

# Developing Abilities and Restoring Rights

## A Guide for Supporting Persons with Disabilities

*(Part of the Developing Abilities and Restoring Rights Series)*



*This document was commissioned, funded and sponsored by the Florida Developmental Disabilities Council, Inc., and produced through funding provided by the U.S. Department of Health and Human Services, Administration for Developmental Disabilities.*

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# Preface

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The Florida Developmental Disabilities Council (FDDC) is a non-profit organization that receives federal assistance from the Department of Health and Human Services Administration on Intellectual and Developmental Disabilities. The federal law that created the FDDC states that the purpose of the FDDC is to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this title.

To fully support people to lead the lives they are entitled to live, the FDDC recognizes the need to raise awareness of ways to build abilities among persons with disabilities in the area of legal rights particularly those who are under guardianship or guardian advocacy. The FDDC strongly believes that numerous legal options and tools exist in Florida law to assist persons with disabilities to live and work as independently as possible within their communities.

This manual seeks to provide the legal community and professionals working in the area of guardianship with tools to better represent the interests of persons with developmental disabilities by enhancing the person's independence, productivity, inclusion and exercise of self-determination in all facets of community life based upon such authorities as federal and state statutes, applicable case citations, Florida Administrative Codes, Florida Probate Codes, and Rules of Professional Conduct.



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# Section One: Introduction

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## A. Overview of Materials

Persons with disabilities may be placed under guardianship<sup>1</sup> because someone believed they were incapable of safeguarding their own health and well-being. However, there are people who resist the imposition of guardianship and want to be in control of their own lives. Therefore, legal practitioners need to be equipped and prepared to assist persons who want more involvement in decision-making.

*Developing Abilities and Restoring Rights: A Manual for Legal Professionals* is a manual designed for professionals involved in the guardianship process, specifically, attorneys, judges, examiners and guardians. This manual is part of an educational initiative sponsored by the Florida Developmental Disabilities Council<sup>2</sup> and the Guardian Trust.<sup>3</sup> Three publications comprise the *Developing Abilities and Restoring Rights* series:

1. *Developing Abilities and Restoring Rights: A Workbook for Persons with Disabilities*
2. *Developing Abilities and Restoring Rights: A Guide for Supporting Persons with Disabilities*
3. *Developing Abilities and Restoring Rights: A Manual for Legal Professionals*

The objective of the series is to develop abilities and build independence among people with disabilities, particularly those who are under guardianship and who may want some or all of their rights restored. Guardianship professionals using this manual are encouraged to also read the accompanying *Workbook* and *Guide* to increase awareness and a broader understanding of the activities and strategies available to individuals seeking greater independence. Although these materials are designed specifically to address the needs of persons with developmental disabilities, the materials will also be useful in working with persons with age-related or acquired disabilities.

The purpose of the legal manual is to give guardianship professionals practice aids to equip them in assisting persons under guardianship seeking to have their legal rights restored. Guardianship professionals play a vital role in safeguarding the due process protections afforded by Florida law. Guardians are required to help build capacities and bring potential restoration cases to the attention of the court. Attorneys and guardians bring potential alternatives to guardianship and restoration cases to the attention of the judge. Physicians examine the persons seeking restoration and make recommendations to the court. Judges evaluate evidence according to law and ultimately decide whether a person's rights can be restored.

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<sup>1</sup> Throughout this Manual, the term guardianship is used to refer to guardianship and guardian advocacy unless there is a difference in treatment between the two processes.

<sup>2</sup> The Florida Developmental Disabilities Council is a non-profit organization that receives its funding from the U.S. Dept. of Health and Human Services, Administration on Intellectual and Developmental Disabilities. Its purpose is to promote innovative programs to improve the quality of life of individuals with a disability.

<sup>3</sup> Guardian Trust is an organization of Special Needs Trust Administrators established to help people with disabilities financially qualify for public assistance programs such as Medicaid and Supplemental Security Income (SSI).

This manual includes:

- an overview of disabilities and civil rights relevant to guardianship;
- strategies to avoid, limit or replace a plenary guardianship;
- a review of the restoration of rights process, barriers to restoration, restoration case law; and
- best practices for participants in the restoration process. For example:
  - ✓ Attorneys interested in representing people with disabilities will find a discussion of how to evaluate the case; work with the person under guardianship and other interested persons; and, strategies on how to evaluate and present a strong case for restoration.
  - ✓ Judges will find a review of the legal requirements involved in restoration proceedings and a discussion of potential sources of evidence to aid in ruling on restoration issues.
  - ✓ Guardians will find a discussion of their statutory responsibility to assist the person under guardianship in regaining capacity.
  - ✓ Examiners (physicians) appointed to evaluate the individual will find a discussion of their role in the restoration process and a brief discussion of potential tools to assess capacity.

This manual will also raise awareness among guardianship professionals of the need to support building independence and developing abilities for persons with disabilities. This effort to raise awareness stems from a national movement encouraging the principles of supported decision-making, personal autonomy, and self-determination.

In the 2014 Restoration of Capacity Study and Work Group Report funded by the Florida Developmental Disabilities Council and Guardian Trust, it was reported that:

The increased focus on “supported decision-making” as opposed to “surrogate decision-making” is perhaps the most significant development that will impact people currently in guardianship as well as those who may be able to avoid guardianships that would have otherwise been inevitable. ...A groundswell of support has occurred for examining guardianship from a human rights perspective. The Third National Guardianship Summit held in Utah in 2011, like the two previous summits before it, generated many ideas for improvements in guardianship theory and in practice. The topics covered included an overview of status of and need for standards in guardianship, surrogate decision-making, the need for person-centered planning, specific discussions of various areas of guardianship decision-making, and increased monitoring. While not legally binding, many of these ideas were subsequently incorporated into the National Guardianship Association Standards of Practice.<sup>4</sup> These standards emphasize the need to include the individual under guardianship in decision-making and engage in person-centered planning at every opportunity. Additionally, the standards establish that the guardian has a responsibility (standards which mirror what is already in Chapter 744, Fla. Stat., Florida’s guardianship

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<sup>4</sup> NGA Standards available from: [http://guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://guardianship.org/documents/Standards_of_Practice.pdf).

statute) to facilitate the individual's gaining or regaining functional capacity and his or her ability to seek restoration.<sup>5</sup>

Florida's disability advocates are part of this national trend as demonstrated by the research study commissioned by Florida Developmental Disabilities Council and Guardian Trust which collected guardianship and restoration data to determine the need for assistance with restoration among persons with development disabilities under guardianship. The research findings revealed that guardians and people under guardianship are not specifically aware of the right to a continuous review of the need for guardianship nor are they aware of the legal process to obtain rights restoration. The results of the study demonstrate the need to raise awareness about the availability of restoration under Florida law and the need to develop practical tools and strategies to support restoration activity.

The Quality Trust for Individuals with Disabilities launched the "Jenny Hatch Justice Project" in 2013. The Quality Trust provided legal representation to Jenny Hatch, a 29-year old woman with Down syndrome living in Virginia, who fought to have guardianship lifted so she could live where and how she wanted. The case brought national attention to the issue of people with developmental disabilities having their rights restricted under guardianship. Also, it has brought together national leaders and scholars on guardianship reform to develop new paradigms that would replace guardianship with more person-centered models based on the principles of self-determination.<sup>6</sup>

## B. Overview Of Disabilities

It is important to understand some of the unique characteristics of four general types of disabilities: developmental disabilities, age-related disabilities, acquired disabilities and mental health conditions.

### 1. Developmental Disabilities

Federal and state laws defining disabilities vary significantly. 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 one of five disorders or syndromes: intellectual disability, cerebral palsy, autism, spina bifida or Prader-Willi syndrome. The disorder must manifest before the age of 18 and constitutes a substantial handicap that can reasonably be expected to continue indefinitely.<sup>7</sup> General descriptions of Florida's five developmental disabilities are:

- a. 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.

<sup>5</sup> Florida Developmental Disabilities Council (2014 February 28). Restoration of Capacity Study and Work Group Report.

<sup>6</sup> <http://www.jennyhatchjusticeproject.org/home>

<sup>7</sup> Sec. 393.063(31), Fla. Stat. (2015).

Adaptive behavior is the collection of conceptual, 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, naiveté (i.e., wariness), 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, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.<sup>8</sup>

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

- b. 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 kinds of abilities and challenges. The effect of cerebral palsy on functional abilities varies greatly. Some people are able to walk while others are not. Some people show normal to near normal intellectual function, 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, and
- speech difficulties.

- c. Autism. Autism is more commonly referred to as “Autism Spectrum Disorder” (ASD), 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 people with ASD look that sets them apart from other people, 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

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<sup>8</sup> American Association on Intellectual and Developmental Disabilities (2013 March 8). Retrieved from <http://aaidd.org/intellectual-disability/definition#.Vseo5OL2aM8>

of people with ASD can range from gifted to severely-challenged. Some people with ASD need a lot of help in their daily lives; others need less.<sup>9</sup>

Characteristics of autism may include:

- avoidance of or not paying attention to others,
- difficulty relating to other people,
- difficulty communicating,
- repetitive behavior,
- possible reduction in intelligence, and
- behavior problems that include resistance to change and emotional responses.

People with autism may have sensitivity to stimulation of their senses (touch, taste, hearing, and sight). 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.

- d. 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). Additionally, legal professionals should be aware that children of Vietnam veterans who have spina bifida may be eligible to receive a special benefit under the Agent Orange Benefits Act.

Spina bifida does not get worse over time; however, secondary problems can worsen and require intensive management. Some of the health problems for people 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, and
- “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. Finally, although many people with spina bifida have average intelligence, there are some learning disabilities and cognitive impairments that can be associated with hydrocephalus.<sup>10</sup>

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<sup>9</sup> Centers for Disease Control and Prevention, Retrieved March 18, 2015, <http://www.cdc.gov/ncbddd/autism/facts.html>.

<sup>10</sup> Spina Bifida Association. Retrieved January 20, 2016, <http://spinabifidaassociation.org>.

e. 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. Although children and infants with Prader-Willi syndrome have similar features and symptoms, no one characteristic is specific to the disorder. 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 experience 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.

Other characteristics include the following:

- trouble pronouncing words,
- excessive sleepiness,
- decreased pain sensitivity,
- skin-picking habits, and
- slowed growth.

Personality difficulties may emerge between 3 and 5 years of age and include the following:

- temper tantrums,
- stubbornness, and
- acts of violence.<sup>11</sup>

## 2. Age-Related Disabilities

An age-related disability may occur as a natural progression of the aging process and may affect capacity in adults. Disabilities associated with aging are generally characterized by limitations in performing activities of daily living (ADLs) such as bathing, dressing, eating, ambulating, toileting and general hygiene. Age-related disabilities may accompany other medical and psychological conditions. Chronic diseases like cardiovascular disease, chronic obstructive pulmonary disease, arthritis, osteoporosis, visual and hearing impairments are among those conditions. Dementia and cognitive decline are often diagnoses related to aging.

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<sup>11</sup> Cassidy, S.B. Prader-Willi Syndrome. *Journal of Medical Genetics*, 34 (11), 917-923. (1997).



### 3. Mental Health Conditions

Mental health conditions include depression, bipolar disorder, delirium and dementia. Dementia is the most well-known of these conditions. Dementia is a general term for a medical condition characterized by a loss of memory and functioning. Two examples of dementia include alcohol-induced and vascular dementia. Alcoholic-induced dementia is one of the most common forms of dementia and is caused by the long term abuse of alcohol over 20 or more years. Vascular dementia is caused by multiple strokes that accumulate and cause dementia.

There are other forms of dementia, such as Alzheimer's disease, Pick's disease and Diffuse Lewy Body dementia.

- Alzheimer's disease is a specific form of dementia caused by a progressive brain disease involving protein deposits in the brain resulting in disruption of neurotransmitter systems. Symptoms include initial short term memory loss, followed by problems in language and communications, orientation to time and place, everyday problem solving, and eventually recognition of people and everyday objects. Alzheimer's is generally progressive and irreversible, ultimately resulting in a terminal state.
- Pick's disease is characterized by progressive deterioration of the brain's nerve cells that take on a particular shape referred to as "Pick bodies." The symptoms of Pick's disease include dementia, aphasia or loss of language ability, personality changes and antisocial behavior.<sup>12</sup>
- Diffuse Lewy Body dementia is also a progressive neurological disorder. The condition is sometimes associated with Parkinson's disease. It may involve difficulty with abstract thinking, short-term memory and cognition. Another common symptom is recurring hallucinations.<sup>13</sup>

Delirium is a temporary state of confusion that is sometimes misdiagnosed as a form of dementia. Causes include dehydration, poor nutrition, taking multiple medications with resulting drug interactions, and metabolic imbalances. Delirium can be temporary and reversible.

### 4. Acquired Disabilities

An acquired disability may occur at any age. Examples of causes include disease, oxygen deprivation, infection, trauma to the head or severe injury to the spine.

- An acquired brain injury refers to any type of brain damage that happens after birth, and includes fetal alcohol spectrum disorders.
- A spinal cord injury may occur because of an industrial or vehicular accident or violent crime resulting in partial or complete paralysis.
- A person can have a developmental disability and an acquired disability. This condition is sometimes referred to as dual-diagnosis.
- Other examples of acquired disability include alcoholism, substance abuse and various forms of mental illness that impact abilities to think and to write, impaired memory and

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<sup>12</sup> Semple, David. *Oxford Handbook of Psychiatry*. Oxford Press. 143 (2005).

<sup>13</sup> Lewy Body Dementia Association. Retrieved January 20, 2016, <http://lbda.org>

motor coordination. The level of disability varies on a continuum from mild to complete impairment.

Under certain circumstances, an acquired disability may also be considered a developmental disability. An example is a child who falls into a swimming pool and is deprived of oxygen. A diagnosis of “intellectual disability” can result if the child’s IQ meets the statutory definition. However, someone who experiences the exact same circumstances, but is over the age of 18 would be considered to have an acquired disability.

## C. Common Misconceptions Surrounding Disabilities

The diagnosis of a disability alone is not determinative of the need for guardianship. Many people with a disability have only physical impairments without cognitive or intellectual impairments. Guardianship is not appropriate if the person only has a physical disability and no cognitive or intellectual impairments that interfere with decision-making ability.<sup>14</sup> In fact, incapacity cannot be inferred from a person’s intellectual disability.<sup>15</sup> Even the diagnosis of an intellectual or cognitive disability does not automatically mean guardianship is the most appropriate decision-making option.

There are some common misconceptions surrounding disabilities that may lead to inappropriate guardianships:

- A person with an intellectual disability cannot achieve academically or professionally.
- A person with an intellectual disability cannot be a productive member of the community, a religious group, or workforce.
- A person with an intellectual disability cannot have meaningful or intimate personal relationships.
- Every disability involves some level of cognitive impairment or intellectual disability.
- A person who does not use words to communicate (non-verbal) must have a guardian.
- Every person with an intellectual disability or cognitive impairment is incapacitated.
- Every person with an intellectual disability or cognitive impairment needs a guardian.
- Every person receiving services through the Agency for Persons with Disabilities or living in a group home is incapacitated.

The following vignette as well as the subsequent vignettes provided throughout the remainder of this manual are based on actual cases reported by guardianship professionals anecdotally as the names have been changed to protect their confidentiality. This first vignette demonstrates common misconceptions some people may make about persons with disabilities.

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<sup>14</sup> One exception is voluntary guardianship which is available to persons with capacity who choose to have a guardian of the property to manage finances. Sec. 744.341, Fla. Stat. (2015).

<sup>15</sup> Sec. 765.204(1), Fla. Stat. (2015).

Mike lives with quadriplegia alone in his own apartment. He receives homemaking and personal care services from a governmental agency for a few hours each day. He cannot perform any of his Activities of Daily Living (ADLs) on his own. He is unable to transfer from his wheelchair to his bed without assistance. He is incontinent of bladder and bowel. A friend comes over once a month and writes the checks to pay his bills. His case manager at the governmental agency believes his well-being was at risk living alone and sought the appointment of a guardian. Mike successfully defeated the guardianship case by demonstrating he only had physical disabilities and no cognitive or intellectual impairments.

## D. The Dignity of Risk

An important concept underlying supporting persons with disabilities is the concept of dignity of risk. This concept refers to an understanding that everyday life experiences come with risk and that all people encounter success and failure in life. However, often when working with or supporting people with disabilities, the natural inclination is to protect them from the natural risks associated with life. Anyone working in this area should carefully examine their own assumptions to avoid being overprotective. The goal when supporting persons with disabilities is to support their gathering of information and options and then to help them consider and plan for obvious risks. When failure occurs, and it will, be prepared to help the person learn and grow from the experience.

In practice, guardianship does not afford persons under guardianship the opportunity to experience risk. The purpose of guardianship is to protect property and safeguard a person's well-being.<sup>16</sup> The guardian is vested with the authority to make decisions for the person and is held accountable for the guardian's decisions. In some respects, the guardian is responsible for the outcomes of decisions made by the person under guardianship. A guardian can use the statutory mandate of honoring the preferences of a person under guardianship as a mechanism for allowing greater choice for the person under guardianship.

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<sup>16</sup> Sec. 744.1012, Fla. Stat. (2015).



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# Section Two: Options And Strategies

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The Florida Legislature places a strong emphasis on ensuring the least restrictive decision-making assistance is used. This section explores several alternatives to guardianship and possible strategies that can be used to avoid the restrictiveness of a plenary guardianship. In a plenary guardianship, a guardian is appointed to exercise all delegable civil rights removed by a court. Therefore, a plenary guardianship is considered to be the most restrictive decision-making assistance option available.

## A. Civil Rights

An individual possessing legal capacity could choose someone else to exercise some civil rights. Regardless of a person's legal capacity, Florida guardianship law sets forth certain civil rights that cannot be removed by a court.<sup>17</sup> Other civil rights set forth in the guardianship statute can be removed only after a judicial process determining an individual's legal incapacity.<sup>18</sup>

A person who has been determined incapacitated retains 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;

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<sup>17</sup> Sec. 744.3215(1), Fla. Stat. (2015).

<sup>18</sup> Sec. 744.3215(2)(3), Fla. Stat. (2015)

13. To receive visitors and communicate with others;
14. To have notice of all proceedings related to guardianship; and
15. To have privacy.<sup>19</sup>

Rights that may be removed by an order determining incapacity and delegated to a guardian are the right:

1. To contract;
2. To sue and defend lawsuits;
3. To apply for government benefits;
4. To manage property or make dispositions of property;
5. To determine residence;
6. To consent to medical treatment; and
7. To make decisions about social environment or social aspects of the person's life.<sup>20</sup>

Rights that may be removed by an order determining incapacity but not delegated to a guardian are the right:

1. 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);
2. To vote;
3. To have a driver's license;
4. To travel; and
5. To seek or retain employment.<sup>21</sup>

## **B. Less Restrictive Alternatives to Guardianship**

In a plenary guardianship, a guardian is appointed to exercise all delegable rights removed by a court. A plenary guardianship is the most restrictive form of guardianship available; therefore, alternatives to guardianship should be considered at every stage of a guardianship. Creative strategies to build independence and limit guardianship can be used:

- Prior to initiating a guardianship;
- During the establishment of a guardianship;
- To develop abilities of the person under guardianship with the goal of restoring one or more rights; or
- To replace an existing guardianship.

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<sup>19</sup> Sec. 744.3215(1), Fla. Stat. (2015).

<sup>20</sup> Sec. 744.3215(3), Fla. Stat. (2015).

<sup>21</sup> Sec. 744.3215(2), Fla. Stat. (2015).

Florida law mandates judicial review of any alternative to guardianship that comes to the attention of the court at any time in a guardianship case.<sup>22</sup>

## 1. Supported Decision-Making

All people need support and assistance to manage their lives, some to a greater extent than others. Support and assistance can come from various sources such as family members, friends, as well as governmental and non-governmental programs.

Supported decision-making involves the person with a disability using the assistance of another person to gather information about choices, weigh risks and benefits, evaluate the appropriateness of alternatives and reach a conclusion. The person with a disability selects the individual or network of individuals who provides the circle of support, but the person with the disability makes the actual decision. A supported decision-making arrangement can be established informally or a more structured arrangement can be drafted. For example, a person under guardianship could ask someone to help identify residential choices or help create a budget and pay bills.

Supported decision-making is described as follows in the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities:<sup>23</sup>

With supported decision-making, the presumption is always in favor of the person with a disability who will be affected by the decision. The individual is the decision maker; the support person(s) explain(s) the issues, when necessary, and interpret(s) the signs and preferences of the individual. Even when an individual with a disability requires total support, the support person(s) should enable the individual to exercise his/her legal capacity to the greatest extent possible, according to the wishes of the individual... [p] paragraph 4 of article 12 calls for safeguards to be put in place to protect against abuse of these support mechanisms.

The U.S. Administration for Community Living, Department of Health and Human Services has established a National Resource Center for Supported Decision-Making.<sup>24</sup> The Resource Center contains state comparisons; a research and resource library; educational and training resources; and personal stories and examples of self-determination and supported decision-making.

Supported decision-making should not be considered in isolation. Supports and services that address the limitations of a person with a disability can supplant the need for guardianships and can be used as a part of supported decision-making. The federal Developmental Disabilities (DD) Act of 2000 allocates federal monies to the states to assist in providing comprehensive services and advocacy assistance to persons with developmental disabilities. Florida's legislative intent within the developmental disabilities statute provides, "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."<sup>25</sup>

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<sup>22</sup> Sec. 744.462, Fla. Stat. (2015).

<sup>23</sup> Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities. Retrieved January 20, 2016,

<sup>24</sup> National Resource Center for Supported Decision-Making: <http://www.supporteddecisionmaking.org>.

<sup>25</sup> Sec. 393.062, Fla. Stat. (2015).



In the area of developmental disabilities, governmental programs and services are designed to improve the quality of life of the person with a developmental disability. There is a broad array of available services covering many aspects of community living such as in-home supports, supported employment, personal care, training, and rehabilitative services. Two of the most widely used governmental programs are Florida Division of Vocational Rehabilitation and the Agency for Persons with Disabilities which provides services primarily through its Medicaid Home and Community Based Waiver.

Waiver services have limited availability due to long wait lists and budget constraints. However, there are procedures for “crisis enrollment.”<sup>26</sup> Crisis enrollment provides expedited enrollment on the waiver and is only available if the service recipient is homeless, a danger to self or others, or the recipient’s caregiver is unable to provide service.<sup>27</sup>

If a person needs waiver services, but does not qualify for crisis enrollment, an individual can always choose to privately pay for supportive services. For a thorough listing of services and service providers available in Florida, searchable by zip code, see the online Resource Directory located at [www.apdcares.org](http://www.apdcares.org). Additional resources can be found at the Florida Developmental Disabilities Council website: [www.fddc.org](http://www.fddc.org). Publications can be ordered singly or in bulk and are shipped free of charge. One particularly helpful resource available through the Florida Developmental Disabilities Council is the *Planning Ahead* guide.<sup>28</sup>

The federal government and the State of Florida established a one-stop resource center focused on supports for older persons and persons with disabilities called Aging and Disability Resource Centers, formerly known as Area Agencies on Aging. To find these and other services, including local community resources, call 211, a general information and resource telephone hotline.

Additional sources of supports can come from a personal network of friends, family, members of the faith community and co-workers. The accompanying *Guide* and *Workbook* to this Manual include strategies for building supports to act as decision-making resources for persons with developmental disabilities. Services can be used to maintain residences, manage finances, provide oversight and companionship to prevent exploitation.

Randy Roe is a 36 year old man who is literate and physically capable of completing the average activities of daily living. His IQ is 59. Since becoming an adult he has relied on residential and supportive services through the Agency for Persons with Disabilities. He does not have significant familial support. He was placed under guardianship due to his failure to pay for basic living expenses despite receiving Supplemental Security Income (SSI). He became virtually homeless. The guardianship stabilized his residential and financial situation, however, he consistently and persistently opposed the guardianship. Over several years, Mr. Roe participated in developing a monthly budget with his guardian. After several hearings and over the objection of a physician’s examiner’s report that found he continued to lack capacity, the court ordered restoration of his right to manage his property with the condition that he would use the services of a supported living coach through the Agency for Persons with Disabilities to help him pay his bills.

<sup>26</sup> Fla. Admin. Code. R. 65G-1.010(3).

<sup>27</sup> Fla. Admin. Code. R. 65G-1.047.

<sup>28</sup> Florida Developmental Disabilities Council. *Planning Ahead*. [http://www.fddc.org/sites/default/files/PA\\_Book\\_final\\_3-5-12-1.pdf](http://www.fddc.org/sites/default/files/PA_Book_final_3-5-12-1.pdf).

## 2. Banking Services/Money Management

Bank accounts with authorized co-signors, direct deposit, online bill pay, and reloadable debit cards are possible ways to involve persons with disabilities in the management of their money. A person under guardianship may be willing to use one or more of these methods independently or with a trusted person's assistance. These mechanisms can be used creatively to give more freedom within a guardianship with a designated amount of money. This is a way to give a person under guardianship experience managing money without placing total assets at risk, ensures bills are paid timely, and allows remote monitoring of accounts.

## 3. Representative Payee

A Representative Payee is a person or organization appointed by the Social Security Administration to manage the social security cash benefit for persons the Social Security Administration deems incapable of appropriately managing their social security benefits. The Representative Payee must be authorized to act by Social Security and must submit an annual report. If Social Security benefits is the only income received by the person and the guardian is the Representative Payee, then an annual accounting does not have to be filed. Not having to file an annual accounting can save guardianship and attorney fees in some cases.

## 4. Powers of Attorney

Because powers of attorney are flexible, they can be drafted to address a person's specific needs. Powers of attorney can be used to handle financial transactions and other specified acts on behalf of the person.

An individual must have legal capacity to execute a power of attorney. In Florida, a person with a disability has full legal capacity unless the person is adjudicated incapacitated pursuant to Chapter 744, Florida Statutes.<sup>29</sup> According to the *Assessment of Older Persons with Diminished Capacity: A Handbook for Lawyers*, the standard of capacity necessary to execute a power of attorney is identical to the capacity needed to contract.<sup>30</sup> Generally, the capacity to execute a contract or power of attorney involves the ability to understand the nature and effect of the action.<sup>31</sup>

One drawback to a power of attorney that should be considered by the practitioner is that a power of attorney is effective upon execution. This makes it difficult to just use the power of attorney as a way to avoid guardianship in the event a principal becomes incapacitated in the future. Florida has abolished the use of a "springing power of attorney" which allowed someone to execute a power of attorney before it was needed to be used, allowing the agent's authority to "spring" into effect on some specified event such as the principal becoming incapacitated. One practice is to have the principal sign a durable power of attorney when the principal has capacity, but not deliver the actual instrument to anyone until the principal is incapacitated. However, the logistics of this practice are not fool proof.

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<sup>29</sup> Sec. 744.3115, Fla. Stat. (2015).

<sup>30</sup> ABA Commn. on L. Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

<sup>31</sup> *Id.*

Ned is an elderly man who was referred to guardianship because he did not consistently pay his utility bill. Ned could not manage monitoring his mail or writing checks to pay his bills. His professional guardian realized over time that there was one particular neighbor of Ned's who consistently helped him with transportation and other self-care activities. On several occasions, it was the neighbor who brought Ned's needs to the attention of the guardian. With Ned's permission, the guardian approached the neighbor and asked if he would be willing to take on a more responsible role in Ned's care. Ned and the neighbor agreed and the guardian filed a Suggestion of Capacity because a lesser restrictive alternative was available. The examiner documented continuing deficits in Ned's condition and recommended no restoration, but the court did not follow the examiner's recommendation. At hearing, the judge asked several questions pertaining to Ned's understanding of a power of attorney. The judge restored capacity and dismissed the guardianship with the understanding that Ned would execute a power of attorney naming the neighbor as agent.

## 5. Health Care Advance Directives

Chapter 765 of the Florida Statutes governs health care advance directives such as health care surrogate designations, living wills and medical proxies. The statute gives clear instructions that health care advance directives are intended to be less restrictive than guardianship, providing surrogate decision-making in the area of health care in circumstances where the principal has capacity or lacks capacity.<sup>32</sup>

Designating a health care surrogate involves having someone select another individual to make health care decisions in the event of the person's incapacity. In a guardianship proceeding, a judge must determine the validity of any health care advance directives that existed prior to the establishment of the guardianship.<sup>33</sup> Where there is the appointment of a guardian of the person over health care decisions and the principal previously designated a health care surrogate, the judge must include in his or her order and letters of guardianship the scope of authority that the guardian and health care surrogate will exercise regarding health care decisions.<sup>34</sup> The standard of capacity needed to appoint a health care surrogate is the ability to communicate a willful and knowing health care decision.<sup>35</sup> If the person under guardianship can meet that standard, then the right to make health care decisions should be able to be restored.

The procedure for determining capacity for the purpose of initiating a surrogate's authority is different than the incapacity procedure of Chapter 744, Florida Statutes. To initiate the authority of a health care surrogate, the attending physician must evaluate the person's capacity and enter that evaluation in the patient's clinical record. If the attending physician is uncertain whether the person has capacity, a second physician must evaluate the patient and if the two agree, the declaration of incapacity for the purpose of initiating a health care surrogate's authority is entered into the patient record.<sup>36</sup>

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<sup>32</sup> Sec. 765.102, Fla. Stat. (2015).

<sup>33</sup> Sec. 744.3115, Fla. Stat. (2015).

<sup>34</sup> *Id.*

<sup>35</sup> Sec. 765.101(8), Fla. Stat. (2015).

<sup>36</sup> Compare Sec. 765.204(2), Fla. Stat. (2015) with Sec. 744.3201, Fla. Stat. (2015).

A living will is an oral statement or a written statement signed in the presence of two witnesses that expresses a person's instructions on life-prolonging procedures, such as resuscitation or artificial feeding. It can also be used 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, or
- persistent vegetative state.

A medical proxy is an option that can be used when a person has not established an advance directive, lacks capacity and needs medical decision-making assistance. Unlike an advance directive, the person needing assistance is not able to 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 for an incapacitated person or a person with a developmental disability:<sup>37</sup>

- a. a legal guardian or guardian advocate,
- b. a spouse,
- c. an adult child or a majority of adult children,
- d. a parent,
- e. an adult sibling or a majority of adult siblings,
- f. any other adult relative,
- g. a close friend,
- h. a licensed clinical social worker selected in consultation with a bioethics committee and who is not employed by the medical provider.

## 6. Trusts

There are potential advantages to using a trust to hold property or manage funds of a person with a disability. Trust funds can only be used as the person granting the trust directs. Trusts offer a level of protection and oversight unavailable to most informal arrangements. The Florida Trust Code, Chapter 736, Florida Statutes, sets forth provisions governing the creation and administration of trust estates. One possible way to use a trust as an alternative to guardianship is to structure the trust giving trust powers similar to the enumerated rights under guardianship and the trustee authority similar to the delegable rights conferred to a guardian. The trust can contain restrictions or limitations on distribution to reduce wasting or misappropriation of trust assets. Of course, a trustee must be selected carefully to avoid exploitation. Special consideration of public benefit eligibility should be taken when drafting trusts for persons with a disability. Trusts are similar to guardianship in that:

- a trustee acts as a fiduciary;
- the court can be called upon to provide oversight; and
- civil and criminal penalties exist for breach of trust.

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<sup>37</sup> Sec. 765.401, Fla. Stat. (2015).

## C. Strategies to Avoid, Limit or Replace Plenary Guardianship

While the ultimate goal for persons under guardianship or guardian advocacy may be to have their civil rights completely restored, other options that lead to greater choice and involvement in decision-making should not be overlooked. The strategies that follow should be considered where appropriate. Alternative Dispute Resolution options can be used in ways to reduce conflict in guardianship. A Progressive Rights Restoration Plan is a new concept introduced as a result of the recommendations of the Restoration of Capacity Study Project (2014) as a way to more formally document a person's efforts to build abilities and regain capacity with the goal of rights restoration. Limited Guardianship and Guardian Advocacy are less restrictive forms of guardianship than plenary guardianships.

### 1. Alternative Dispute Resolution

Alternative dispute resolution can be especially useful for persons under guardianship to address conflict with guardians and other interested persons and to negotiate greater freedoms within the guardianship. Along with traditional mediation techniques, newer forms of alternative dispute resolution are becoming available such as elder mediation and eldercaring coordination.<sup>38</sup> Attorneys and judges should look for opportunities to refer conflicts within guardianships for alternative dispute resolution.

While the question of capacity cannot be mediated, there are many advantages to using mediation in guardianship cases. Cost, formality and giving the conflict resolution authority to a neutral third-party are reasons to avoid guardianship litigation. Alternative dispute resolution can be used in various stages of the guardianship process:

- prior to initiating guardianship proceedings;
- during the pendency of guardianship proceedings; and,
- post adjudication and the appointment of a guardian.

Special considerations for alternative dispute resolution are:

- person's capacity to participate in mediation;
- choice of participants in the mediation; and
- confidentiality and privacy in mediation.<sup>39</sup>

When considering restoration of rights, alternative dispute resolution may be a way to build consensus among the guardian, the person under guardianship, and other interested parties to loosen some restrictions of guardianship. Mediation may be a way to reach agreement on the elements of a Progressive Rights Restoration Plan.

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<sup>38</sup> ElderCaring Coordination is a dispute resolution option for high conflict guardianship cases. ElderCaring Coordination is patterned after parenting coordination. For more information, see the Association for Conflict Resolution ElderCaring Coordination Guidelines. ACR Elder Decision-Making Section, Retrieved March 22, 2015. <http://acrelldersection.weekly.com/documents.html>.

<sup>39</sup> Radford, M. *The Use of Mediation in Adult Guardianship Cases*, National Guardianship Association, 2007.

## 2. Progressive Rights Restoration Plan

A Progressive Rights Restoration Plan is a strategy designed to help the person under guardianship make incremental steps towards restoring one or more rights. It can be used even before filing a Suggestion of Capacity. It can also be used as a part of the restoration proceedings, including being introduced at the hearing stage. Essential elements of a Progressive Rights Restoration Plan include:

- identifying the right or rights seeking to be restored;
- describing the incremental steps designed to develop abilities and who will perform those steps;
- listing the person(s) responsible for monitoring the progress of those steps, if any;
- setting benchmarks and assessment points that indicate significant accomplishments; and
- setting target dates for completion.

A Progressive Rights Restoration Plan could be included as a part of the Guardian's Annual Plan and as a way to document the guardian's activities to help the person regain capacity as required by statute.<sup>40</sup> Or, a Progressive Rights Restoration Plan could be offered as an alternative to immediate restoration of one or more rights. An attorney should carefully weigh the likely success of either approach. The *Workbook* in this series offers suggestions of activities that build abilities in the area of each civil right. Appendix A contains a blank Progressive Rights Restoration Plan and Appendix B provides an example of a completed one.

James had a plenary guardian for many years because he mismanaged his finances and was evicted from his apartment. During the guardianship hearing process, James was largely silent. Later, James explained that he did not understand that guardianship meant he would lose control of his finances and the ability to choose where he lives. James' attorney did not vigorously oppose the establishment of the guardianship. Once James realized the impact of guardianship in his life, he persistently asked how he could make the guardianship go away. Finally, James found a willing attorney to represent him and restoration proceedings began. The physician examiner reported that James should remain under guardianship. At hearing, it seemed apparent from the judge's line of questioning that it was unlikely James would have any rights restored. The guardian interjected and proposed an incremental plan to give James more choice and freedom in managing his finances by giving James increasing responsibility for paying items of his monthly budget. The judge continued the restoration proceedings for six months, then held a status conference, modified the plan and continued the proceedings for another three months. At the end of the nine months, the judge asked whether the budget had been followed, whether payments were made timely and whether any harm had come to James as a result of managing his finances. The judge restored several rights including the right to manage property.

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<sup>40</sup> Sec. 744.3675(3)(a), Fla. Stat. (2015).



### 3. Limited Guardianship

In 1989, the concept of the “limited guardian” was instituted for the first time in Florida. A limited guardian is a person who has been appointed by the court to exercise the legal rights and powers specifically designated by a court. The court must find that the person under guardianship lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property. A plenary guardian is one who, after a court has declared an individual incapacitated and finds that he or she lacks the ability to perform the tasks necessary to care for his or her person or property, is appointed to exercise all the rights and powers of the person that can be delegated.

A limited guardianship gives the court the flexibility to tailor a guardianship to meet the specific needs of the person. For example, a person with a disability may be more interested in deciding where he or she will live and less concerned about the right to contract. If the concern that prompted the guardianship is to safeguard property to avoid exploitation, then the person may be able to retain the right to determine residence even though the right to contract or manage property is removed.

### 4. Guardian Advocacy

Guardian advocacy is only available to individuals with at least one of the five developmental disabilities defined by Chapter 393, Florida Statutes.<sup>41</sup> Another statutory requirement of guardian advocacy is that the individual must lack the decision-making ability to perform some, but not all delegable rights.

To appoint a guardian advocate, the statutes do not require a determination of incapacity. This is one of the main reasons people believe guardian advocacy to be less restrictive than guardianship. Rather than having a team of experts (the examining committee) evaluate the individual 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 individual’s area(s) of incapacity to determine whether the individual needs a guardian advocate to exercise certain rights.

Another 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. For these reasons, guardian advocacy is usually considered to be less expensive, less intrusive and easier to implement than guardianship. Whatever legal process is chosen (guardianship or guardian advocacy), the duties and responsibilities of the guardian or guardian advocate are the same as defined in Chapter 744, Florida Statutes.

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<sup>41</sup> Another reference to guardian advocacy is found in Chapter 394, Florida Statutes. A guardian advocate for persons with mental illness is limited to providing consent to mental health treatment in inpatient psychiatric settings only.



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# Section Three: Restoring Rights

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## A. Guardianship and Guardian Advocacy Restoration Processes

Under the Uniform Guardian and Protective Proceedings Act (UGAPPA), guardians have an affirmative duty to encourage the person under guardianship to participate in decisions and assist the person in regaining capacity. Under Florida law, individuals under guardianship or guardian advocacy who regain capacity are entitled to seek restoration through a well-defined process that includes due process protections (see chart in Appendix C).

The legal process to restore one or more rights under guardianship begins with the filing of a Suggestion of Capacity.<sup>42</sup> Any interested party, including the individual under guardianship, may file a Suggestion of Capacity with the court where the guardianship is pending. A Suggestion of Capacity simply must state that the person has regained the ability to exercise some or all of the rights that were removed and a good faith reason for the belief. Upon the filing of the Suggestion of Capacity, the clerk will notify all interested persons. The court will appoint a physician to examine whether the person has regained capacity. If the physician recommends restoration of one or more rights, there are no objections filed from any interested persons and the judge is satisfied that the examination establishes by the preponderance of the evidence that restoration is appropriate, then the judge will enter an order restoring one or more rights. If the physician recommends no restoration, or a timely objection is filed, the court will set a hearing and appoint an attorney to represent the individual under guardianship.

The process is substantially similar for individuals under guardian advocacy, except that a Suggestion of Restoration of Rights starts the process.<sup>43</sup> In addition, the court relies on reports and other relevant information about the person's abilities rather than a report of the court appointed physician evaluator.

A Suggestion of Restoration of Rights must include a list of each right requested to be restored, and:

- evidence of the person's increased abilities for each right requested to be restored (it is a good idea to include a signed statement from a doctor or other medical provider that says the person should get right(s) restored); or
- a statement of good faith explaining why the person can now exercise each right without a guardian advocate.<sup>44</sup>

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<sup>42</sup> Sec. 744.464(2), Fla. Stat. (2015).

<sup>43</sup> Sec. 393.12(12), Fla. Stat. (2015).

<sup>44</sup> *Id.*

Upon the filing of the Suggestion of Restoration of Rights, the clerk will notify all interested persons and the judge will appoint an attorney if the person is not represented by counsel. If the Suggestion does include evidence, the judge will review the evidence to either immediately restore the rights requested or set for hearing. A hearing will be scheduled if:

- the judge requires additional evidence or testimony;
- the Suggestion does not include evidence that supports increased abilities; or
- any interested persons object to the restoration.

If the Suggestion does not include evidence that supports increased abilities, the judge will set a hearing to review evidence and hear testimony. If any interested persons object to the restoration, the judge will set a hearing. The judge will then enter an order denying restoration or restoring the right or rights requested.

## **B. Florida Case Law**

A survey of Florida case law on guardianship restoration reveals a limited number of judicial appellate decisions on the general subject of rights restoration. A synopsis of the cases that cite Chapter 744.464, Florida Statutes, are:

- A case that held there was no conflict of interest when an attorney represented a person under guardianship and other multiple parties all of whom were interested in seeking restoration of rights.<sup>45</sup>
- A third party engaged counsel to represent a person under guardianship for restoration of rights and removal of guardian. The court held that if the right to contract is removed, the person can only retain counsel if the court appoints the counsel or the guardian retains the counsel.<sup>46</sup>
- A woman under guardianship established capacity and obtained restoration of her rights despite a challenge from her son. Interestingly, the court appointed a three-member committee to evaluate her capacity rather than the physician evaluator required by the restoration statutes. The trial court proceedings also included depositions of the woman's personal physicians.<sup>47</sup>
- A guardian and daughter of the person under guardianship sought revocation of a will executed prior to the person's incapacity alleging the undue influence of a non-relative, third party, in establishing the will. The appellate court agreed with the trial court that the guardian could not revoke the will on the person's behalf and cited the restoration provisions of Chapter 744 as a possible way for the person under guardianship to establish her capacity in the area of establishing a will.<sup>48</sup>

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<sup>45</sup> Vick v. Bailey, 777 So.2d 1005 (2nd DCA 2000).

<sup>46</sup> In re Guardianship of Bockmuller v. Harris, et al, 602 So.2d 608 (2nd DCA 1992).

<sup>47</sup> Connell v. In re Connell, 476 So.2d 1381(1st DCA 1985).

<sup>48</sup> Whitley v. Craig, 710 So. 2d 1375 (5th DCA 1998).

## C. National Case Law

A comprehensive analysis of restoration case law across the country provides insight into restoration in practice and judicial treatment of petitions for restoration.<sup>49</sup> Dating back to the mid-19th century, restoration case law nationwide has evolved from an extremely paternalistic and protective approach to a more person-centered mentality focused on the individual's capacity and ability to make and communicate decisions for themselves. Until the 1970's, courts commonly determined that the individual had capacity but denied restoration based on the court's belief that the guardian could manage the affairs of the person under guardianship better than the individual could.<sup>50</sup>

From the case law, it appears that the great majority of petitions for restoration are filed by older persons and persons with mental illness.<sup>51</sup> Very few petitions for restoration are filed by individuals with developmental or intellectual disabilities nor from individuals suffering from brain injury. It is unclear whether this is due to a disproportionately greater number of guardianships for older persons and persons with mental illness or due to some other reason. Petitions for restoration filed by older persons and persons with mental health were granted more frequently than petitions from individuals with developmental or intellectual disabilities or individuals with a brain injury.<sup>52</sup>

Although almost all states permit the person under guardianship or any interested party to petition for restoration, in seventy-five percent of the cases the person filed the petition, either pro se or with counsel.<sup>53</sup> In about ten percent of cases, a family member or friend filed the petition on behalf of the person.<sup>54</sup> In a smaller number of cases, the guardian was the petitioner.<sup>55</sup>

The case law show that courts rely most heavily on an evaluating physician's report in making determinations as to capacity and restoration.<sup>56</sup> Often, the physician's report is the primary piece of evidence swaying the court's decision one way or the other. In cases where the person under guardianship testifies at trial, courts rely heavily on the individual's demeanor and ability to correctly answer questions. Where the individual testifies at trial, cases are relatively evenly split in regards to granting or denying restoration. It appears that individuals who can rationally and correctly testify as to their guardianship and other aspects of their life has a greater likelihood of convincing a court that they have regained capacity.

One fairly recent change to state law that is of particular interest in the context of restoration is in Illinois, which now allows the court to modify or revoke letters of guardianship based on a verified petition signed by the person under guardianship and the guardian which indicates that the person has regained capacity.<sup>57</sup> While this may make it easier for restorations to occur when the guardian is supportive, it should be noted that Illinois law also provides that a petition for restoration not supported by the guardian must be supported by clear and convincing evidence, which is actually a higher standard of proof than in Florida.

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<sup>49</sup> Cassidy, J., (2015), Restoration of Rights for Adults under Guardianship (Bifocal), Vol. 36, No.3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 755 ILCS 5/11a-20.

Michigan has also significantly revamped its guardianship system and there are several changes to the Michigan statute that are notable. One is that courts are required to review the continued need for a guardian one year after appointment and every three years thereafter. Another is that the individual under guardianship is entitled to an independent evaluation by a physician or professional of his or her choice, which will be paid for by the state if the individual is indigent; and, the individual is entitled to a trial by jury on the issue of incapacity. Finally, Michigan law gives priority to the guardian of the individual's choosing over all others, including relatives.<sup>58</sup>

Statutory changes outlined here are designed to increase the self-determination of individuals either by raising the bar for imposing guardianship in the first place or by granting more autonomy and authority to individuals once they are under guardianship. Additionally, there are efforts underway to assist individuals with having their rights restored. As an example, Disability Rights North Carolina includes on its website detailed instructions on how to petition the court for restoration.<sup>59</sup>

## **D. General Barriers to Restoration**

Every person under guardianship has the right to restoration should he or she regain capacity sufficient to manage his or her affairs, but not all individuals who regain capacity are restored. There are numerous barriers to restoration that can prolong the guardianship long after the regaining of capacity. Due to the state-specific nature of guardianship law, the procedural process, the court's duties, and the guardian's responsibilities vary significantly by state, court, and judge. As a result, some barriers are statewide while others vary among jurisdictions, courts, and judges.

### **1. Lack of Access to Counsel of Choice**

It is critical for the person to secure counsel should the petition proceed beyond the initial communication to the court.<sup>60</sup> Once an individual loses the right to contract, it may be difficult for the person under guardianship to independently hire an attorney to pursue restoration. The likelihood of non-payment of attorney fees and the ethical concerns of lack of capacity deter attorneys from restoration petitions. In Florida, the person under guardianship may hire an attorney of his or her choice if the individual retains the right to contract, otherwise, the court will determine who represents the person under guardianship during the restoration process.<sup>61</sup>

### **2. Lack of Awareness of the Right to Restoration**

The individual under guardianship may have disabilities that prevent him or her from comprehending legal terminology regarding removal and restoration of civil rights. For many persons under guardianship there is little opportunity to learn of the right to be restored. Once under guardianship, the individual may live isolated from society. The order of guardianship may be the only opportunity to notify them of the right to restoration, but often the order does not clearly state the right to restoration.<sup>62</sup>

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<sup>58</sup> Mich. Comp. Laws Ann. Sec. 700.5313 (West).

<sup>59</sup> <http://www.disabilityrightsn.org/publications>

<sup>60</sup> See Patricia M. Cavey, Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths, 2 Marq. Elder's Advisor 5 (2000).

<sup>61</sup> Sec. 393.12(12), Fla. Stat. (2015) and Rule 5.681, Fla Prob R.

<sup>62</sup> Florida Developmental Disabilities Council. (2014). Restoration of Capacity Study and Work Group Report. Tallahassee, FL.

### **3. Lack of Established Systems Dedicated to Providing Support to Individuals who have some or all Rights Restored**

Once the guardianship is removed, the individual may regain financial and personal obligations that the person was not responsible for during the guardianship. Without support systems to ease the transition out of guardianship, the individual may lack the guidance necessary to learn how to manage his or her own affairs independently or with support.

### **4. A National Perspective on Barriers in the Judicial Process**

Should the individual pursue restoration, he or she may face barriers in the judicial process. For example, courts rely heavily on the recommendations of a physician to determine whether an individual has regained capacity. But often, the physician does not specialize in neurocognitive or psychiatric health. Familiarity with mental health and developmental disabilities is not a prerequisite for a physician to conduct an examination of the person and determine whether he or she has regained capacity.

A lack of clear statutory legal procedure for restoration creates a barrier to restoration because the courts have little guidance and the decisions lack uniformity. This ambiguity may deter potential petitioners from pursuing restoration. For example, thirty-three states do not expressly provide an evidentiary standard in restoration proceedings, leaving courts to determine the adequacy of evidence and the appropriate barriers to restoration. In a restoration proceeding, the petitioner has the burden to show that the person has capacity to manage personal or financial affairs such that guardianship is no longer necessary.<sup>63</sup> The burden then shifts to the party opposing restoration to prove the continuation of incapacity. Unlike in a petition for appointment of a guardian where the burden of proof is generally clear and convincing evidence, the standard in termination proceedings varies greatly and is often unclear.

Of the states that define an evidentiary standard, two states require the relatively low standard of prima facie evidence,<sup>64</sup> seven states use a preponderance of the evidence standard,<sup>65</sup> and eight states use the higher standard of clear and convincing evidence.<sup>66</sup> Mississippi requires “such proof as the chancellor may deem sufficient.”<sup>67</sup> In spite of the variation and ambiguity, it is clear that at least eight states require courts to use a lesser burden of proof (either prima facie or preponderance of the evidence) in a petition for termination than in an initial petition for guardianship. In all other states, the petitioner for restoration may face a greater barrier due to the greater evidentiary standard that he or she must meet. In states that have not codified an evidentiary standard, there is little guidance for courts to decide the level of evidence necessary to show that the person has regained capacity sufficient to manage his or her affairs.

Another state-specific barrier is moratorium periods on filing requests for review. States may enact procedural bars to petitions for restoration. Eleven states permit courts to specify a minimum time period after the issue of the order adjudicating incapacity during which a petition for a review of

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<sup>63</sup> Ramirez v. Garcia de Bretado, 547 S.W.2d 717 (Tex. App. 1977); Harris v. Johnson, 149 Ind. App. 512, 273 N.E.2d 779 (Ind. Ct. App. 1971).

<sup>64</sup> Cassidy, supra note 5, at 123; Minn. Stat. Ann. § 524.5-317 (2009); Me. Rev. Stat. tit. 18-A, § 5-307(d) (2009).

<sup>65</sup> Cassidy, supra note 5, at 123. These seven states are: Connecticut, Georgia, Louisiana, Missouri, North Carolina, Texas, and Virginia. Conn. Gen. Stat. Ann. § 45a-660; Haw. Ga. Code Ann. § 29-4-42; La. Code Civ. Proc. Ann. Art 4554; Mo. Ann. Stat. § 475.083; N.C. Gen. Stat. Ann. § 35A-1130; Tex. Prob. Code Ann. § 694; Va. Code Ann. § 64.2-2012.

<sup>66</sup> Cassidy, supra note 5, at 123. These eight states are: Hawaii, Illinois, Iowa, Kansas, Nevada, Ohio, Oregon, and Pennsylvania. Rev. Stat. §§ 560:5-112; 560:5-318; Illinois St. Ch. § 5/11a-20; Iowa Code Ann. § 633.675; Kan. Stat. Ann. §§ 59-3090- 59-3091; Nev. Rev. Stat. Ann. §§ 159.1905, 159.191; Ohio Rev. Code Ann. § 2111.47; Or. Rev. Stat. Ann. § 125.090; 20 Pa. Cons. Stat. Ann. § 5517.

<sup>67</sup> Cassidy, supra note 5, at 123. Miss. Code Ann. § 93-13-125.



the order may not be filed without special leave, generally lasting for no longer than one year.<sup>68</sup> While this may reduce frivolous and hasty attempts to remove a guardian, it could delay legitimate petitions for restoration of rights.

Four states specify a period during which a petition for reconsideration of a determination of incapacity cannot be filed, regardless of what the original order says.<sup>69</sup> Arizona precludes an interested person, other than the guardian or the person under guardianship from filing such a petition within one year of the order adjudicating incapacity unless the court believes that the individual is no longer incapacitated.<sup>70</sup> Texas expands the one-year period to allow anyone to file the restoration petition.<sup>71</sup> Iowa and Wyoming preclude the filing of any petition for termination within six months of the denial of a former petition for termination.<sup>72</sup> In states that limit the time in which a petition for restoration can be filed, individuals who may have regained capacity within that time must wait until the time period ends before petitioning for restoration.

Another judicial barrier to restoration is the lack of clear procedural safeguards in the state restoration statute. In particular, thirty-one state statutes do not expressly permit the petitioner to informally communicate a request for restoration as opposed to filing a formal application.<sup>73</sup> In these states, the judicial process is less accessible because the individual may need to secure counsel to file a petition, and the financial cost and time may deter interested parties from taking action.<sup>74</sup>

An additional barrier in many states is the lack of periodic assessment of capacity by courts to determine whether guardianship is still necessary. Following appointment of a guardian, courts have an on-going responsibility to ensure that the terms of the order remain consistent with the respondent's needs and conditions.<sup>75</sup> Only three states, Connecticut, Missouri, and New Mexico, require the court to periodically analyze whether the individual's circumstances have changed sufficiently to justify termination of the guardianship and restoration of rights. In states without such procedural safeguards, the court is unlikely to pursue restoration without a petition even when the mental capacity of the individual improves. Ordinarily, once a guardian has been appointed, the court will act only if a moving party so requests. Florida is unique in its annual review of the need for guardianship.

Three states have placed a barrier on restoration by limiting who can petition for restoration. While most states permit the person under guardianship or any interested party to seek restoration, Connecticut, Iowa, and Wyoming, only permit the person to petition for restoration. New Jersey limits authority to the individual and the guardian.

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<sup>68</sup> Cassidy, *supra* note 5. These eleven states are: Alabama, Hawaii, Idaho, Indiana, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, South Carolina, and Utah. Ala. Code § 26-2A-110; Haw. Rev. Stat. §§ 560:5-112, 560:5-318; Idaho Code Ann. § 15-5-307; Ind. Code Ann. § 29-3-12-1; Mass. Gen. Laws Ann. ch. 190B, § 5-311; Mich. Comp. Laws Ann. § 700.5309; Mont. Code Ann. § 72-5-325; Neb. Rev. Stat. § 30-2622-30-2623; N.H. Rev. Stat. Ann. § 464-A:40; S.C. Code Ann. § 62-5-306; Utah Code Ann. § 75-5-306-75-5-307.

<sup>69</sup> Cassidy, *supra* note 5. These four states are: Arizona, Iowa, Texas, and Wyoming. Ariz. Rev. Stat. Ann. § 14-5306-14-5307; Iowa Code Ann. § 633.675; Tex. Prob. Code Ann. § 694; Wyo. Stat. Ann. § 3-3-1101.

<sup>70</sup> Cassidy, *supra* note 5. Ariz. Rev. Stat. Ann. § 14-5307(C) (2012).

<sup>71</sup> Cassidy, *supra* note 5. See Tex. Prob. Code Ann. § 694A(e) (2005).

<sup>72</sup> Cassidy, *supra* note 5. See Iowa Code Ann. § 633.680 (1963); Wyo. Stat. Ann. § 3-3-1105 (1977).

<sup>73</sup> Cassidy, *supra* note 5. These thirty-one states are: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Ark. Code Ann. § 28-65-401, 28-65-402; Cal. Probate Code 1863(b); Colorado Revised Statutes Annotated §15-14-318; Conn. Gen. Stat. Ann. § 45a-660; Delaware Code Ann. tit. 12 § 3908; Fla. Stat. Ann. §§ 744.464(3), 744.521; Ga. Code Ann. § 29-4-42; Haw. Rev. Stat. §§ 560:5-112, 560:5-318; Iowa Code Ann. § 633.675; Kan. Stat. Ann. § 59-3090-59-3091; La. Code Civ. Proc. Ann. Art 4554; Md. Code Ann., Est. & Trusts § 13-220; Minn. Stat. Ann. § 524.5-317; Miss. Code Ann. § 93-13-125; Mo. Ann. Stat. § 475.083; Nev. Rev. Stat. Ann. §§ 159.1905, 159.191; N.J. Stat. Ann. § 3B:12-28; N.Y. Mental Hyg. Law § 81.36; N.C. Gen. Stat. Ann. § 35A-1130; Ohio Rev. Code Ann. § 2111.47; Okla. Stat. Ann. tit. 30, § 3-116; Or. Rev. Stat. Ann. § 125.090; 20 Pa. Cons. Stat. Ann. § 5517; R.I. Gen. Laws Ann. § 33-15-18; S.D. Codified Laws § 29A-5-508-29A-5-509; Vt. Stat. Ann. tit. 14, § 3077; Va. Code Ann. § 64.2-2012; Wash. Rev. Code Ann. § 11.88.120; W. Va. Code Ann. § 44A-4-7; Wis. Stat. Ann. § 54.64; Wyo. Stat. Ann. § 3-3-1101.

<sup>74</sup> Mary Joy Quinn & Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 Utah L. Rev. 1611, 1638 (2012).

<sup>75</sup> Report, Richard Van Duizend, *National Probate Court Standards*, National Center for State Courts (2013).

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# Section Four: Best Practices For Guardianship Professionals

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## A. Attorneys

Attorneys play an integral part in guardianship proceedings. Attorneys represent alleged incapacitated persons; attorneys represent guardians in the administration of a guardianship estate; and, attorneys advise, counsel and sometimes represent interested persons or family members in bringing petitions to the attention of the court or when a dispute arises. In addition, an attorney is an officer of the court and has an ethical responsibility to address injustice in the legal process.<sup>76</sup> An attorney may have different roles or functions in a guardianship case, but the overall underlying principle is that an attorney working in a guardianship case is ultimately working to benefit the person under guardianship.

### 1. Right to Counsel

Persons under guardianship have an ongoing right to counsel throughout the guardianship.<sup>77</sup> However, a person under guardianship whose right to contract has been removed cannot obtain the services of an attorney without the assistance of the guardian. Requiring the guardian's involvement or assistance before an attorney can be obtained, effectively serves as a barrier to restoration if the guardian opposes restoration. A guardian who does not agree with the request for counsel by the person under guardianship may choose not to execute the attorney's retainer agreement and the person under guardianship does not have the legal authority to do so. Attorneys approached by the person under guardianship for representation should anticipate possible objections to the attorney's appointment and be prepared to advocate for the person's choice of counsel. Attorneys representing guardians owe a duty to the person under a guardianship.

### 2. Attorney-Client Relationship with a Person under Guardianship

A lawyer should maintain a normal attorney-client relationship with a person under guardianship as much as reasonably possible even though the client may have a disability.<sup>78</sup> The lawyer should always begin with the assumption that the person is capable of making decisions about the representation unless the person has been determined incapacitated, either through a court or as a part of the advance directives process. Even where there is a determination of incapacity, the lawyer should recognize and follow to the extent possible, any stated preferences of the person.

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<sup>76</sup> R. Regulating Fla. Bar, Preamble.

<sup>77</sup> Sec. 744.3215(1)(l), Fla. Stat. (2015).

<sup>78</sup> R. Regulating Fla. Bar, 4-1.14. Client under a Disability.



... an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.<sup>79</sup>

When representing a person in restoration proceedings, the lawyer must resist the temptation to impose his or her own opinion about the person's capacity, but instead should assert the person's preferences and goals throughout the representation.

### 3. Accommodations

The lawyer willing to represent persons seeking restorations should make their offices as accommodating as possible. Many times, people with intellectual disabilities have accompanying physical disabilities that may affect their gait, hearing or eyesight. Assess your office environment.

- Is the lighting supportive of reading?
- Are your written materials ADA compliant?
- Are the acoustics in the office suitable for someone with hearing impairments? (For example, is there background noise that could interfere with conversations?)
- Is your office staff patient and friendly?
- Have you scheduled adequate time for interviews?
- Are you intentionally speaking to the person clearly and slowly?
- Is it wheelchair and walker navigable?
- When scheduling initial interviews, prescreening staff should ask if there are special needs or if a particular time of day would be better for the interview.

### 4. Working with Interested Persons

It is important to take special care in identifying who is the client in the attorney-client relationship and the role of other interested parties.

- Who brought the person to the lawyer's office?
- Who is seeking the representation, the person or someone else, such as a family member or service provider?
- Who is paying the attorney's fees?
- Who is controlling the conversations during the client interview, the third party or the person under guardianship?

Once the attorney-client relationship is established, the attorney must take special care to protect the client's confidential communication or seek the consent of the person under guardianship to communicate with others.

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<sup>79</sup> R. Regulating Fla. Bar, 4-1.14. Client under a Disability. Comment.

In the restoration process, guardians and family members may be supportive or opposed to having the person's rights restored. There may be some who assist or guide the individual in establishing capacity. In fact, the accompanying *Workbook* and *Guide* to this Manual are designed to include others in the restoration of rights process. People in opposition to the restoration can still have the person's best interests in mind and have genuine concerns about the person's well-being. However, there may be improper motivation for opposing restoration such as wanting to control the person or a desire to exploit the individual.

When representing the guardian, the attorney should encourage and advise the guardian to engage in activities with the person under guardianship to build the person's abilities in each civil right removed to the extent possible. The attorney should also monitor and review the report of guardian of the person to ensure the statutory requirement of reporting restoration activities is met.

## **5. Evaluating the Case for Restoration**

The attorney representing the person under guardianship is responsible for evaluating whether the case meets the legal criteria for restoration. The attorney should consider the following factors:

- Which right or rights is the person seeking to have restored?
- Is there sufficient evidence of capacity with respect to those rights to support restoration?
- Why was the guardianship filed?
- How have initial circumstances changed or initial concerns addressed so that there is no longer a need for guardianship?
- Does anyone else support the effort to seek restoration? The guardian? Family members? Service providers?
- Are there individuals other than the person seeking restoration that would benefit directly from the person's restoration or related litigation?
- What are the motives of the persons supporting restoration?
- What are the motives of the persons opposing restoration?
- What are the person's current abilities for each civil right?
- What skills need to be developed by the person?

Caution should be exercised by the attorney when evaluating the claims of capacity of the individual. Any personal biases, misconceptions or judgments should be put aside and the attorney must evaluate the claims of capacity as objectively as possible.

A thorough investigation should be done by the attorney concerning the claims of the person regarding the individual's abilities in the area of the civil right. The *Workbook* and *Guide* can be useful resources for the attorney. The attorney should expand interviews to include the person's support circle for useful information as to the person's abilities. The people in the support circle may serve as potential witnesses in the restoration proceedings. Particular attention should be given to community service programs that provide assistance to the individual.

Do not disregard areas of deficits or impairments the person may have. Address any deficits directly and prepare a credible response for the court of how, despite the deficits or impairments, the individual's health and safety are not likely to be jeopardized by restoring rights.

The attorney should be familiar with the different capacity standards applicable to each civil right. For example, the capacity standard for providing informed consent has different elements than the capacity standard to contract. For a more thorough discussion of capacity standards, please see the *Assessment of Capacity for Older Adults with Diminished Capacity*.<sup>80</sup>

If the attorney is appointed prior to the examination of the person by the physician, the attorney should consider being present at the examination, if feasible, and to appropriately prepare the person for the examination. The attorney should explain the purpose and importance of the examination to the person prior to the examination. Hopefully, adequate preparation will help the person be candid and open regarding personal matters.

## 6. Hearing Preparation

In preparing the client for the hearing, consider any special needs of the person. Ensure adequate time for the hearing. If the person will speak at the hearing, make sure you go over in detail what the person can expect, such as:

- a description of the room;
- where people sit;
- when it is appropriate to talk;
- what is appropriate dress;
- how to handle emotions if something is said that the person does not agree with or may make them angry; and
- what are written and unwritten rules of courtroom decorum.

Make sure you understand how the person will be transported to the courtroom and who will accompany the person. In communicating the time and place of the hearing, encourage the person to arrive early. Explain the security screening process in courthouses. Determine whether assistive devices are needed for the person's participation at the hearing and make timely requests for accommodations. Accommodations available at no cost may include assistive listening devices or interpreter services for persons with hearing loss, for example. Contact the court in advance to request accommodations such as microphones, amplifying devices, or physical access to all parts of the courtroom, including the witness stand.

Consider carefully the evidence you plan to present. The completed activities in the accompanying *Workbook* may be evidence that a particular skill has been achieved. Or, the *Workbook* pages can form the basis for a Progressive Rights Restoration Plan. Compile other records and gather other supporting evidence that will support the case. Use the evidence to paint a picture of what the person's life will look like after the right is restored. The goal is to assure the judge that the initial reasons for imposing the guardianship no longer exist.

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<sup>80</sup> ABA Commn. on L. Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

It may be unusual for the physician evaluator to testify at the hearing; however, consider deposing the physician. Also, consider getting an expert opinion from other professionals, especially those professionals familiar with the person's type of disability. Of course, cost is always a factor in obtaining additional assessments. Consider the person's health insurance and social services as possible resources to obtain the additional examination. Other potential witnesses to consider could be anyone involved in providing support and assistance to the person. Case managers or care coordinators assigned to the person may also be good resources.

It is unlikely that a court will consider restoring rights without talking to the person under guardianship. Preparing a mock hearing to help the person become accustomed to answering questions in the courtroom setting may be helpful, and especially practice cross-examination. Additionally, prepare the person for questions directly from the judge. Identify the weaker parts of your case and prepare responses, if questions arise. The attorney should use his or her judgment in deciding whether to aggressively pursue restoration or to suggest a Progressive Rights Restoration Plan.

## **7. Strategies at Hearing**

It goes without saying that a restoration hearing is inappropriate for a general motion docket and sufficient time should be set aside for the hearing to present all relevant evidence. Consider invoking the rule of sequestration of witnesses if family dynamics are at issue and to protect the privacy of the person under guardianship. If allowed an opening statement, make sure to include general references to the legislative intent of guardianship being a last resort.

At the hearing, do not assume your client is following the pace of discussion. Sometimes, to expedite time, lawyers and judges communicate in a way they understand that may not be clear to a layperson.

Consider, carefully, the order in which you intend to present evidence. It is generally useful to build the case of capacity and ability using evidence presented by third parties, such as support coordinators or supported living coaches. Save the questioning of the person under guardianship as the last witness.

If objections to the restoration were made, where applicable, carefully construct arguments that challenge:

- the experience the evaluating physician has working with persons with developmental disabilities;
- whether the evaluating physician inappropriately focused on diagnoses and prognosis rather than functional abilities of the person;
- whether the evaluating physician considered the person's ability to exercise the right with assistance; and
- whether appropriate assistive devices were used during the physician's examination.

Special attention should be given to cross-examination of guardians or other interested persons. Focus on their role to promote independence and restoration. Challenge conclusory statements and unsupported opinions. Address how assistance and supportive services can alleviate potential adverse situations speculated as a result of restoration. Lastly, look for opportunities at the hearing

to suggest guardianship alternatives or a Progressive Rights Restoration Plan as options to the denial of restoration rights.

## **B. Judges**

Every judge sitting in the role of trier of fact knows how to apply the facts presented to the applicable law. This section of the Manual addresses additional items a judge may want to consider in a restoration case. The primary role of the judge in a restoration case is to ensure procedural due process is provided, evaluate the evidence presented, and rule on the merits of the case. Just as the attorney must consider his or her office environment, so too should the court consider the access to the courthouse and courtroom for persons with disabilities.

### **1. Suggestion of Capacity**

A person under guardianship or an interested person may file a suggestion of capacity with the court. Sometimes, a person acting pro se may communicate a desire to seek restoration of rights in the form of a letter or other correspondence and not in a pleadings format. The judge has the discretion to consider any writing as a Suggestion of Capacity or a Suggestion of Restoration of Rights where the circumstances are clear that the person wants to pursue terminating the guardianship.

The suggestion of capacity must be filed in the county where the guardianship case is pending. Once the suggestion of capacity is filed, the statute is clear that the court must immediately appoint a physician.<sup>81</sup> However, the timeframe for appointing counsel to represent the person seeking restoration in a guardianship case is less clear. The statute seems to suggest that the appointment of counsel is considered at the hearing stage, not at the filing of the Suggestion of Capacity.<sup>82</sup> The better practice is to ensure the person is represented by counsel as early as possible in the proceedings. Notably, the filing of a Suggestion of Restoration of Rights under guardian advocacy does require that the judge appoint counsel for the person with a developmental disability within three days of filing of the Suggestion of Restoration of Rights.<sup>83</sup> Additionally, the person may request to substitute his or her own attorney for the attorney appointed by the court.<sup>84</sup>

### **2. Appointment of Physician Examiner**

The only statutory requirements governing the appointment of the physician to conduct the examination is that he or she must be appointed immediately upon the filing of the Suggestion of Capacity.<sup>85</sup> Some courts use the guardianship examining committee registry as a source for physician evaluators. In rural areas, this may present a potential conflict in that the physician who served on the examining committee that initially recommended an incapacity determination may be the only physician available to conduct a restoration evaluation.

Additional sources to find physician evaluators are area medical schools, clinics and hospitals. Medical directors at skilled nursing facilities may be a good resource because those doctors are

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<sup>81</sup> Sec. 744.464(2)(b), Fla. Stat. (2015).

<sup>82</sup> Sec. 744.464(2)(e), Fla. Stat. (2015)

<sup>83</sup> Sec. 393.12(12)(a), Fla. Stat. (2015).

<sup>84</sup> Sec. 744.464(5), Fla. Stat. (2015).

<sup>85</sup> Sec. 744.464(2), Fla. Stat. (2015).

accustomed to traveling to the location of their patients. Psychiatrists used as experts in criminal cases may also be a potential resource to conduct restoration examinations because those psychiatrists are accustomed to providing opinions in legal matters. Additional training should be encouraged when using physicians who are unfamiliar with decisional capacity standards in guardianship cases. Courts should ensure that physicians fully understand their role and the legal standards involved in guardianship restoration cases.<sup>86</sup>

### 3. Additional Considerations

Assess if evidentiary information is sufficient. In other types of legal proceedings, the judge's role is to simply evaluate the evidence presented. Not so in a guardianship restoration proceeding. If a judge believes evidence on capacity is insufficient or inadequate in any respect, the judge can continue the proceedings and instruct parties to obtain additional evidence or assessments. The judge should make sure the parties bring relevant evidence regarding capacity if evidence is lacking.

The judge may wish to independently inquire of the person under guardianship or other witnesses in determining whether an evidentiary basis for restoration exists. Of course, the person cannot be compelled to testify. To ensure objectivity, the judge should be aware of common misconceptions surrounding disabilities as stated on page 8.

#### Incapacity does not mean:

- illiteracy;
- inability to communicate verbally;
- inability to personally perform activities of daily living; or
- being eccentric or choosing to live a non-ordinary lifestyle.

The judge has an affirmative responsibility to ensure the use of lesser restrictive alternatives. It is appropriate for the judge to suggest creative solutions that may lead to restoration, understanding that trial and error are viable options. The Progressive Rights Restoration Plan is a good tool to use for this purpose.

Florida Statutes are clear on a preference against guardianship and a judge must consider all other lesser restrictive alternatives before establishing or maintaining a guardianship. Some incapacity conditions may be temporary or reversible. Every available opportunity to allow a demonstration of the capacity of the person under guardianship should be explored.

Florida Statutes also give the judiciary specific mandates to instruct guardians by detailing their scope of authority. Section 744.344, Fla. Stat., affirms, "The order shall state the specific powers and duties of the guardian." A slight modification lessening the control of a guardian can afford a person under guardianship a degree of dignity and an opportunity to show that perhaps the future restoration of one or more rights does not necessarily mean the person's life will be in jeopardy or property wasted. Examples of refinement of rights or rights restored include:<sup>87</sup>

<sup>86</sup> For a discussion on decisional capacity standards, see ABA Commn. on L. Aging & Am. Psychological Assn., *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*. (2006).

<sup>87</sup> ABA Commn. on L. Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).



- choice of roommates or determining living arrangements;
- freedom to spend small amounts of money;
- initiating and following a schedule of leisure and work activities; and
- determining the degree of participation in religious activities.

In cases where complete restoration of rights is not immediately clear or obvious, the court should consider affording greater participation in decision-making within the guardianship. The court can provide instructions to the guardian to engage in capacity building activities. The *Workbook* and *Guide* can be used as tools in this area. A Progressive Rights Restoration Plan can be used if the court denies restoration of some or all of the rights. The Court can initiate the use of a Progressive Rights Restoration Plan on its own initiative.

## 4. Orders

Florida Statutes provides for disposition of a restoration case without a hearing in certain limited circumstances.<sup>88</sup> The physician must submit his or her report within twenty (20) days after the court's appointment. If the judge is satisfied that the examination establishes by the preponderance of the evidence that restoration is appropriate and there are no timely filed objections, the court shall enter an order restoring all or some of the rights. The order must be entered within thirty (30) days of the examiner's appointment. Adherence to the time frames ensures prompt resolution of the case in keeping with the idea that guardianships should only be in place for as limited time as possible.

If there are timely filed objections or the court is not satisfied with the examination, the court shall conduct a hearing. Upon conclusion of the hearing, the court shall enter an order denying restoration, or restoring some or all of the rights upon the court's finding that the person has met the burden of proof. The person under guardianship must prove by a preponderance of the evidence that restoration of some or all of the rights are appropriate and warranted. If only some rights are restored, the order must state which rights are restored. The guardian shall file a new guardianship report, presumably a new plan, within sixty (60) days of the entry of the order.

## C. Guardians

Guardians have an affirmative responsibility to help build the person's abilities in each civil right that has been removed. A guardian of the person must include in each annual plan any activities the person under guardianship engaged in that were designed to enhance capacity.<sup>89</sup> The annual plan must name any rights the guardian believes the person under guardianship has developed the ability to exercise.<sup>90</sup> Guardians should actively seek opportunities to promote therapies and education. The *Workbook* and *Guide* in the *Developing Abilities and Restoring Rights* series can be useful tools in designing activities to achieve this goal. Additionally, at any time after the appointment of a guardian, Rule 5.685, Florida Probate Code, requires the guardian shall bring to the court's attention any suitable alternative to guardianship.

<sup>88</sup> Sec. 744.464(12), Fla. Stat. (2015).

<sup>89</sup> Sec. 744.3675(3), Fla. Stat. (2015).

<sup>90</sup> *Id.*



Even in guardianship, a person should be encouraged to exercise decision-making to the extent possible. The National Guardianship Association (NGA) Standards of Practice 9 – Self Determination of the Person states:<sup>91</sup>

- I. The guardian shall provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising as they relate to the personal care and financial needs of the person.
- II. The guardian shall attempt to maximize the self-reliance and independence of the person.
- III. The guardian shall encourage the person to participate to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.
- IV. The guardian shall make and implement a plan that seeks to fulfill the person's goals, needs and preferences. The plan shall emphasize the person's strengths, skills and abilities to the fullest extent in order to favor the least restrictive setting.
- V. The guardian shall, whenever possible, seek to ensure that the person leads the planning process, and at a minimum to ensure that the person participates in the process.

In essence, the NGA Standards of Practice promote guardians honoring the preferences of the person and using supported decision-making wherever possible.

## **D. Physician Examiners**

### **1. Role**

When establishing a guardianship, a three-member examining committee is appointed to examine and recommend to the court which rights, if any, should be removed and delegated to another person to exercise. However, in guardianship restoration cases, a physician is appointed to examine whether the person has regained capacity. Examinations for persons with intellectual disabilities can be particularly challenging for physicians who may not have specific experience in the area of intellectual disabilities. Often, the questions of capacity are not physical in nature, but are functional in nature.

Scholars, researchers, and clinicians have studied various ways of assessing decisional capacity and have created a body of scholarly work in the area. Standards for capacity differ according to the right being evaluated. For example, there is one standard for capacity to make medical decisions and a different standard for capacity to vote. Nevertheless, a common thread discussed across the different standards of capacity is whether a person understands the nature of the decision and the risks, benefits and alternatives presented by the choices.

Examiners should never assume that persons with disabilities automatically lack capacity. When assessing capacity, examiners should remember that capacity may be temporary due to medical reasons such as an infection or reaction to medication. Capacity may be situational and contextual. There may be resources and support services available that can affect any

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<sup>91</sup> National Guardianship Association. Standards of Practice. [http://www.guardianship.org/guardianship\\_standards.htm](http://www.guardianship.org/guardianship_standards.htm)

assessment of capacity. For example, if an individual has the services of a supported living coach who can assist in gathering information on residential options, the individual may have the capacity to determine residence.

## **2. Functional Assessment Examinations**

Florida law requires a focus on the functional ability of the person to exercise the particular right in question. This emphasis on functional ability goes beyond assessing an individual's ability to perform activities of daily living. When performing a capacity examination, the examiner should use targeted questions, direct assessment and observation of functioning for the specific right in question. Additional considerations are:

- A physical examination should rule out medical causes of incapacity.
- The examiner's report should include any recommendations for future assessments or treatments that may increase capacity.
- Examiners should disclose the basis for their recommendations and list any tests or instruments used for assessments.
- Examiners should determine the type of data needed. For example, if the right being considered for restoration is largely decisional in nature, like the right to contract, then the examiner should focus on cognitive tests involving memory, reasoning and cognitive functioning. Or, if the right being considered for restoration is functional in nature, like the right to drive, then the examiner should focus more on observation of personal skills as well as judgment and reasoning ability.
- Client Interviews are by far the most common method of examination.

## **3. Tools and Instruments**

In screening individuals for incapacity, the examiner should use tools and instruments that the examiner has experience using. Some screening instruments may be specific to a particular profession, i.e., psychological tests. Other instruments like the Mini-Mental State Examination is used widely among lay members of an examining committee.

Other screening instruments made available from the national Alzheimer's Association are listed below:

- Alzheimer's Association Tools for Early Identification of Dementia
- Geriatric Depression Scale and Single-Item Depression Indicator
- Functional Activities Questionnaire
- Cognitive Incapacity and Problem Behaviors Assessment

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# Section Five: Conclusion

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For a practitioner interested in maximizing the independence of persons with a disability, the *Developing Abilities and Restoring Rights: A Manual for Legal Professionals* is just the beginning. Use it as a starting point in the search for resources and the development of creative strategies to develop and build independence among people who are under guardianship. The legislative intent of Chapter 744, Florida Statutes, states that the guardianship process should assist persons in developing or regaining their abilities to the maximum extent possible and this can be realized when guardianship professionals value the individual's dignity and humanity.



# Section Six: Appendix

APPENDIX A: PROGRESSIVE RIGHTS RESTORATION PLAN					
Right to be Restored	Goals	Steps	Who Will Assist	Target Date for Completion	Comments
	Goal #1	1			
		2			
		3			
		4			
		5			
	Goal #2	1			
		2			
		3			
		4			
	Goal #3	1			
		2			
		3			

## APPENDIX B: PROGRESSIVE RIGHTS RESTORATION PLAN (EXAMPLE)

Right to be Restored	Goals	Steps	Who Will Assist	Target Date for Completion	Comments
RIGHT TO MANAGE MONEY	Goal #1: Complete money management course: Money Smart	1. Decide whether to take course on line, web-based or classroom	Mary Ann will discuss with Bob & reach conclusion	1-Mar	person under guardianship = Bob guardian = Mary Ann attorney = John
		2. Sign up for course or get DVD	Bob will do with Mary Ann's help, if needed	3-Mar	
		3. Complete course	Bob will do with James - Mary Ann available if needed	30-Mar	Mary Ann will ask Bob's supported living coach to assist him with the course (SL coach = James)
	Goal #2: Begin to Manage Money	1. Develop a budget and all sources of income	Bob, James and Mary Ann	5-Apr	
		2. Identify several activities that Bob wants to do, are in the budget and that can be paid for with cash	Bob and James	5-Apr	
		3. Discuss with Mary Ann to approve cash purchases and how often Bob will get money, need for receipts, etc. (weekly, bi-weekly)	Bob, James and Mary Ann	5-Apr	
		4. Review after one month to see how Bob's budget and expenditures went	Bob, James and Mary Ann	30-Apr	on-going - as Bob becomes accomplished, authority and responsibility expands
	Goal #3: Expand authority and amount of money managed	1. Research local banks & credit unions about checking accounts, cost, etc.	Bob and James	10-Apr	
		2. Discuss with Mary Ann, Bob assuming responsibility to pay 1 - 2 bills	Bob, James and Mary Ann	10-Apr	Date for this will be determined by how Bob manages cash
		3. Bob begins paying bills identified and reconciling account with Mary Ann		15-Apr	on-going - as Bob becomes accomplished, authority and responsibility expands
	Report to Court	Bob and James will develop progress report for Mary Ann to review and approve	Bob, James and Mary Ann	1-Jun	report provided to John to file with the court for partial or full restoration of right



## APPENDIX C: RESTORATION OF RIGHTS PROCESS IN FLORIDA

	Guardian Advocacy	Guardianship
Elements of the Process	Chapter 393.12(12), Florida Statutes	Chapter 744, Florida Statutes
Suggestion of Restoration of Rights/ Capacity	Any interested person, including the person under guardian advocacy, may file a Suggestion of Restoration of Rights which must state that the person has regained the ability to exercise some or all of the rights that were given to the guardian advocate. Evidentiary support or a statement of the good faith reason for the belief must also be included.	Any interested person, including the person under guardianship, may file a Suggestion of Capacity stating that the person is currently capable of exercising some or all of the rights which were removed. If the person is not already represented by an attorney, a request may be made for the Court to appoint one.
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 with a developmental disability 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 his 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 shall appoint one to represent that person.
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 was not provided and enter such orders as are appropriate to secure the required documents; 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 with a disability 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 with a developmental disability, the guardian advocate, the attorney for the person with a developmental disability, the attorney for the guardian advocate, if any, and any other interested person 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, 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.
Order of Restoration	<p>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 with a developmental disability may now exercise.</p> <p style="text-align: center;">OR</p> <p>At the conclusion of a hearing, the court shall enter an order denying the Suggestion of Restoration of Rights or restoring 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.</p>	<p>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.</p> <p style="text-align: center;">OR</p> <p>At the conclusion of a hearing, the Court shall enter an order either denying the Suggestion of Capacity or restoring 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 guardian shall prepare a new guardianship report which addresses only the remaining rights retained by the guardian.</p>

