated when the minor turns 18 years of age.

Pre-Need Guardian

A **pre-need guardian** is the person named in a written declaration to serve as guardian in the event of the incapacity of the declarant. The written declaration must reasonably identify the declarant and pre-need guardian and be signed by the declarant in the presence of at least two attesting witnesses. The declaration is filed with the clerk of the court, and when a petition for incapacity is filed, the clerk produces the declaration for the court file. Production of the declaration creates a refutable presumption that the pre-need guardian is entitled to serve as guardian. The court is not bound to appoint the pre-need guardian if he or she is found to be unqualified to serve.

Pre-need guardians for minors follow the same procedures as above, except that both parents must agree on the guardian. The parents must file the declaration with the clerk of the court. When a petition for incapacity of the last surviving parent or the appointment of a guardian upon the death of the last surviving parent is filed, the clerk produces the declaration. The court is not bound to appoint the pre-need guardian if he or she is found to be unqualified to serve.

Voluntary Guardian

A **voluntary guardian** is created without an adjudication of incapacity. The court appoints a guardian of the property although the person is mentally competent, yet incapable of the care, custody, and management of his or her estate because of age or physical infirmity, and has voluntarily petitioned for the appointment. A certificate by a licensed physician, stating that he or she has examined the petitioner and that the petitioner understands the nature of the guardianship, is required. A guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the person not more than 90 days before the annual report is filed with the court. The certificate must certify that the person is competent to understand the nature of the guardianship and of the person's authority to delegate powers to the voluntary guardian. The person's delegation of authority must be filed with the petition. This form of guardianship is commonly used by individuals with physical disabilities.



Successor Guardian

A **successor guardian** is appointed when a guardian resigns, dies, becomes incapacitated, or is removed. A successor guardian must be appointed, and duly qualified, before a guardian can be relieved of his or her duties and obligations.

A successor guardian should learn as much as possible about the guardianship before accepting it and contact everybody involved in the current guardianship. Most importantly, the successor guardian should review the court file and meet with the person under guardianship.

There are several steps necessary to appoint a successor guardian:

1. When a guardian wants to resign, the guardian must file a petition for resignation and there must be an order from the court accepting the resignation. If the guardian dies or becomes incapacitated, anyone can notify the court.
2. A petition for appointment of a successor guardian must be filed with the court and include an application for appointment of guardian. Also, the successor guardian must execute a notarized oath to faithfully perform the duties of a guardian.
3. New letters of guardianship will be issued by the court authorizing the successor guardian to act on behalf of the person under guardianship.

The guardian must get a receipt from the successor guardian once the property is delivered to the successor guardian. The former guardian should keep his or her records of evidence of receipts and cancelled checks for at least three years after being discharged.

Regardless of why a successor guardian is appointed, the attorney for the original guardian bears some responsibility for ensuring that a smooth transition occurs. The attorney should communicate openly with the guardian, his or her successor and, whenever possible, with the person under guardianship to make sure that the successor is fully prepared to take on the duties and responsibilities of being a guardian for the person under guardianship.





Termination of Guardian Advocacy and Guardianship

General

A guardian advocacy or guardianship can be terminated under the following circumstances:

- Unable to locate the person after a diligent search.
- In guardianship of property only, the person has exhausted guardianship assets.
- Death of the person (if the person dies, a guardian of the person is discharged upon the filing of a death certificate).
- Restoration of rights of the person (see processes below).

When a guardian advocacy or guardianship has been terminated, a guardian of the property must file a final report. The guardian of the property may retain sufficient funds from the guardianship property to pay the final costs of guardianship administration, such as attorney and guardian fees. An interested person may file an objection to the final report. Upon resolution of any objections and the court's satisfaction that the guardian has performed his or her duties, the court may grant an order discharging the guardian. For three years following the guardian's discharge, the guardian must maintain guardianship records to substantiate the verified inventory.

Restoration of Rights Process

Guardian advocacy or guardianship should not be assumed to be a permanent arrangement. Over time, everyone develops abilities through physical development and life experiences (for example, education, social interaction, and community involvement). Individuals may change their goals and seek greater control over decision-making, or it may be discovered that restrictions were overreaching and unnecessary. Under any of these conditions, there are legal procedures available to review the person's legal status and consider restoring some or all of a person's civil rights that were removed by the court. Guardian advocates and guardians should always be cognizant of an individual's progress and, if improvement is evident, the individual should be restored to capacity at the earliest possible time.

Under Florida law, individuals under guardian advocacy or guardianship are entitled to seek restoration through a well-defined process that includes due process protections. The step-by-step legal processes to restore rights under Florida law are described below.



Guardian Advocacy, Sec. 393.12(12), Florida Statutes:

1. File a petition with the court called a “Suggestion of Restoration of Rights.” A person does not need an attorney to file a Suggestion of Restoration of Rights. Any interested person, including the person with a disability, may file a Suggestion of Restoration of Rights with the court in the county where the guardian advocacy case is currently located.

A Suggestion of Restoration of Rights can be a simple, signed note or letter with the individual’s contact information requesting restoration, or can include the following:

- The case number (this can be found on the Letters of Guardian Advocacy).
- A list of each right requested to be restored.
- Evidence of the person’s increased abilities for each right requested to be restored. (It is recommended that a signed statement from a doctor or other medical provider be included that says the person should get right(s) restored.)
- A statement of good faith explaining why the person can now exercise each right without a guardian advocate.

Once the clerk of the court receives the Suggestion of Restoration of Rights, the clerk will send a notice to all interested persons about the Suggestion of Restoration of Rights. The judge will appoint an attorney if the person has not hired one.

2. The person will meet with the attorney. The person may have decided to hire an attorney to file the Suggestion of Restoration of Rights, or the court will have appointed one to represent the person. Either way, it is important for the person to meet with the attorney.

3. Court Action:

- If the Suggestion of Restoration of Rights did include evidence, the judge will review the evidence and either restore the right(s) requested, or set a hearing to review additional evidence and testimony.
- If the Suggestion of Restoration of Rights did not include any evidence that supports the person’s increased abilities, the judge will set a hearing to review evidence and hear testimony. The person’s attorney will help identify and gather this evidence.
- If any interested person objects to the Suggestion of Restoration, the judge will schedule a hearing to review evidence and hear testimony.



- Depending on the judge's decision after review of evidence or after a hearing, the judge will enter an order denying the Suggestion or will enter an order restoring the right(s) requested to be restored.

Guardianship, Sec. 744.464, Florida Statutes:

1. File a petition with the court called a "Suggestion of Capacity." The person does not need an attorney to file a Suggestion of Capacity. Anyone, including the person under guardianship, may file a Suggestion of Capacity where the guardianship was filed.

A Suggestion of Capacity can be a simple, signed note or letter with the individual's contact information requesting restoration, or can include the following:

- The case number (this can be found on the Letters of Guardianship).
- A list of each right requested to be restored.
- A statement of good faith explaining why the person can now exercise each right requested to be restored.

Once the clerk of the court receives the Suggestion of Capacity, the clerk will send a notice to all interested persons about the Suggestion of Capacity. The judge will appoint a physician to examine the person.

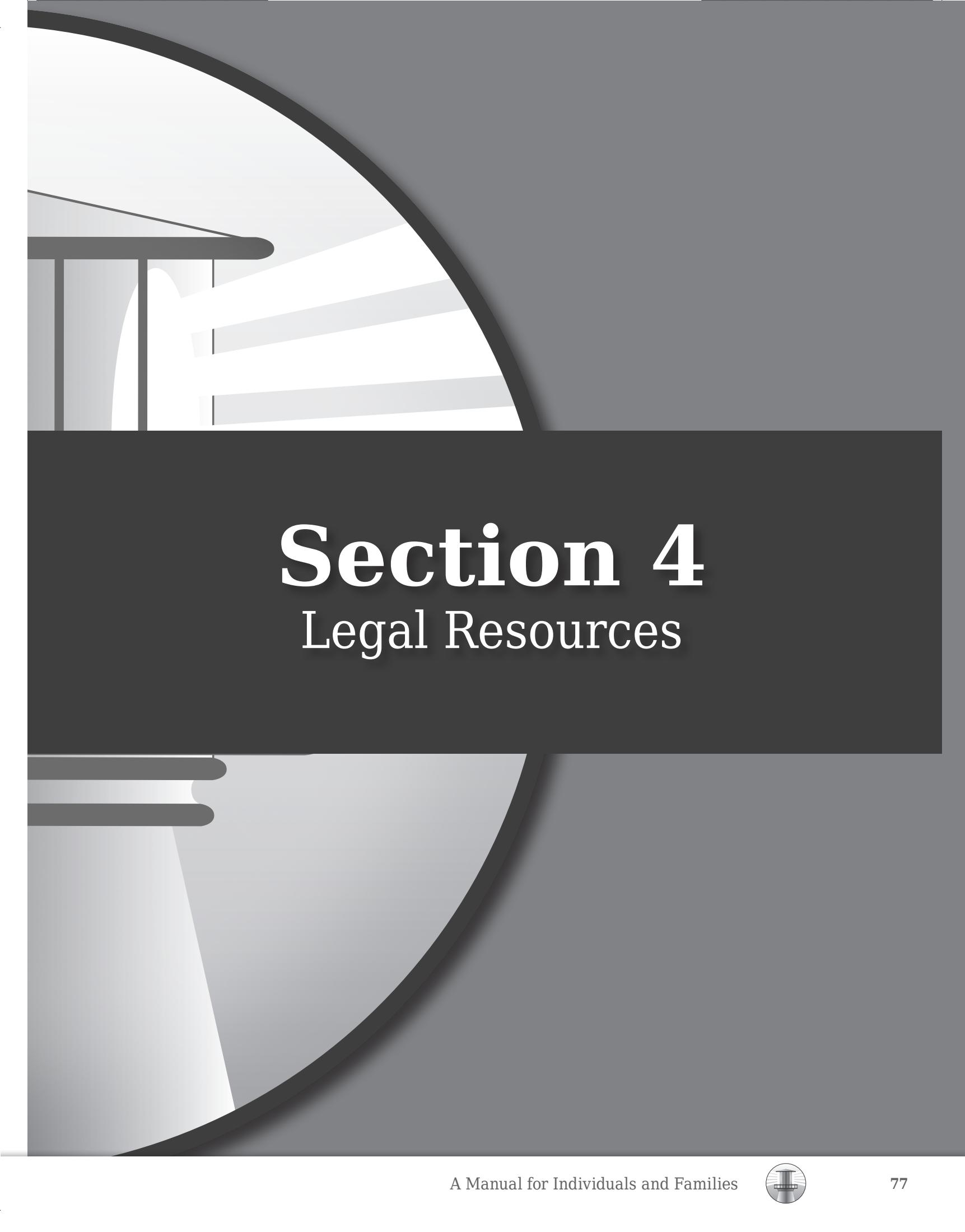
2. The person will meet with the physician. The physician will evaluate whether the person has regained capacity by performing an examination to determine if the person has gained enough ability to exercise the right(s). After the examination, the physician will make a recommendation and file a report with the Court.
3. The person may have decided to hire an attorney to file the Suggestion of Capacity and represent him or her at a restoration hearing, or the Court can appoint an attorney to represent the person.
4. Court Action:
 - If the physician recommends the restoration of the right(s) and no objections from any interested persons are filed, the judge will accept the physician's recommendation and the right(s) will be restored with no hearing.
 - If the physician recommends restoration, but objections are filed by any interested persons, the judge will set a hearing where the person under guardianship, the person's attorney, any interested person, and any other individuals (such as the physician, family members, or the person's guardian) may testify. After testimony, the judge will make a decision as to either restore the person's right(s) or not to do so.



- If the physician recommends no restoration, or someone else (such as the person's guardian) objects in a timely manner, the judge will set a hearing where the person under guardianship, the person's attorney, and any other individuals (such as the physician, family members, or the person's guardian) may testify. After testimony, the judge will make a decision as to either restore the person's right or not to do so.







Section 4

Legal Resources



Reasons to Seek Legal Advice

Today, internet websites, office supply stores, and books offer resources for self-help forms and legal advice on how to make decisions without the assistance of an attorney. We can locate forms to file for divorce, transfer property, and prepare leases, to name a few.

However it is important to seek the legal advice of an attorney to avoid problems in the future. With many of the decision-making options previously discussed, delegating authority to someone else without seeking the advice of an attorney may not achieve desired outcomes and take into consideration Florida's legal requirements.

For example, a family member may believe that a durable power of attorney may meet the needs of an adult child with a disability. The adult child may not understand what he or she is signing. Although a durable power of attorney self-help form may be found on the internet, it still may not solve the decision-making needs of the individual and may not take into consideration important legal principles like "informed consent" or "capacity."

- Talking to an attorney about the different options that meet a person's unique circumstances can avoid problems in the future, and ensure the documents meet the person's needs, and the person's choices are honored by others.
- Seeking legal advice can also help avoid those instances where relatives or others have used undue influence by insisting that a family member with a disability turn over management of his or her property to another by signing a power of attorney.
- Instances of coercion and exploitation have led to state laws that protect persons with disabilities. Seeking legal advice from a competent and ethical attorney before turning over management of property can help avoid these types of problems.

On occasion we may find ourselves seeking the advice of professionals, all of whom expect fair payment for their services. Accountants, physicians, engineers, and other professionals offer valuable services, which sometimes can be costly. The cost for any professional service is relative to the benefit received, and the same is true for legal services. Consulting an attorney for decision-making assistance is important and well worth the cost. Having a person's civil rights removed or properly delegating a person's rights to another person is a serious matter and funds should be allocated for this purpose.



How to Find an Attorney and Other Resources

Many people do not know how to find an attorney who practices in the area of decision-making options, guardian advocacy, guardianship and related matters. The Florida Bar and other agencies provide referral services as well as **pro bono** and legal aid assistance. Another way to find an attorney is by asking other individuals in the community who may have had the need for these types of legal services, who they would recommend. Advocacy groups may also have recommendations.

The Florida Bar Referral Service

The Florida Bar wants to make legal services readily available to individuals and families who need a lawyer. The Florida Bar Lawyer Referral Service and local bar association lawyer referral services are designed to make it easy to contact a lawyer.

- The Florida Bar provides contact information for local bar associations that provide referral services. For this list, go to: www.floridabar.org/lawyerreferral, General Information, Coverage Areas and Local Bar Associations' Lawyer Referral Services.
- Referrals for other areas will be provided by The Florida Bar's Lawyer Referral Service at the toll-free number or direct phone line listed below:

The Florida Bar Lawyer Referral Service
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399
1-800-342-8011
1-850-561-5844

Lawyer Referral Service staff will provide the name, address, and telephone number of an attorney who handles the area of law described by the caller.

Under The Florida Bar Lawyer Referral Service, lawyers charge clients \$25 (local Bar-sponsored program charges range from \$20 to \$50) for the initial half-hour office consultation.

A client will have up to one-half hour to discuss the problem with the attorney. The client and the lawyer are under no obligation to go beyond the first consultation. After the first meeting, it is up to the client to decide whether to authorize the lawyer to take action on the legal problem. The fee for any additional service should be arranged between the client and the attorney during the initial meeting.



The Florida Bar Panels – Low Fee and Elderly

The Florida Bar Lawyer Referral Service has also established Low Fee and Elderly Panels for clients in need. If the personal circumstances qualify for either of these panels, the client will receive a free initial 30-minute office consultation.

If the legal problem is one that can be handled easily, fees for further legal work will be lower than the lawyer's regular rate. Fee-generating cases, such as personal injury or malpractice cases are not included in this reduced fee program and are handled at the attorney's regular rate. Participating attorneys are encouraged to use a payment plan or another method of assisting the client in paying legal fees.

Local bar associations that offer referral services may offer similar reduced fee programs and should be contacted for availability and qualification requirements.

Pro Bono/Legal Aid

Legal Aid agencies are the organizations that refer pro bono cases to attorneys around Florida.

- The Pro Bono/Legal Aid Directory is a guide to free legal information and legal services in Florida. For more information, go to: <http://floridalawhelp.org/find-legal-help/directory>.
- The FloridaLawHelp.org website contains legal educational materials, sample forms, and information about the courts, community resources and free and low-cost legal aid programs to help with legal problems.
- Legal Aid in Florida's consumer pamphlet (only available online) provides a listing of all Legal Aid offices in the state. For this listing, go to: <http://www.floridabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/a949d517a480a5a685256b2f006c5c77?OpenDocument>.
- Legal Services Corporation has many resources for providing civil legal assistance to low-income Americans. For more information, go to: <http://www.lsc.gov>.

Disability Rights Florida

Disability Rights Florida is a statewide designated protection and advocacy system for individuals with disabilities in the State of Florida. It is a non-profit corporation providing free and confidential services which include self-advocacy support, technical assistance, investigations into complaints of abuse, neglect and rights violations, dispute resolution support, negotiation and mediation support and advocacy services.



- For additional information on Disability Rights Florida, go to: <http://www.disabilityrightsflorida.org>.
- Disability Rights Florida can be reached by phone, fax, or mail:

800-342-0823 Toll Free
850-488-9071
850-488-8640 Fax
Telecommunication Device for the Deaf (TDD) 800-346-4127

Disability Rights Florida
2473 Care Drive, Suite 200
Tallahassee, Florida 32308

Senior Legal Helpline

The Senior Legal Helpline provides free legal advice and brief services by telephone appointment to eligible Florida residents age 60 and older, for civil (not criminal) legal problems. Eligible callers are scheduled for a free telephone consultation with an attorney or paralegal who will call them on the day of their appointment. Most callers will receive answers to their legal questions during their initial telephone appointment. Clients may also qualify for referrals to providers who offer free legal services in the clients' local communities. These providers work in partnership with the Senior Legal Helpline and the Department of Elder Affairs to ensure that low-income and other vulnerable elderly Floridians have equal access to legal remedies.

- To contact the Senior Legal Helpline, call the Department of Elder Affairs toll free helpline: 1-888-895-7873.
- For additional information on legal services available to seniors, go to: http://elderaffairs.state.fl.us/doea/legal_services.php.



Office of Public and Professional Guardians (OPPG)

Office of Public & Professional Guardians, housed within the Department of Elder Affairs, appoints local public guardian offices as directed by statute to provide guardianship services to persons who do not have adequate income or assets to afford a private guardian and there is no willing family or friend to serve. The office, which contracts with 17 local Offices of Public Guardianship throughout Florida, is also responsible for the registration and education of professional guardians.

- The OPPG can be reached by mail, phone, or email at:
4040 Esplanade Way, Suite 360-I
Tallahassee, FL 32399-7000
1-850-414-2381
OPPGinfo@elderaffairs.org
 - For additional information about OPPG, go to:
<http://elderaffairs.state.fl.us/doea/srgo.php>
 - For a list of local public guardians by region, go to:
http://elderaffairs.state.fl.us/doea/srgo_public.php.
 - For a current list of professional guardians by county, go to:
http://elderaffairs.state.fl.us/doea/srgo_professional.php
 - To file a complaint against a professional guardian, call the OPPG toll-free at: 1-855-305-3030, or complete the complaint form that can be found at the following web address:
http://elderaffairs.state.fl.us/doea/oppg_complaint.html
- To apply for services or obtain information about services and programs provided by Florida's Department of Elder Affairs, call the toll-free Elder Helpline at 1-800-96-ELDER (1-800-963-5337). Information regarding elder services is also available through the Elder Helpline Information and Assistance service within each Florida county. For a listing of county helpline numbers, go to:
http://elderaffairs.state.fl.us/doea/elder_HELPLINE.php



How to Prepare for a Meeting with an Attorney

Preparation

Before meeting with an attorney about a person's decision-making options, consult with the person and have the person attend the meeting, if possible. Together, consider these questions:

- What is the specific problem(s) the person is having?
 - ✓ Is the person having trouble with managing money?
 - ✓ Is the person having trouble with medical and mental health issues?
 - ✓ Is this person having problems choosing a residence?
 - ✓ Has the person been abused, neglected or exploited?
 - ✓ What are the person's abilities?
- Who is in the person's circle of support?
- Is someone using undue influence when the person is making decisions?
- Does the person make his or her own decisions?
- What are the motives for seeking legal assistance for the person? Control, protect, or support?
- Have the issues been discussed with the person?
- Is the person in agreement?
- Has the person had a recent physical to rule out medical problems?

Together, research and learn about existing or available decision-making options. Gather financial, medical, educational and legal information.

- Does the person already have a power of attorney?
- Does the person have any advance directives?
- Does the person have a guardian from another state? Does the person have a guardian in Florida who has died?
- Does the person receive Social Security or any other governmental benefits?
- Does the person have an Individual Education Plan, or a support or care plan?
- Does the person have a checking account, savings account, own a home, etc.?



Contact an Attorney

Contact an attorney by telephone and ask for an appointment and ask about the cost of that appointment. Some attorneys will provide the first hour of consultation for free. Ask for directions to the office and show up on time for the meeting! Do not forget to check whether you or the person with a disability could qualify for free or low cost legal assistance.

The First Meeting

An attorney typically helps a client become more comfortable through the first few awkward moments of the meeting by asking about family or individual circumstances. The person with a disability should always ask and expect to be involved in the conversation, provide answers to questions asked and provide personal information. The attorney should involve the person in the conversation, but if not, the person should politely speak up. Making occasional eye contact and speaking directly to all present in the meeting is important for establishing rapport and demonstrating respect. Also, make sure to ask the attorney to make copies of any documentation brought to the meeting. Take a note pad and make notes during the meeting.

In this first meeting, discuss with the attorney:

- The situation and what is trying to be accomplished.
- The various options found during research. Ask questions about anything not understood, and ask if there are any other options that have been overlooked.
- The information brought to the meeting.

Some or all of the following questions may be asked during the initial and follow-up meetings:

- Ask the attorney for a recommendation for this specific situation. Ask why he or she came to that conclusion. If the recommendation is not one of the options found during the initial research, ask the attorney why? Ask how many times the attorney has used this recommendation.
- Ask about the advantages and disadvantages of the attorney's recommendations. Be sure to ask about time frames. (How long will it take to put the option in place?)
- Ask about the full cost of all of the options discussed (filing fees, court costs, attorney time, etc.). Ask if there would be an additional cost for calling the attorney with follow up questions. If necessary, ask if the attorney is a member of the Florida Bar's low fee or disability law panel, or if there are local or regional resources available if you cannot afford the attorney's fees.
- Ask the attorney, "What do I do next?"



Do not hesitate to ask questions and expect clear explanations if it is not understandable. Take detailed notes for later reference. Notice the demeanor of the attorney. Does the attorney appear patient when responding to questions? Ask how many similar cases he or she has handled. For example, if the attorney is recommending a durable power of attorney, how many has the attorney written? If recommending a guardian advocate, how many guardian advocacy cases has he or she handled? Ask the attorney for references.

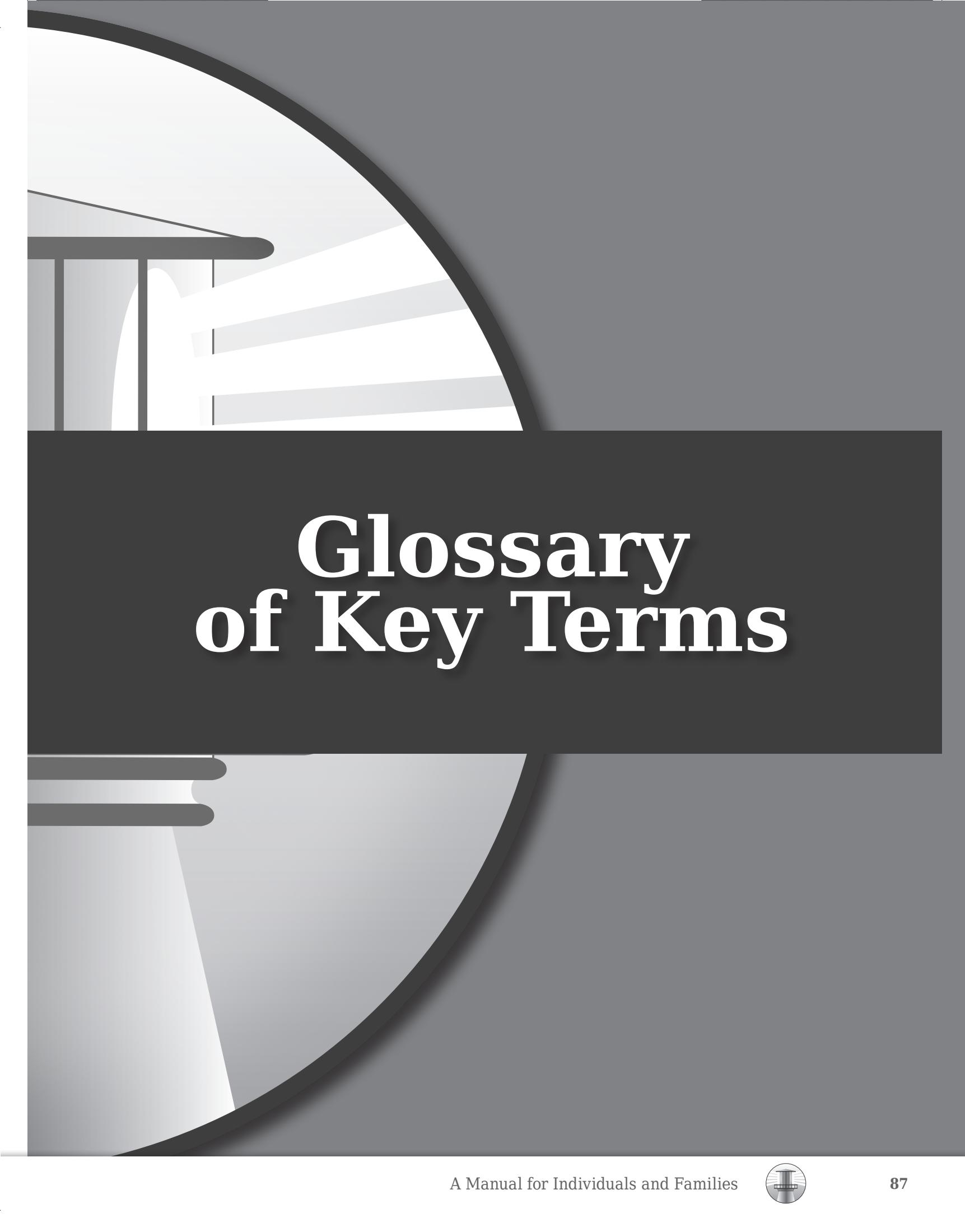
To find out if a specific attorney is in good standing, contact The Florida Bar (1-800-342-8011) or go to The Florida Bar's website: www.floridabar.org and click on "Find A Lawyer".

After the meeting, review the notes taken. Think about the person's abilities. Consider the person's needs and the attorney's recommendations. Discuss the recommendations with the person and consider discussing the recommendations with the person's circle of support. In consultation with the person, decide whether to follow the attorney's recommendation(s) or seek other another legal opinion.

Once a determination is made regarding legal representation, the person must decide how to pay for the legal assistance needed.







Glossary of Key Terms



This glossary should serve as a quick reference guide to terms used throughout this manual. Consult state law for more specific definitions.

Acquired Disability – may occur at any age and causes include oxygen deprivation, infection, blow to the head or severe injury to the spine.

Activities of Daily Living (ADLs) – routine activities that people tend to do every day without needing assistance; there are six basic ADLs: eating, bathing, dressing, toileting, transferring (walking), and continence.

Adaptive Behavior – the collection of conceptional, social, and practical skills that are learned and performed by people in their everyday lives.

Advance Directive – a witnessed written document or oral statement that provides instructions and preferences should the individual be unable to make decisions; examples of a written document include a health care surrogate designation and living will.

Agency for Persons with Disabilities (APD) – a state agency working in partnership with local communities and private providers to assist people who have developmental disabilities and their families; provides assistance in identifying the needs of people with developmental disabilities for supports and services. For more information about APD, go to: www.apdcares.org.

Alleged Incapacitated Person (AIP) – a person who is the subject of a petition to determine incapacity.

Americans with Disabilities Act of 1990 (ADA) – a federal law that prohibits discrimination against persons with disabilities in employment, public services, transportation, public accommodations, and telecommunications services.

Annual Accounting – a report, required by law to be filed by the guardian of the property, due to the court each year itemizing expenditures and receipts made on behalf of the person under guardianship during the previous year; under certain circumstances this requirement can be waived.

Annual Guardianship Report – a report that consists of an annual plan or annual accounting, or both, depending on the rights delegated to a guardian.

Annual Plan – a report, filed by the guardian of the person, due the court each year specifying the medical, mental and physical care of the person under guardianship for the upcoming year.

Assisted Living Facility (ALF) – a residential facility that provides personal care services to meet an individual's personal needs; less restrictive than a nursing home; ALFs are licensed and regulated by the Florida Agency for Health Care Administration. For more information, go to: www.fdhc.state.fl.us/MCHQ/Health_Facility_Regulation//Assisted_Living/alf.shtml.



Attending Physician – the primary physician who is responsible for the treatment and care of the patient.

Autism – a developmental disorder that appears by age three; characterized by impairment of the ability to form normal social relationships, by impairment of the ability to communicate with others, and by repetitive behavior patterns.

Best Interest – standard of surrogate decision-making based on what a reasonable person would consider the optimal decision or arrangement for an incapacitated person, taking into account the least intrusive and most normalizing approach possible given the individual's needs - as opposed to a “substituted judgment” standard of decision-making based on the incapacitated person's known values or preferences.

Capacity – an individual's physical or mental ability; a legal status presumed to apply to all adults and is generally defined in law in reference to a specific task (e.g., capacity to execute a will); when used by legal practitioners, the element of understanding is often referenced (for example, capacity may be used to refer to the ability to understand the nature and the effects of one's acts).

Cerebral Palsy – a neurological movement disorder characterized by the lack of muscle control and impairment in the coordination of movements and is usually a result of injury to the brain during early development in the womb, at birth, or in the first two years of life; this disorder is not progressive.

Circle of Support – a group of trusted individuals who support an individual's goals and dreams.

Civil Right – a fundamental power or privilege that is defined in state and federal law and that can be exercised by each citizen; examples of civil rights are freedom of speech, press, and assembly, as well as freedom from disability discrimination for employment, education, housing, etc.

Cognitive Impairment – a disorder that affects thought and actions and can range from mild to severe; the most common mild cognitive impairment is memory problems; other areas affected can include language, attention, reasoning, judgment, reading and writing.

Competent Adult – a person over the age of 18 who has not been found to be incapacitated by a Florida court.

Delegate – to assign to another the authority to act on one's behalf.

Developmental Disability – in Florida, a developmental disability is defined as a “disorder or syndrome that is attributable to an intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; and that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.” (Sec. 393.063(9), Florida Statutes)





Down Syndrome – a congenital disorder arising from a chromosome defect, causing intellectual impairment and physical abnormalities, including short stature and a broad facial profile; arises from a defect involving chromosome 21, usually an extra copy (trisomy-21).

Due Process – constitutional guarantee that the government will act fairly and with adequate process (such as notice, opportunity to be heard, right to confront, and cross-examine witnesses) if it attempts to deprive a person of life, liberty, or property.

Durable Power of Attorney (DPOA) – a legal instrument used to delegate authority to another; the person who signs (“executes”) a power of attorney is called the “principal,” and the person to whom authority is delegated is called the “agent”; enables the agent to act for the principal even after the principal loses capacity to make decisions, and is effective until revoked by the principal or until the principal’s death; can be an effective alternative to guardianship, allowing an individual to plan for the control of his or her affairs in the event of incapacity.

Evidence – testimony and other sources of fact used by either party to prove legal questions in dispute; rules of law that determine what testimony is to be admitted or rejected in each case and the weight given to such testimony.

Examining Committee – A three member committee of certain professionals appointed by a judge to evaluate the capacity of an alleged incapacitated person; each examining committee member must file a report with the court recommending which, if any, legal rights the person is incapable of exercising.

Emergency Temporary Guardian (ETG) – A person appointed by the court when there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired, or that the person’s property is in danger of being wasted, misappropriated, or lost unless immediate action is taken; a petition to determine incapacity must be filed prior to the appointment of an ETG; the ETG is a temporary appointment although under certain conditions, the court may extend that appointment.

Family Guardian – any family member related by blood or marriage who is appointed by the court; may serve more than two family members without qualifying as a professional guardian; is eligible to receive compensation for his or her time and expense in the care of the person under guardianship.

Fiduciary – a person who has assumed a special relationship to another person or his or her property, such as a trustee, administrator, executor, lawyer, guardian, or conservator; a general term to apply to many categories of decision-making and management arrangements; must exercise the highest degree of care and accountability to maintain and preserve the person’s rights and/or property within the fiduciary’s charge.

Final Accounting – a report, filed by the guardian of the property, which is required promptly upon his or her termination as guardian; will include a final itemization of expenditures made on behalf of the person under guardianship.



Final Report – consists of a final accounting and must be filed under certain situations.

Foreign Guardian – a guardian from another state, territory or country; Florida will honor guardianship from any state, territory, or country, however, the guardian must, within 60 days after moving to Florida, file a certified copy of the guardianship order in the county where the person under guardianship resides; the guardian will now need to follow all Florida laws related to guardianship and will need to be represented by an attorney.

Guardian – a person who has been appointed by the court to act on behalf of the person under guardianship in accordance with Chapter 744, Florida Statutes; may be the guardian of the person or property, or both.

Guardian Ad Litem – advocates for abused, abandoned and neglected children.

Guardian Advocate – a person appointed by the court to act on behalf of a person with a developmental disability in accordance with Sec. 393.12, Florida Statutes; appointment occurs without an adjudication of incapacity of the person with a disability.

Guardian of the Person – a guardian who possesses all of the rights granted by the court to manage any personal affairs or make medical decisions for the person under guardianship.

Guardian of the Property – a guardian who possesses any or all powers and rights over the property of the person under guardianship.

Health Care Surrogate – a witnessed written document or oral statement that provides health care instructions and names another person to make health care decisions should the individual be unable to make decisions.

Health Insurance Portability and Accountability Act – provides the ability to transfer and continue health coverage for workers and families when they change or lose their jobs; reduces health care fraud and abuse; mandates industry-wide standards for health care information on electronic billing and other processes; and requires the protection and confidential handling of protected health information.

Incapacity – a legal status determined in a court whereby an individual is judged to lack sufficient ability to make specific personal or financial decisions for himself or herself; under the Uniform Guardianship and Protective Proceedings Act, an incapacitated person means an individual who “for reasons other than being a minor is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.”

Incapacitated Person – a person who has been judicially determined to lack the capacity to manage some or all of his or her property or essential health and safety requirements (see Incapacity).





Individual Education Plan (IEP) – a written plan and the primary vehicle for communicating a school district's commitment to addressing the unique educational and functional needs of a student with a disability; includes transition services to attain postsecondary goals and independent living skills; the plan is developed in accordance with IDEA.

Individuals with Disabilities Education Act (IDEA) – a federal law ensuring that children with disabilities ages 3 through 21 receive a free and appropriate education (FAPE).

Informed Consent – agreement to a treatment or other intervention that is based on adequate knowledge of the condition and alternatives (is informed), is not coerced (is voluntary), by a person who has capacity for such decisions; is the process by which a fully informed patient can participate in choices about health care.

Initial Guardianship Plan – a report, filed by the guardian of the person, describing the care the person under guardianship will receive in accordance with the recommendation of the examining committee; must be filed with the court within 60 days after the Letters of Guardianship have been issued.

Initial Guardianship Report – consists of an initial guardianship plan or verified inventory, or both, depending on rights delegated.

Instrumental Activities of Daily Living (IADL) – represent the skills that people usually need to be able to manage in order to live as independent adults; these activities include cooking, handling transportation, using the telephone and other communication devices, shopping, keeping track of finances, managing medication and basic home maintenance.

Intellectual Disability – is defined under Chapter 393, Florida Statutes, as sub-average general intellectual functioning accompanied by deficits in adaptive behavior which manifests prior to the age of 18 and can reasonably be expected to continue indefinitely.

Intellectual Functioning – functioning as assessed by one or more of the individually administered general intelligence tests developed for this purpose.

Last Will and Testament – a legal document which names a person(s) to manage the estate of a deceased person and provides for the distribution of property.

Least Restrictive Alternative – the least intrusive service or treatment that can effectively and safely address a person's needs and stated preferences; is a constitutional principle providing that the government may not pursue a legitimate purpose (such as protecting an individual who lacks capacity) through means that broadly stifle rights when the purpose can be achieved more narrowly.



Legal Representative – an individual or entity authorized under applicable law to consent to specified actions or decisions on behalf of an individual; a legally authorized representative could include, for example, a guardian, or an agent under a power of attorney; may also include other named decision-makers and may be focused on particular decisions (for instance, a legally authorized representative under Medicare can enroll individuals in Medicare plans).

Letters of Guardian Advocacy – a legal document issued by a Florida court designating a person to act as guardian advocate on behalf of a person with a developmental disability; these letters will specify the powers and duties of the guardian advocate.

Letters of Guardianship – a legal document issued by a Florida court designating a person to act as guardian on behalf of another person; will specify the type of guardianship as well as the powers and duties of the guardian.

Limited Guardian – a guardian appointed by the court to exercise only those rights specifically designated by court order; a guardian who does not possess all of the legal rights and powers of a plenary guardian.

Manage Property – take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits and income.

Medicaid Waivers – programs designed by Medicaid to assist people with disabilities to live in their communities rather than in institutions (such as hospitals, nursing facilities or intermediate care facilities); the majority of Florida's waivers are authorized by Title XIX of the Social Security Act, Section 1915(c) and referred to as home and community-based services waivers (HCBSWs) and provide targeted case management; to be a waiver participant, an individual must be medically qualified, certified for the waiver's institutional level of care, choose to enroll in the waiver as an alternative to institutionalization, and be financially eligible based on his or her income and assets. For more information about Medicaid waivers in Florida, go to: http://ahca.myflorida.com/Medicaid/hcbs_waivers/index.shtml.

Minor – a person under the age of 18.

Next of Kin – those persons who would be heirs at law of the person under guardianship or alleged incapacitated person if such person were deceased, and includes the lineal descendants of such person under guardianship or alleged incapacitated person.

Non-Professional Guardian – a person who has at any time been appointed by the court to act on behalf of two or less persons under guardianship in accordance with Chapter 744, Florida Statutes; may be appointed guardian of the person or property, or both; a family guardian, also considered a non-professional guardian, can serve more than two individuals if related by blood or marriage.





Office of Public and Professional Guardians (OPPG) – has oversight responsibilities for all public and professional guardians; establishes standards of practice, and criteria for education, registration and certification of public and professional guardians in Florida.

Person-Centered Planning – is based on the values of human rights, independence, choice and social inclusion, and is designed to enable people to direct their own services and supports.

Petitioner – a person or agency who makes a request to the court; in guardianship, it is the person who files the petition alleging that an individual lacks capacity and requires a guardian.

Phelan-McDermid Syndrome - also known as 22q13.3 deletion syndrome, is a rare chromosomal disorder caused by the loss of a small piece of chromosome 22; the deletion occurs near the end of the chromosome at a location designated q13.3; features vary widely and involve many parts of the body.

Plenary Guardian – a guardian appointed by the court to exercise all delegable rights and powers of the person under guardianship as ordered by the court related to personal care and property.

Power of Attorney (POA) – a legal instrument used to delegate authority to another; the person who signs (“executes”) a power of attorney is called the “principal,” and the person to whom authority is delegated is called the “agent.”

Prader-Willi Syndrome – a complex genetic disorder that typically causes low muscle tone, short stature, incomplete sexual development, intellectual disability, behavioral problems, and a chronic feeling of hunger that can lead to excessive eating and life-threatening obesity.

Pre-Need Guardian – a person named in a written declaration to serve as guardian in the event of the incapacity of the declarant.

Pro Bono – providing or involving free legal services.

Professional Guardian – a guardian appointed by the court to act on behalf of three or more persons under guardianship in accordance with Chapter 744, Florida Statutes; may be appointed guardian of the person or property, or both (a person serving as a guardian for two or more relatives is not considered a professional guardian).

Property – real and personal property or any interest in it and anything that may be the subject of ownership.

Public Guardian – a professional guardian or organization contracted by the State of Florida to serve indigent, incapacitated persons who have no willing family member or friend and no assets to pay a professional guardian; must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons; shall maintain a staff or contract



with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner; The Office of Public & Professional Guardians, housed within the Department of Elder Affairs, appoints local public guardian offices; there is a public guardian serving every county in Florida.

Representative Payee – an individual or agency appointed by the Social Security Administration (SSA) to receive and manage federal SSA benefits; these benefits include Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), and retirement benefits from the Social Security Administration.

Self-Determination – a term referring to the right for all persons to determine their own economic, social and cultural development.

Service Provider – an individual or agency that provides needed services, such as a doctor, dentist, banker, car salesman, personal care assistant, or a teacher.

Simplified Annual Accounting – may be filed if all the assets are maintained in a restricted account with a designated depository and the only transactions that occur are interest accrual, deposits pursuant to a settlement, or financial institution service charges; must include year-end statement from the financial institution.

Social Security Disability Insurance (SSDI) – a federal insurance program administered by the Social Security Administration and funded by deductions to workers' wages (Federal Insurance Contributions Act - FICA) which pays benefits to workers and certain members of their family if they are "insured," meaning that they worked long enough and paid Social Security taxes; SSDI payment is based on the earning of the worker and the number of people receiving benefits; if a worker has a child with a disability, the child may receive SSDI benefits based on the parent's FICA if one of three events occur: (1) the insured parent dies, (2) the insured parent becomes disabled, or (3) the insured parent retires. For more information about SSDI, go to www.ssa.gov/dibplan/index.htm.

Spina Bifida – a serious birth defect that occurs when the tissue surrounding the developing spinal cord of a fetus does not close properly; is part of a group of birth defects called neural tube defects; a portion of the neural tube fails to develop or close properly, leaving a gap or split, causing damage to the nervous system and defects in the spinal cord.

Standby Guardian – a person who is given the power by the court, upon petition of a currently serving guardian, to assume the duties of guardianship upon the death or adjudication of incapacity, of the last surviving natural or appointed guardian.

Substituted Judgment – the standard of surrogate decision-making that requires decisions in accordance with an individual's known values or preferences, as opposed to the "best interests" standard based on what a reasonable person would deem best under the circumstances.



Successor Guardian – a person appointed by the court to assume the duties of guardian as a result of the death, resignation or removal of the previous guardian.

Support Coordinator (or Case Manager) – a specific service provided to persons receiving services through the Agency for Persons with Disabilities; assists clients in assessing and matching their service needs with service providers, in accordance with services approved for the client; assists clients in better utilizing community supports and building circles of support.

Supplemental Security Income (SSI) – a federal income supplement program funded by general tax revenues (not Social Security taxes) and administered by the Social Security Administration; designed to help persons who have little to no income and are blind, elderly or have a disability; provides cash to meet basic needs (food, shelter and clothing). For more information about SSI, go to: www.ssa.gov/ssi/.

Trust – a legal instrument in which the owner of real or personal property (the trustor or settler) gives ownership of the property to a trustee to hold and to manage for the benefit of a third party (the beneficiary); can be a useful device for planning for the financial security of an incapacitated individual.

Verified – to confirm or substantiate by oath; to show to be true; may be subject to penalties of perjury.

Verified Inventory – a report, filed by the guardian of the property that describes the assets of the person under guardianship; must be filed with the court within 60 days after being appointed guardian of the property.

Veteran Guardian – designated to protect veterans and other persons who are entitled to receive benefits, such as pension, compensation insurance or other monies, from the United States Department of Veterans Affairs as a result of service in the Armed Forces of the United States.

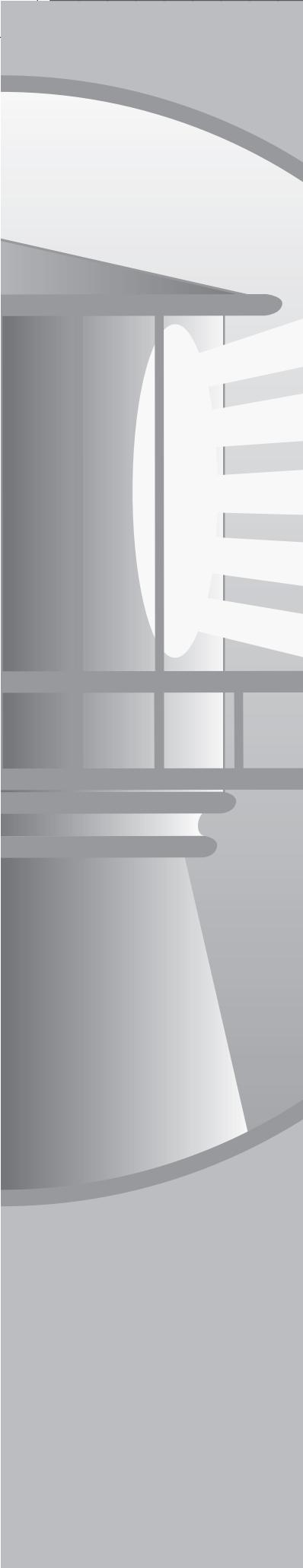
Voluntary Guardian – a form of guardianship that is created without an adjudication of incapacity; a certificate by a licensed physician is required asserting that the petitioner has been examined and that he or she understands the nature of the guardianship; the petitioner for the voluntary guardianship designates the guardian at the time the petition is filed.

Ward – a person who has some or all of his or her rights removed by the court and for whom a guardian has been appointed.



Appendix





Appendix

- A. Learning Activities Answer Key**
- B. Educational Resources**
- C. Sample Educational Durable Power of Attorney**
- D. Five Wishes**
- E. Medical Proxy and Declaration of Medical Proxy Form**
- F. General Duties of Guardian Advocates and Guardians Chart**
- G. Actions of Guardians/Guardian Advocates Needing Extra Court Approval**
- H. Comparison of Guardian Advocacy and Guardianship Processes Chart**
- I. Comparison of Restoration of Rights Process for Guardian Advocacy and Guardianship Chart**





A. Learning Activities Answer Key



Learning Activity #1 (Page 16):

The second statement is an example of self-determination because Ann initiates the action and solicits others to help her achieve what she (Ann) wants – not what her mother, support coordinator and guidance counselor recommend.



Learning Activity #2 (Page 21):

Least restrictive to most restrictive:

- A – Ignoring the doctor's advice and continuing her present lifestyle is not the safest option, but allows Aunt Susie the most independence, as well as the ability to maintain her current lifestyle.
- D – A caregiver in the home provides some safety while Aunt Susie maintains independence and control over services and current lifestyle.
- C – Moving in with a relative or friend allows Aunt Susie to remain in her community and provides more oversight than D, but may negatively impact Aunt Susie's current lifestyle.
- E – Moving to an assisted living facility does not allow Aunt Susie as much independence as A, D, or C and more than likely would limit her social inclusion and control over services.
- B – Moving to a nursing home restricts Aunt Susie's independence, changes existing social interactions, and limits control over services and supports.

Involving Aunt Susie in the planning process applies "person-centered planning" to her situation. It is more respectful than having her family make this decision for her. Making decisions without the involvement of the person is NOT recommended. Aunt Susie's decisions should not be driven by what Medicaid (or other governmental benefits) will pay for or whether there is a vacancy in an assisted living facility. Her decisions should be driven by what she wants, needs and can afford.





Learning Activity #3 (Page 21):

The first consideration, if at all possible, should be to discuss with Uncle John whether he wants to follow the doctor's instructions. If Uncle John cannot express what his wishes are, the guardian should first use the substituted judgment principle. The substituted judgment principle requires the guardian to look at the past decisions Uncle John made when he was capable of making a decision. Did he try smoking cessation when he had capacity? Did he ever talk to anyone about how he felt about smoking and whether he wanted to stop? Once the guardian gathers that information, the current decision should be made consistent with Uncle John's prior practices and statements. However, if there are no indications as to Uncle John's prior practices or statements, the guardian should make the decision that is in Uncle John's best interest. Here, that would mean helping Uncle John reduce or stop smoking.



Learning Activity #4 (Page 22):

While it appears that Mary may lack capacity, the scenario does not state that a determination has been made. Therefore, substituted judgment should be considered first, and if a determination cannot be made, then best interest should be used.



Learning Activity #5 (Page 22):

Substituted judgment should be used.





Learning Activity #6 (Page 44):

Legal Rights that can be Delegated to Someone Else	Tools and Instruments
Right to Apply for Government Benefits	<i>Supported Decision-Making</i> <i>POA/DPOA</i> <i>Representative Payee</i> <i>Health Care Surrogate (medical benefits only)</i> <i>Medical Proxy (medical benefits only)</i>
Right to Manage Money and Property	<i>Supported Decision-Making</i> <i>Banking Services</i> <i>POA/DPOA</i> <i>Representative Payee</i> <i>Trust</i>
Right to Determine Residence	<i>Supported Decision-Making</i> <i>POA/DPOA</i> <i>Health Care Surrogate (medical residence only)</i> <i>Medical Proxy (medical residence only)</i>
Right to Consent to Medical and Mental Health Treatments	<i>Supported Decision-Making</i> <i>POA/DPOA</i> <i>Health Care Surrogate</i> <i>Medical Proxy</i>
Right to Make Decisions about Social Environment	<i>Supported Decision-Making</i>
Right to Contract	<i>Supported Decision-Making</i> <i>POA/DPOA</i>
Right to Sue and Defend Lawsuits	<i>Supported Decision-Making</i> <i>POA/DPOA</i>





Learning Activity #7 (Page 45):

1. James' parents should review his bank reconciliations more often (suggest monthly until the overdrafts stop). They could also review his budget with him to show how the bank charges from overdrafts are reducing his available cash for entertainment.

The use of a pre-paid credit card could also be discussed with James to see if this would help with his money management, as well as help him build a credit history.

2. Bobby is a young man living on his own and appears to be doing quite well. He has a good circle of support and appears to be living a person-centered life.

Decision-making options for him to consider:

- Supported decision-making - Bobby should continue to make most, if not all of his decisions on his own, in consultation with others.
- Banking services - does he have a bank account, or if he has one, does he want someone else named on the account in case he needs that assistance?
- Durable power of attorney/health care surrogate - does he want to designate someone to make his health care decisions should he become incapacitated?
- Medical proxy - since Florida recognizes Down syndrome as a developmental disability, if Bobby does not designate a health care surrogate, his family could use the medical proxy to make decisions for him, should the situation arise.
- Trust - does his family anticipate leaving him money and want to place it in a trust for his future usage?

3. Kelly should be given the opportunity first to express her desires and what decision-making assistance she might need. If she wants her parents to assist her in making decisions, these are decision-making options for her to consider to avoid guardian advocacy or guardianship:

- Supported decision-making - Kelly should continue to make most, if not all of her decisions on her own, in consultation with others.
- Durable power of attorney - Kelly can designate someone to help her manage her money if she needs assistance; does she want to designate someone to help with educational decisions by using an educational DPOA?



- Representative Payee - does she want someone to apply as a representative payee?
- Health Care Advance Directive - does she want to designate someone to make or assist with health care decisions?
- Medical proxy - allows parents to make medical decisions if physician states Kelly is incapable of providing informed health care consent (this option does not require delegation from Kelly).

The advantages of these options are low cost, Kelly retains all her legal rights (with the exception of medical proxy), and there is no judicial involvement in family affairs. However, the challenges are that Kelly must understand and be able to communicate she is giving a parent the right to make certain decisions, and the parent must understand and be able to explain to third parties that these alternative decision-making options are valid, legal options.

4. Lou Ann is the mother of three who sustained a traumatic brain injury. It appears that her family has done a good job of being her circle of support and that she is self-determined to resume her previous lifestyle to the extent possible. Her family has been exercising person-centered principles and now Lou Ann wants to be more independent. Her son and older daughter could remain in her circle of support after they move out, and communicate by phone. The important question is, does Lou Ann need support in her home to continue living there? If so, she could consider renting a room in exchange for assistance, identifying a relative or friend who could provide temporary assistance, or private pay for assistance. Depending on the extent of her long-term disabilities, she could apply for Social Security Disability Insurance and/or a Medicaid waiver.

Decision-making options for her to consider:

- Supported decision-making - Lou Ann should continue to make her own decisions in consultation with others.
- Banking services - since her daughter assisted with paying bills, how was this done? Does she already have a bank account on which her daughter is a signer? If not, does she want to open one? If her daughter is going to live in the same town, she can still help pay bills, if needed. Also, this would be a good opportunity to teach her 13 year old money management to perhaps assist her in the future.
- Durable power of attorney/health care surrogate - does Lou Ann have a surrogate health care decision-maker? If not, does she want to designate one? Also, since she has a young daughter, she should consider expanding her durable





power of attorney to include other life decisions, in case she becomes incapacitated before her younger daughter becomes an adult.

- Trust - was there a lawsuit related to her accident and did Lou Ann receive any compensation? If so, does she want to create a trust to manage those assets?

5. Florence is an elderly woman who is considering moving closer to her daughter and has recently been diagnosed with early onset dementia. She has taken a person-centered approach by deciding to share her money management with her daughter when her husband died. She will need to develop a new circle of support when she moves, as well as identify where she will live and establish new professional services. Florence should identify where she would like to live and her daughter should identify places that match Florence's wishes and her budget. She can visit the various options in order to make a decision on where to move. Florence should talk with her local bank to see if there is a branch in her new location, so no major changes will be needed. Once she moves, she can talk with her new neighbors and her daughter to identify new doctors and dentist. Before she moves, she can ask her current doctors and dentist if they can recommend someone in the town where she is moving.

Decision-making options for her to consider:

- Supported decision-making - Florence should continue to make her own decisions in consultation with others.
- Banking services - since her daughter assists her now, does she want to continue this arrangement or does she want to make any changes?
- Durable power of attorney/health care surrogate - does Florence have a durable power of attorney or health care surrogate? If not, does she want to execute either document? Also, at her age and recent diagnosis, she should consider expanding her durable power of attorney to include other life decisions, in case she becomes incapacitated.
- Trust - does Florence have a trust now and does it need updating? Does she want to establish a relationship with a local attorney in the town where she is moving or continue to work with the one that drew up the trust initially? If she does not have a trust, does she want to create one?

6. Jack is a middle-aged adult residing in a group home for persons with developmental disabilities. His circle of support has recently decreased with the loss of his mom and dad, but he has two



siblings who continue to be involved with him. Since he receives services from the Agency for Persons with Disabilities, Jack has a support coordinator who should be a part of his circle of support. Jack should ask his support coordinator to invite his siblings to his annual support planning meeting so everyone is involved in how to best support Jack.

Decision-making options for him to consider:

- Supported decision-making - Jack should continue to make his own decisions in consultation with others. The biggest question here is how independently is Jack making decisions? Was he strongly influenced by his parents, or by service providers? It is unclear whether Jack likes where he lives and if he is happy with his life, in general. With the recent loss of his parents, this might be a good time for his sister and brother to meet with him to discuss what he wants his future to look like.
- Banking services - it is unclear whether Jack is employed and how his personal allowance is handled. This should be clarified and addressed. A pre-paid credit card should also be discussed to provide Jack with independence over his money management.
- Durable power of attorney - since Jack's mom was his agent under his durable power of attorney and she has died, someone else needs to be put in place, if he so desires, and if he continues to have capacity to do so. If his attorney believes he continues to have capacity, he needs to determine what duties and responsibilities he wants to now delegate (the same as he gave his mom, more duties, or less duties?). If his attorney believes he does not have capacity to execute a durable power of attorney, his brother or sister can become his medical proxy to manage his governmental benefits and health care decisions.
- Representative payee - this is not addressed in the scenario, but it should be determined if he has one. Jack should discuss this with his circle of support to decide whether this should be changed or remain the same. If Jack doesn't know who this is, his support coordinator should be able to answer it.
- Trust - did Jack's parents leave him any assets when they died? If so, a special needs trust should be established to protect his Medicaid eligibility. Jack and his siblings should consult with an attorney if any assets were left to Jack.



B. Educational Resources

FDOE Exceptional Student Education Program Development and Services

The Bureau of Exceptional Education and Student Services administers programs for students with disabilities and students who are gifted. Additionally, the bureau coordinates student services throughout the state and participates in multiple inter-agency efforts designed to strengthen the quality and variety of services available to students with special needs ages three to twenty-one.

Each school district is responsible for providing services to students who are eligible for exceptional student education (ESE) programs. School districts and schools develop their own programs to serve their students in the most effective way possible. The bureau provides training to school staff, district administrators, and others on important issues and current instructional practices; gives the districts information on state and federal law relating to the education of exceptional students; monitors the districts' compliance with those laws; helps resolve conflicts between school districts and families of exceptional students; and provides any other technical assistance school districts need.

- To contact the Bureau of Exceptional Education and Student Services within the Florida Department of Education:
Florida Department of Education (FDOE)
Bureau of Exceptional Education and Student Services
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400
Phone: (850) 245-0475
Fax: (850) 245-0953
- For information and resources from the Bureau's Information and Resource Center, go to: <http://www.fl DOE.org/academics/exceptional-student-edu/beess-resources/> or call (850)-245-0477.

The Florida Diagnostic & Learning Resources System (FDLRS)

The Florida Diagnostic & Learning Resources System (FDLRS) provides diagnostic, instructional, and technology support services to district exceptional education programs and families of students with disabilities. Service centers include 19 centers that directly serve school districts in the areas of Child Find, Parent Services, Human Resource Development (HRD), and Technology. In addition, the FDLRS Network also includes 6 Multi-disciplinary Centers who focus on in-depth evaluations and several statewide projects offering specialized services.



- For more information about FDLRS and to find a center near you, go to: www.fdlrs.org.
- To contact FDLRS by mail, phone or fax:
3841 Reid Street
Palatka, FL 32177
Phone: (386) 312-2265
Fax: (386) 329-3835

Project 10: Transition Education Network

The Transition Education Network assists Florida school districts and others in providing secondary transition services to students with disabilities in order to improve their academic success and post-school outcomes. Project 10 serves as the primary conduit between the Florida Department of Education, specifically the Bureau of Exceptional Education and Student Services (BEESS), and relevant school district personnel in addressing law and policy, effective practices, and research-based interventions in the area of transition services for youth with disabilities.

For more information about the Transition Education Network and available resources and publications, go to: www.project10.info.

National Center on Secondary Education and Transition

The National Center on Secondary Education and Transition (NCSET) coordinates national resources, offers technical assistance, and disseminates information related to secondary education and transition for youth with disabilities in order to create opportunities for youth to achieve successful futures.

For more information about NCSET, go to: www.ncset.org.



C. Sample Educational Durable Power of Attorney

Durable Power of Attorney for Education

Know All Men By These Presents that I, _____, the Principal, of _____ (address), do hereby make, constitute and appoint my _____ (relationship to Principal), _____ (Agent name), of _____ (Agent address), to serve as my true and lawful attorney in fact, referred to herein as "agent" or "attorney in fact", to exercise the powers and discretion set forth below and without approval or consent of any other attorney in fact.

My Agent, when acting in good faith and in my name, place and stead, and on my behalf, and for my use and benefit, is authorized to do the following:

- A. To attend education meetings and participate in the development and implementation of an Individual Education Plan and/or a Transitional Individual Education Plan on my behalf while I am enrolled in any school; and to attend meetings and participate in the development of a Support Plan with any agency acting for persons with disabilities which exists in the area in which I reside upon the completion of my education.
- B. To provide opportunities for me to engage in any public and/or private educational programs.
- C. To make decisions for me concerning my education.
- D. To provide opportunities for me to engage in any recreational activities having an educational purpose.
- E. To investigate and arrange for opportunities for me to engage in educational activities that provide occupational training.
- F. To enroll me in any educational programs.
- G. To authorize any services for me that are designed to provide me with educational benefit and/or access to a free, appropriate public education in public school as provided for in the Individuals with Disabilities Education Act.
- H. To negotiate and approve on my behalf reasonable accommodations in education services as required under Section 504 of the Rehabilitation Act of 1973. To have access to my school records and other personal education information.

The scope of this power shall also extend to confidential records and information, whether prepared by school personnel or by third parties, including but not limited to medical services providers, psychological services providers, assistive technology providers, speech, physical and occupational services providers, social work providers, and any provider of durable medical equipment.



This Durable Power of Attorney is non-delegable except as provided in F.S. 709.2114 (1) (b).

This Durable Power of Attorney is not terminated by subsequent incapacity of the principal, except as provided in chapter 709, Florida Statutes or otherwise by law. This Power of Attorney is governed by the laws of the State of Florida. In accordance with chapter 709.2106 (5), Florida Statutes, a photocopy or electronically transmitted copy of an original of this Power of Attorney has the same effect as the original document.

Dated _____, 2017.

(Principal Name and Address)

In the presence of (2 witnesses):

Sign _____ Sign _____

Print Name _____ Print Name _____

State of Florida

County of _____

I Hereby Certify that the foregoing instrument was acknowledged before me this _____, 20_____, by _____ (Principal Name) who personally appeared before me at the time of notarization, and who executed the foregoing document, and who is personally known to me or who produced proper identification.

Notary Public:

Sign _____

Print _____

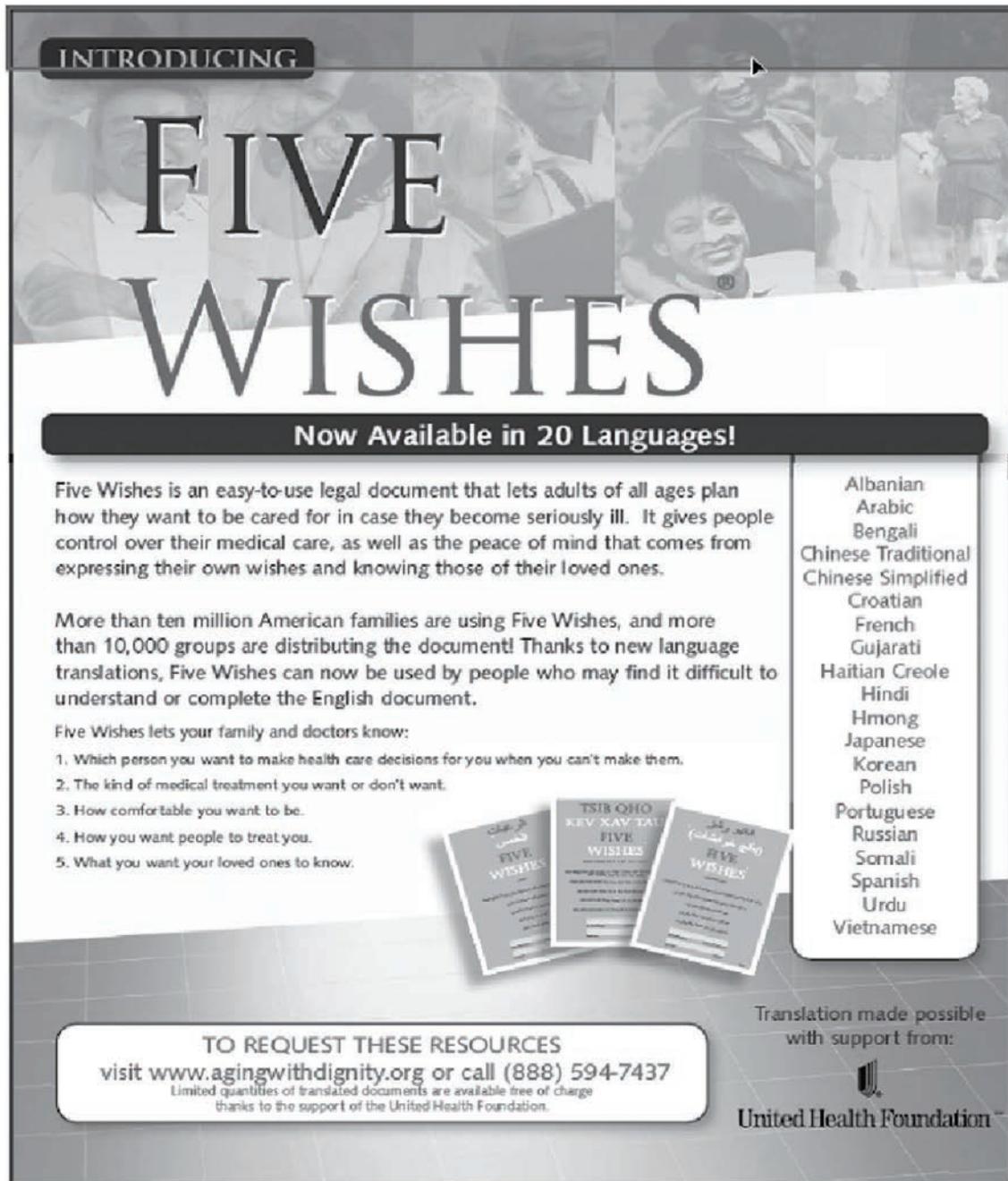
State of Florida at Large _____

My Commission Expires _____

Commission Number _____



D. Five Wishes



INTRODUCING

FIVE WISHES

Now Available in 20 Languages!

Five Wishes is an easy-to-use legal document that lets adults of all ages plan how they want to be cared for in case they become seriously ill. It gives people control over their medical care, as well as the peace of mind that comes from expressing their own wishes and knowing those of their loved ones.

More than ten million American families are using Five Wishes, and more than 10,000 groups are distributing the document! Thanks to new language translations, Five Wishes can now be used by people who may find it difficult to understand or complete the English document.

Five Wishes lets your family and doctors know:

1. Which person you want to make health care decisions for you when you can't make them.
2. The kind of medical treatment you want or don't want.
3. How comfortable you want to be.
4. How you want people to treat you.
5. What you want your loved ones to know.

TO REQUEST THESE RESOURCES
visit www.agingwithdignity.org or call (888) 594-7437
Limited quantities of translated documents are available free of charge thanks to the support of the United Health Foundation.

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Albanian
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E. Medical Proxy and Declaration of Medical Proxy Form

Under Florida Statute 765.401, a medical proxy is defined as follows:

- (1) If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:
 - (a) The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability as defined in s. 393.063, Florida Statutes, who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;
 - (b) The patient's spouse;
 - (c) An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
 - (d) A parent of the patient;
 - (e) The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;
 - (f) An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or
 - (g) A close friend of the patient.
 - (h) A clinical social worker licensed pursuant to chapter 491, or who is a graduate of a court-approved guardianship program. Such a proxy must be selected by the provider's bioethics committee and must not be employed by the provider. If the provider does not have a bioethics committee, then such a proxy may be chosen through an arrangement with the bioethics committee of another provider. The proxy will be notified that, upon request, the provider shall make available a second physician, not involved in the patient's care to assist the proxy in evaluating treatment. Decisions to withhold or withdraw life-prolonging procedures will be reviewed by the facility's bioethics committee. Documentation of efforts to locate proxies from prior classes must be recorded in the patient record.
- (2) Any health care decision made under this part must be based on the proxy's informed consent and on the decision the proxy reasonably believes the patient would have made under the circumstances. If there is no indication of what the patient would have chosen, the proxy may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.





- (3) Before exercising the incapacitated patient's rights to select or decline health care, the proxy must comply with the provisions of ss. 765.205 and 765.305, except that a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.
- (4) Nothing in this section shall be construed to preempt the designation of persons who may consent to the medical care or treatment of minors established pursuant to s. 743.0645.



Declaration of Medical Proxy

Under Florida Statute 765.401, a medical proxy can be appointed to make health care decisions for an "incapacitated or developmentally disabled patient" if there is no executed advance directive, if there is no designated surrogate or alternate surrogate to execute an advance directive, or if the designated or alternate surrogate is no longer available to make health care decisions.

Health care decision means providing informed consent, refusal of consent or withdrawal of consent to any and all health care; decisions concerning private, public, government, or veteran's benefits to defray the cost of health care and the right of access to all records of the principal reasonably necessary for a medical proxy to make decisions involving health care. Health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act. Please check the appropriate proxy category you are signing under:

- A court appointed guardian or guardian advocate;
- The patient's spouse;
- An adult child of the patient or the majority thereof;
- A parent of the patient;
- An adult sibling of the patient or the majority thereof;
- An adult relative of the patient who has exhibited special care and concern for the patient;
- A close friend of the patient; or
- A licensed clinical social worker or a clinical social worker who is a graduate of a court-approved guardianship program selected by a bioethics committee.

The patient's attending physician should evaluate the patient's capacity and if the physician concludes the patient has capacity to make health care decisions, the attending physician should enter that evaluation in the patient's record. If the attending physician questions capacity, a second physician can also be consulted.

I, _____, medical proxy, confirm that the above conditions have been met for the patient, _____, and that there are no available surrogates to be considered from a prior class according to this statute. Therefore, I accept the designation of Medical Proxy for the patient named above. I agree to make health care decisions based upon what I reasonably believe the patient would make under the circumstances. I accept the responsibilities of Medical Proxy as authorized under Sec. 765.401, Florida Statutes.

Medical Proxy Signature

Date

STATE OF FLORIDA

COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this _____ day of _____, _____, by _____

Notary Public Signature

Print, Type or Stamp Commissioned Name of Notary

Personally Known _____ OR Produced Identification _____ Type of Identification Produced _____



F. General Duties of Guardian Advocates and Guardians

General Duties of Guardian Advocates and Guardians	
Initial	Review Letters of Guardianship to identify specific authority delegated
	Advise the person under guardianship and others in the community of the appointment as guardian
	Advise the person under guardianship of the right to restoration
	Address immediate needs of the person under guardianship related to rights delegated
	Determine whether the person under guardianship is free from abuse, neglect and exploitation (ANE) and report to proper authorities if ANE is suspected or observed
	Meet with the person under guardianship to determine person's preferences, wants and goals as related to rights delegated
	Develop system for documentation and record keeping
	Develop a plan for the coming year and identify and list all assets
	File initial reports
On-Going	Implement the initial plan
	Continue to discuss with the person under guardianship the preferences, wants and goals as related to rights delegated
	Exercise rights delegated
	Maintain records
	Maintain personal contact
	Develop the abilities of the person under guardianship to increase or maintain level of independence through services, therapies and activities
	Continue to advise the person under guardianship of the right to restoration
	Monitor for ANE and report to proper authorities
	File annual reports



Termination	Determine reason for termination
	Submit appropriate court filings and obtain court order
	Deliver property to rightful party
	File appropriate final reports as required



G. Actions of Guardians/Guardian Advocates That Need Extra Court Approval

The law in Florida requires a guardian to obtain court approval before taking certain actions. The following is a list of actions that require a petition for authority to act and court approval.

Court approval required to:

- Commit a person to a facility, institution or licensed service provider without a formal placement proceeding.
- Petition for dissolution of marriage.
- Consent to experimental biomedical or behavioral procedures or experiments.
- Consent to sterilization or abortion.
- Consent to termination of parental rights.
- Make decisions related to travel.
- Perform, compromise or refuse performance of contracts of the person under guardianship that continue as obligations of the estate.
- Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment.
- Make ordinary or extraordinary repairs to guardianship property.
- Subdivide, develop or dedicate land to public use; dedicate easements.
- Enter into a lease for any purpose, with or without option to purchase or renew.
- Enter into a lease or arrangement for exploration and removal of minerals or other natural resources.
- Abandon property when, in the opinion of the guardian, it is valueless or it is so encumbered or in such condition that it is of no benefit to the estate.
- Pay calls, assessments, and other sums chargeable or accruing against, or on account of securities.
- Borrow money, with or without security, to be repaid from the property or otherwise and advance money for the protection of the estate.
- Compromise, extend or otherwise modify the terms of any obligation owing to the estate.
- Prosecute or defend claims to protect the estate and the guardian in the performance of guardian's duties.
- Sell, mortgage or lease real or personal property, including the homestead.



- Continue any unincorporated business or venture in which the person under guardianship was engaged.
- Purchase a home in Florida for the person under guardianship or the dependent family of the person under guardianship.
- Exercise options in an insurance policy of the person under guardianship.
- Pay reasonable funeral expenses of the person under guardianship up to \$6,000.
- Make gifts or donations of property of the person under guardianship.
- Execute a codicil to obtain the maximum charitable deduction when the will of the person under guardianship evinces such an objective.
- Create revocable or irrevocable trusts in connection with tax or estate planning.
- Disclaim an interest in property.
- Enter into contracts.
- Pay for the support, health, and maintenance of a minor person under guardianship when one or both of the parents are alive.



H. Comparison of Guardian Advocacy and Guardianship

		Guardian Advocacy	Guardianship
Statutory Authority	Sec. 393.12, Florida Statutes	Chapter 744, Florida Statutes	
Governing Court Rule	Florida Probate Rules	Florida Probate Rules	
Petitioner	<p>Person petitioning the court is:</p> <ul style="list-style-type: none"> Someone alleging that a person with a developmental disability (DD) needs decision-making assistance in specified areas, or an Individual in need of a guardian advocate. 	<p>Person petitioning the court is someone alleging the incapacity of another.</p>	
Petition to Determine Incapacity	<p>No petition to determine incapacity is filed. (No adjudication of incapacity under guardian advocacy.)</p>	<p>A petition is filed and is usually accompanied by a petition to appoint guardian. The court appoints an attorney to represent the alleged incapacitated person (AIP). The AIP can substitute counsel if he/she chooses.</p> <p>Costs: AIP attorney's fees and filing fees paid from AIP's property if guardianship is established, unless AIP is indigent.</p>	
Petition for Appointment of a Guardian Advocate/Guardian	<p>Guardian advocacy is available only to persons with developmental disabilities, who can perform some, but not all decision-making tasks necessary to care for their person or property.</p>	<p>A Petition for Appointment of a Guardian must be filed with the Petition to Determine Incapacity. Generally, the petition must include specific information about the individual with a disability, such as name, age, contact information, next of kin and the individual's attending physician. It must also state those rights that the individual is incapable of exercising, to the best of the petitioner's knowledge. (Statute specifies what must be included in the petition.)</p>	



Guardian Advocacy		Guardianship
Statutory Authority	Sec. 393.12, Florida Statutes	Chapter 744, Florida Statutes
Governing Court Rule	Florida Probate Rules	Florida Probate Rules
Petition for Appointment of a Guardian Advocate/Guardian (continued)	<p>Generally, the petition must include specific information about the individual with a disability, including name, age, contact information, and type of disability, as well as specifying the exact area(s) in which the person lack(s) the capacity to make informed decision(s) about his or her care and treatment. It must also name the person desiring to become the guardian advocate. (Statute specifies what must be included in the petition.)</p> <p>Costs: Filing Fee (statute does not specify who pays)</p>	<p>Costs: Filing Fee (Paid from property of the person if guardianship established, unless person under guardianship is indigent. Paid by petitioner if petition filed in bad faith. Unclear who pays if petition dismissed and there is no bad faith filing.)</p>
Notice	<p>Notice of petition must be given to:</p> <ul style="list-style-type: none"> • Person with a DD (served on and read) • Next of kin of person with a DD • Health care surrogate, if any • Agent under a Durable Power of Attorney, if any 	<p>Notice of petition must be given to:</p> <ul style="list-style-type: none"> • AIP (served on and read) • Next of kin named in petition • Attorney for AIP
Examining Committee	None	<p>An Examining Committee is appointed by the court and consists of three (3) members.</p> <p>Costs: Examining committee fees are paid from the AIP's assets, unless the AIP is indigent.</p>



Guardian Advocacy		Guardianship
Statutory Authority	Sec. 393.12, Florida Statutes	Chapter 744, Florida Statutes
Governing Court Rule	Florida Probate Rules	Florida Probate Rules
Requirement that Guardian have an Attorney	A guardian advocate need not be represented by an attorney unless required by the court, or if the guardian advocate is delegated any rights regarding property other than the right to be the representative payee for government benefits.	Generally, the Florida Probate Rules require guardians to be represented by counsel. Exception: A guardian need not be represented by an attorney to file simplified annual accountings where all assets of the estate are in designated depositories and the only transactions that occur in that account are interest accrual, deposits from a settlement, or financial institution service charges.
Adjudicatory Hearing to Determine Incapacity	No hearing to determine incapacity; however, there is a hearing to appoint a guardian advocate. At the hearing, the court shall receive and consider all reports relevant to the person's disability, including any individual support plans, any individual education plans, and any other professional reports documenting the condition and needs of the person.	AIP must be present, unless he/she waives presence. Incapacity must be established by clear and convincing evidence if no lesser restrictive option is available.
Removal of Rights	The individual retains all rights except those granted to the guardian advocate to exercise. Letters of Guardian Advocacy are issued by the Court and specify which rights the guardian advocate can exercise.	The court will issue Letters of Guardianship specifying which rights have been removed, who is authorized to act on behalf of the person and to what extent the guardian is authorized.
Exceptions from Reporting	Guardian advocates are not required to file annual accountings if the only property is Social Security benefits and the guardian is also the representative payee.	Guardians are not required to file annual accountings if the only property is Social Security benefits and the guardian is also the representative payee.



Guardian Advocacy		Guardianship
Statutory Authority	Sec. 393.12, Florida Statutes	Chapter 744, Florida Statutes
Governing Court Rule	Florida Probate Rules	Florida Probate Rules
Restoration of Rights	<p>Any interested person, including the person under guardian advocacy, may file a Suggestion of Restoration of Rights. It can be a simple note or letter with the person's contact information and requesting restoration, or can include the case number and a list of each right requesting to be restored.</p> <p>Evidentiary support or a statement of the good faith reason for the belief must also be included. If no evidentiary support is attached, the court must immediately set a hearing wherein the court can consider all reports and testimony relevant to the person's decision-making abilities.</p> <p>At the conclusion of the hearing or review of the evidence submitted, the court will enter an order denying the suggestion or restoring some or all of the individual's rights.</p>	<p>Any interested person, including the person under guardianship, may file a Suggestion of Capacity. It can be a simple, signed note with the person's contact information and requesting restoration, or can include the case number, a list of each right requesting to be restored and a statement of good faith reason for the belief must also be included.</p> <p>The court will immediately appoint a physician to examine the person under guardianship and submit the report within 20 days.</p> <p>If the person under guardianship does not have an attorney, the court shall appoint one to represent the person under guardianship.</p> <p>If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the court shall set the matter for hearing.</p> <p>At the conclusion of the hearing or review of the physician's report, the court will enter an order denying the suggestion or restoring some or all of the individual's rights.</p>



I. Comparison of Restoration of Rights Process for Guardian Advocacy and Guardianship Chart

Restoration of Rights Process in Florida		
Elements of the Process	Guardian Advocacy Sect. 393.12(12), Florida Statutes	Guardianship Section 744.464, Florida Statutes
Suggestion of Restoration of Rights/Capacity	<p>Any interested person, including the person under guardian advocacy, may file a Suggestion of Restoration of Rights. It can be a simple, signed letter with the person's contact information and requesting restoration, or can include case number and a list of each right requesting to be restored. Evidentiary support or a statement of the good faith reason for the belief must also be included.</p> <p>The Suggestion must be filed in the court where the guardian advocacy case is currently located. (This can be found at the top of the Letters of Guardian Advocacy.)</p>	<p>Any interested person, including the person under guardianship, may file a Suggestion of Capacity. It can be a simple, signed note with the person's contact information and requesting restoration, or can include the case number, a list of each right requesting to be restored and a statement of good faith reason for the belief must also be included.</p> <p>If the person is not already represented by an attorney, a request may be made for the Court to appoint one.</p> <p>The Suggestion must be filed in the court where the guardianship case is currently located. (This can be found at the top of the Letters of Guardianship.)</p>
Physician's Review	Evidentiary support includes, but is not limited to, a signed statement from a medical, psychological or psychiatric practitioner by whom the person under guardian advocacy was evaluated and which supports the Suggestion for the restoration.	The Court will immediately appoint a physician to examine the person under guardianship and submit a report within 20 days.
Appointment of Attorney	Within 3 days after the filing of the Suggestion, an attorney will be appointed by the Court, if the person is not already represented by counsel.	If the person under guardianship does not have an attorney, the court can appoint one to represent that person.



Restoration of Rights Process in Florida		
Elements of the Process	Guardian Advocacy Sect. 393.12(12), Florida Statutes	Guardianship Section 744.464, Florida Statutes
Need for a Hearing	<p>1. If no evidentiary support is attached to the Suggestion of Restoration of Rights, the Court shall immediately set a hearing to inquire of the petitioner and guardian advocate as to the reason that information was not provided and enter such orders as are appropriate to secure the required documents;</p> <p>and</p> <p>2. If an objection is timely filed, or if the evidentiary support suggests that restoration of rights is not appropriate, the court shall set the matter for hearing.</p>	If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the Court shall set the matter for hearing.
Notice of a Hearing	The person under guardian advocacy and the person's attorney shall be provided notice of the hearing. The clerk of the court shall immediately send notice of the filing of the suggestion to the person under guardian advocacy, the guardian advocate, the attorney for the person, the attorney for the guardian advocate, if any, and any other interested persons designated by the Court.	The Court shall immediately send notice of the filing of the suggestion of capacity to the person under guardianship, the guardian, and the attorney for the person, if any, and any other interested persons designated by the Court.
Filing of Objections	Any objections to the Suggestion of Restoration of Rights must be filed within 20 days after service of the notice.	Any objections to the Suggestion of Capacity must be filed within 20 days after service of the notice.



Restoration of Rights Process in Florida		
Elements of the Process	Guardian Advocacy Sect. 393.12(12), Florida Statutes	Guardianship Section 744.464, Florida Statutes
Order of Restoration	If no objections are filed and the court is satisfied with the evidentiary support for restoration, the Court shall enter an order of restoration of rights which were delegated to a guardian advocate and which the person under guardian advocacy may now exercise.	If no objections are filed, and the Court is satisfied with the medical examination, the Court shall enter an order of restoration of capacity, restoring all or some of the rights which were removed from the person under guardianship. The order must be issued within 30 days after the medical report is filed.
	OR	OR
	At the conclusion of a hearing, the court shall enter an order denying the Suggestion of Restoration of Rights, or the Court will restore all or some of the rights that were delegated to the guardian advocate. If only some rights are restored to the person with a developmental disability, the court shall enter amended Letters of Guardian Advocacy.	At the conclusion of a hearing, the Court shall enter an order either denying the Suggestion of Capacity, or the Court will restore all or some of the rights which were removed from the person under guardianship. If only some rights are restored to the person, the order must state which rights are restored and the court shall enter amended Letters of Guardianship. The guardian shall prepare a new guardianship report which addresses only the remaining rights retained by the guardian.



Lighting the Way to Guardianship and Other Decision-Making Alternatives

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