Lighting the Way to Guardianship and Other Decision-Making Alternatives:

A Manual for Individuals and Families

Partners
Agency for Persons with Disabilities
Guardian Pooled Trust
Office of Public Guardian, Inc.
Statewide Public Guardianship Office

Florida Developmental Disabilities Council, Inc.

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If legal advice or other expert assistance is required, the services of a competent professional should be obtained.
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Introduction

The Florida Developmental Disabilities Council, Inc. (FDDC), recognizes that making legal decisions with and for individuals with developmental disabilities can be challenging. Individuals and families are often intimidated by Florida's legal system. In addition, Florida faces a shortage of attorneys and other qualified legal professionals that are knowledgeable about legal issues relating to people with disabilities and their families. The Council believes it is important for individuals with disabilities to have information that will empower them to manage all aspects of their daily affairs to the best of their abilities.

The primary purpose of this manual is to increase the knowledge of individuals with disabilities and their families about the various ways under Florida law to provide decision-making assistance, including guardian advocacy and guardianship. How to access the legal system, when necessary, is also addressed in the manual. A companion manual for attorneys and other qualified legal professionals was also created and is available to assist the legal community.

Experts in the various subject areas developed the content of this manual using a rigorous process that included an assessment of the needs of self-advocates, families and attorneys and the development of specific training objectives. Reference materials were gathered and are cited throughout this manual with an appendix of additional resources. The Florida Developmental Disabilities Council’s Planning Ahead Guide, Chapter 8, is a cornerstone of the subject matter contained in this manual. Please note that the content of the manual is current as of March 2010; however, the additional reference materials and resources may not be current or include recent changes in the law. You will also find that words or phrases in bold are defined in the Glossary.

This manual is intended to be an overview of guardian advocacy and guardianship, and other decision-making options available under Florida law.
Section 1
Fundamental Concepts
## Civil Rights Chart

<table>
<thead>
<tr>
<th>Civil Rights (alphabetically)</th>
<th>Can NEVER be taken away from The Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commit a Person to a facility, institution or licensed service provider without formal placement proceeding</td>
<td></td>
</tr>
<tr>
<td>Contract</td>
<td></td>
</tr>
<tr>
<td>Counsel (an Attorney), To be represented by</td>
<td>X</td>
</tr>
<tr>
<td>Court Access, To have</td>
<td>X</td>
</tr>
<tr>
<td>Dissolution of Marriage, Petition to</td>
<td></td>
</tr>
<tr>
<td>Driver's License, To apply for</td>
<td></td>
</tr>
<tr>
<td>Education, To receive a proper</td>
<td>X</td>
</tr>
<tr>
<td>Employment, Seek or retain</td>
<td></td>
</tr>
<tr>
<td>Experimental Biomedical or Behavioral Procedures or Experiments, Consent to participate in</td>
<td></td>
</tr>
<tr>
<td>Freedom from Abuse, Neglect and Exploitation</td>
<td>X</td>
</tr>
<tr>
<td>Governmental Services, Apply for</td>
<td></td>
</tr>
<tr>
<td>Humanely Treated with dignity and respect</td>
<td>X</td>
</tr>
<tr>
<td>Independence, To remain as independent as possible</td>
<td>X</td>
</tr>
<tr>
<td>Lawsuits, Sue and defend</td>
<td></td>
</tr>
<tr>
<td>Living Arrangements, Right to decide</td>
<td></td>
</tr>
<tr>
<td>Marry</td>
<td></td>
</tr>
<tr>
<td>Medical, Dental, Surgical and Mental Health Treatment, Consent to</td>
<td></td>
</tr>
<tr>
<td>Money and Property, Manage</td>
<td></td>
</tr>
<tr>
<td>Parental Rights, Consent to termination of</td>
<td></td>
</tr>
<tr>
<td>Rehabilitation and Services, To receive necessary</td>
<td>X</td>
</tr>
<tr>
<td>Social Aspects of Life, Consent to</td>
<td></td>
</tr>
<tr>
<td>Sterilization or Abortion, Consent to</td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td></td>
</tr>
<tr>
<td>Vote</td>
<td></td>
</tr>
</tbody>
</table>
Civil Rights

In the United States, a civil right is a right that is protected by either federal or state law. Civil rights spell out fundamental freedoms and privileges including due process and freedom from discrimination. Courts directly impact how these laws are interpreted. Everyone eighteen years of age or older has the same civil rights and no one can legally take these away unless the person is provided due process. The chart on the previous page identifies an individual’s civil rights and those rights that can never be taken away.

• For most people, the most familiar civil right is the right to be represented by an attorney in criminal proceedings. For example, if you are accused of committing a crime, and cannot afford an attorney, the court will appoint one for you. Similarly, if someone tries to take a civil right away from you in court, you may have the right to be represented by a court-appointed attorney.

• Under some circumstances, a person can let someone else act for himself or herself. For example, you can give someone the right to apply for government services and benefits or you can give someone the right to make medical decisions for you.

• Under other circumstances, a person’s rights can be partially or completely removed by a court and given to someone the court chooses, like a guardian or guardian advocate.

If someone is 18 or older, a social worker, support coordinator, service provider, or even parents lack the legal authority to remove civil rights or make another person’s decisions. Only a court can do that! This single fact explains why legal representation is a fundamental guarantee.

Federal Civil Rights for Persons with Disabilities

Several federal laws ensure the civil rights of people with disabilities. The most important are mentioned below.

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

• The Americans with Disabilities Act (ADA), passed in 1990, prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunication. This comprehensive civil rights law requires that, among other things, “state and local governments” provide people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (such as public education, employment, transportation, recreation, health care, social services, courts, voting and town meetings)” (All About Rights, 2004, p. 7).

• The Individuals with Disabilities Education Act (IDEA), passed in 1997, among other things, strengthens the role of parents in educational planning and decision-making on behalf of their children, primarily through the development of an Individual Education Plan (IEP).
Summaries of additional federal laws that protect the civil rights of people with disabilities can be found at www.ada.gov.

**Florida Civil Rights for Persons With Disabilities**

The Florida Legislature has enacted laws that list the rights of persons with disabilities:

- The Florida Human Relations Act (Chapter 760, Florida Statutes) protects Floridians with disabilities against discrimination in employment and housing, or refusal to serve or accommodate because of a physical disability.

- Section 393.063(9), Florida Statutes, protects the rights of all persons with developmental disabilities. **Developmental disability** is defined as a disorder or syndrome that is attributable to **retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome**; and that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. These persons shall:
  
  (a) have the right to dignity, privacy, and humane care, including the right to be free from sexual abuse in residential facilities.

  (b) have the right to religious freedom and practice.

  (c) have the right to receive services, within available sources, which protect the personal liberty of the individual and which are provided in the least restrictive conditions necessary to achieve the purpose of treatment.

  (d) have a right to participate in an appropriate program of quality education and training services, within available resources, regardless of chronological age or degree of disability. Such persons may be provided with instruction in sex education, marriage, and family planning.

  (e) have a right to social interaction and to participate in community activities.

  (f) have a right to physical exercise and recreational opportunities.

  (g) have a right to be free from harm, including unnecessary physical, chemical, or mechanical restraint, isolation, excessive medication, abuse, or neglect.

  (h) have a right to consent to or refuse treatment, subject to the powers of a guardian advocate appointed pursuant to Section 393.12, Florida Statutes, or a guardian appointed pursuant to Chapter 744 of the Florida Statutes.

  (i) by reason of having a developmental disability, be excluded from participation in, or be denied the benefits of, or be subject to discrimination under, any program or activity which receives public funds, and all prohibitions set forth under any other statute shall be actionable under this statute.
(j) by reason of having a developmental disability, be denied the right to vote in public elections.

Throughout our lives, we have opportunities to exercise our civil rights by participating in the decision-making process. People with disabilities may have additional challenges when it comes to decision-making, however:

- It should never be assumed that a person with a disability cannot have an opinion, make a decision, or function in ways that add meaning and dignity to life.

- A physical disability does not always mean that a person has an intellectual disability, and the presence of an intellectual disability does not mean that an individual cannot make selections among choices.

- The “decision-maker” is always the person with a disability unless he or she has given permission to someone else or a court has taken away his or her civil rights.

No one needs to trade rights guaranteed under the Constitution in order receive supports and/or services.

Self-Determination

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

The right to self-determination is a fundamental right and the foundation for creating the opportunity for persons with disabilities to participate in the decision-making process in all aspects of their lives.

- At a practical level, self-determination involves giving people with disabilities greater control. This allows them to achieve their goals and acquire skills and resources necessary to participate fully and meaningfully in society.

- Self-determination is also a philosophy that recognizes that people with disabilities are valuable, capable people and deserve to be treated with respect and with the same consideration that everyone has a right to expect. Having the right, opportunity, and power to make meaningful choices is key to self-determination.

- Often, people with disabilities face limitations on their choices about where to live, who to live with, how to spend their time and money and even what to eat. Real choice is about being able to choose from the same wide variety of lifestyles, goals, and preferences that others have. To achieve self-determination, people with disabilities must have ownership over their lives.

Even if someone receives decision-making assistance, that person must have the final say over the decisions that are made, and he or she must ultimately be allowed to face the consequences of his or her decisions. To achieve this goal, the individual needs to know that he or she can rely on the support of the people in his or her
Life when the decisions are being made and in helping the individual deal with the consequences. The opportunity to expand one’s experiences, make decisions and deal with the results ultimately helps the individual grow and develop in ways he or she never could if all the choices were safe and made by someone else.

According to Tom Nerney, a national leader on self-determination:

The meaning of self-determination since its inception a decade ago has always rested on a set of principles: Freedom, Authority, Support, and Responsibility. Confirmation has been added recently and defined as the important role that individuals with disabilities must play in the development of this movement. In this ten-year time frame our understanding of self-determination has deepened and broadened. New and highly relevant issues surface as more and more individuals in states across the country begin to implement self-determination for themselves, and issues surface as well for the systems that are the stewards of public funds (Nerney and Harris, nd).

The core principles of self-determination are defined as:

- Freedom - the opportunity to choose where and with whom one lives as well as how one organizes all important aspects of one’s life with freely chosen assistance as needed.
- Authority - the ability to control some targeted amount of public dollars.
- Support - the ability to organize that support in ways that are unique to the individual.
- Responsibility - the obligation to use public dollars wisely and to contribute to one’s community.
- Confirmation - the recognition that individuals with disabilities themselves must be a major part of the redesign of the human service system of long term care (Nerney and Shumway, 1996).

**Learning Activity**

Read the following scenario and questions for discussion of how the principles of self-determination apply.

Ann is an 18 year old woman who is deaf, mildly autistic and has a seizure disorder. Ann wants to move out of the family home and attend a local community college. Ann’s mother thinks Ann should move into a group home for young adults with developmental disabilities who need support services. Ann’s support coordinator agrees.

Ann is on the Agency for Persons with Disabilities (APD) Medicaid waiver, and receives Social Security Disability Insurance (SSDI). Ann’s mother is her representative payee. Ann asked her parents, support coordinator, and a high school guidance counselor with whom she remains friends to attend a meeting to make some decisions about what she should do next and how the funding and services she receives should be applied.
Which of the following is an example of self-determination?

1. The support coordinator gives Ann a list of group homes to choose from.

2. Ann asks the support coordinator and her mother to help her prepare a budget and research the options available for on-campus housing.

---

**Principles Underlying Decision-Making**

Based on the concept of self-determination, the following principles should be understood in order to protect the civil rights of a person with a disability: **person-centered planning, least restrictive alternative, informed consent, substituted judgment** and **best interest**. See the Florida Developmental Disabilities Council's *Planning Ahead* Guide, Chapters 1 and 5, for more information.

**Principle #1 – Person-Centered Planning**

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

For example, elderly Aunt Susie’s doctor says that she is no longer able to take care of herself. She is 80 years old and lives alone. She cooks her own meals and takes her own medicines. She has burned a couple of pots in the last couple of months. It is unclear whether Aunt Susie always takes her medicine on time.

Family members met with Aunt Susie and together they came up with the following available options for her to choose from:

A. ignore the doctor’s advice and continue her current lifestyle and living arrangement,

B. move to a nursing home,

C. move in with a relative or friend,

D. arrange for someone to come into her home and care for her,

E. arrange for her to rent a room in her home to someone who would help her do certain tasks, or

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

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

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

*Source: Amado and McBride (2001)*

The Council on Quality and Leadership is recognized as a leader in person-centered planning. This international not-for-profit organization brings together providers, professionals, advocates and other leaders in the disability field. The Council’s vision is community inclusion, dignity and quality of life for people with intellectual and developmental disabilities and people with mental illness. See www.thecouncil.org for more information.

Three critical terms developed by The Council on Quality and Leadership are:

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

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

Another international organization that supports person-centered planning is TASH. TASH and other advocacy organizations provide educational information and personal support with a shared perspective. TASH believes that no one with a disability should be forced to live, work, or learn in a segregated setting; all individuals deserve the right to direct their own lives. For more information, go to www.tash.org/index.html.

Additional resources that can assist with the person-centered planning process are P.A.T.H. and MAPS. These are great tools to use particularly with people who do not read. The end product is a picture or diagram that shows a person's current situation and the steps to follow in order to achieve the outcome(s) the person chooses. Either of these would be good to use when you make a particular decision or whether you are planning five years into the future.


• MAPS (Making Action Plans): An excellent introduction to MAPS is Millers Map: Intro to MAP Process. Information on videos and books are available from Inclusion Press and can be found at www.inclusion.com/bkactionforinclusion.html.

Another resource in your community is self-advocates and families. You can share your experiences and have the benefit of learning from their experiences.

Support groups that may be helpful include the Family Care Councils, the Family Network on Disabilities, Area Agencies on Aging, and Centers for Independent Living.

**Principle #2 – Least Restrictive Alternatives and Environments**

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

The key point in applying the least restrictive principle is to use a person's skills and abilities to the fullest extent when providing decision-making assistance. Family, friends, professional caregivers, attorneys and the judiciary should apply this principle whenever helping someone. When considering decision-making options, in particular, it is critical to identify the least restrictive option that protects the person's right to make his or her own decisions. Choosing the least restrictive alternative varies from person to person and can vary from civil right to civil right.
Over the last several years, many states have included the least restrictive concept in the laws governing decision-making alternatives. Recent changes in Florida guardianship law require a court to determine the validity of any decision-making alternatives in use prior to the guardianship, such as durable powers of attorney or trusts. Additionally, a petition may be filed at any time during a guardianship to determine whether a less restrictive option (to guardianship) can meet the person’s decision-making needs. If so, the continued need for the guardianship is determined. Some courts (such as those in Broward County, FL) require the annual guardianship report to comment on whether a less restrictive option (to guardianship) can now meet the person’s decision-making needs. If the answer to the question is yes, the guardian advocate or guardian must explain what legal action has been taken to put the less restrictive option into place.

Just as state governments have embraced this concept, so have many national organizations. For example, in 2007, the National Guardianship Association (NGA) adopted the following Standards of Practice (NGA 8) regarding least restrictive environment.

The guardian shall:

- carefully evaluate the alternatives that are available and choose the one that best meets the needs of the ward [or person with a disability] while placing the least restrictions on his or her freedom, rights, and ability to control his or her environment,
- weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the ward (or person with a disability) and maintaining the ward’s protection and safety,
- make individualized decisions; the least restrictive alternative for one ward (or person with a disability) might not be the least restrictive alternative for another ward,
- become familiar with the available options for residence, care, medical treatment, vocational training, and education, and
- strive to know the preferences of the ward (or person with a disability) (2007, p. 6).

Although the NGA standards are for guardianship, the above principle applies throughout the decision-making process.
Learning Activity

Let’s apply the least restrictive concept to the six options previously noted for Aunt Susie. Think about her abilities, her needs, and the options she developed. Put the options in order from least restrictive to most restrictive, by placing the letter of the option beside the appropriate number.

A. ignore the doctor’s advice and continue her current lifestyle and living arrangement,
B. move to a nursing home,
C. move in with a relative or friend,
D. arrange for someone to come into her home and care for her,
E. arrange for her to rent a room to someone who would help her do certain tasks, or
F. move to an assisted living facility (ALF),

1. ________ Least Restrictive
2. ________
3. ________
4. ________
5. ________
6. ________ Most Restrictive

Principle #3 – Informed Consent

The three critical elements of the informed consent principle are:

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

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

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

It is critical that self-advocates and others have access to accurate information when making decisions. Developing a list of advantages and disadvantages may be
helpful so that a quick decision based on emotions is avoided. Gather information from people you trust and who are educated about the particular area. For example, if Aunt Susie did not trust her doctor’s opinion, she could always seek the advice of another doctor.

**Principle #4 – Substituted Judgment**

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

The only time that substituted judgment is exercised is when an individual has given another person the right to make decisions for him or her or when a court has given that right to a guardian or guardian advocate. For example, a self-advocate may give a caregiver a durable power of attorney (DPOA) or the court may appoint someone as that person’s guardian or guardian advocate. In the case of Aunt Susie, unless one of her family members is her guardian or holds her durable of power of attorney, this concept would not be used and Aunt Susie should make her own decisions.

A legal representative should not use substituted judgment if the preferences of the person are unknown or substantial harm would occur. According to the Standards of Practice from the National Guardianship Association substituted judgment “promotes the underlying values of self-determination and well-being of the ward [and] is not used when following the ward’s wishes would cause substantial harm to the ward or when the guardian cannot establish the ward’s prior wishes” (2007, p. 5).

**Principle #5 – Best Interest**

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

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

According to the National Guardianship Association, the principle of best interest:

- is the standard of decision-making the guardian should use when the ward never had capacity or when the ward’s wishes cannot be determined,
- requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the ward,
• is used when following the ward’s wishes would cause substantial harm to the ward, or when the guardian is unable to establish the ward’s prior or current wishes, and

• includes decision-making consideration of the ward’s current and previously expressed wishes (2007, p. 6).

A good understanding of these five principles is important in assuring that a person’s rights are protected. Whether you are that person whose rights are being protected or it involves someone else in your family, considering each of these principles will promote a better outcome.

**Learning Activity**

How would you apply the best interest standard to Aunt Susie, if she smokes, and both her doctor and her legal representative say she has to stop for health reasons?

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**Special Issues**

All of the factors mentioned in the previous section are principles that guide planning efforts over time. While we all need to consider what decision-making alternatives we will use in our life, there may be special issues related to different stages of life. This section will focus on:

• adolescents with a disability, and

• adults with developmental and acquired cognitive disabilities.

**Adolescents with a Disability**

There are three special issues related to adolescents with a disability:

1. The need to plan for assuming rights and responsibilities of adulthood.

2. The reality that decision-making authority transfers from parent to 18-year-old child.

3. The recognition of ways to provide decision-making assistance other than guardianship.

Successful transitioning from adolescence to adulthood is an important process that includes planning and goal setting. Involving the individual in each step is critical,
as well as taking his or her needs and abilities into consideration (person-centered planning). Parents and children should not wait until the child’s 18th birthday to prepare for legal independence.

One of the ways adolescents and parents can prepare for adulthood is through the child’s public education. The Individuals with Disabilities Education Act (IDEA) governs how states and public agencies provide early intervention, special education and related services to more than 6.5 million eligible infants, toddlers, children and youth with disabilities. Under the IDEA, an Individual Education Plan (IEP) is required for each eligible student and reviewed annually to determine the student’s progress.

If a child is in public school and has an IEP, an Individual Transition Plan (ITP) should begin at age 14. The ITP process requires that students develop and implement a plan that prepares them for adult living. Students do this with support from their family, teachers, and anyone else the student’s legal representative invites to attend. In order for the student’s participation to be meaningful, school district personnel are strongly encouraged to provide training for students and their families in self-determination skills (skills including self-awareness, self-advocacy, making choices, setting goals, solving problems, and taking action) and the ITP process. This is a perfect opportunity to discuss decision-making assistance the student may need upon reaching the age of 18, as well as educational areas on which to focus so that the student will be prepared to participate in decisions as much as possible.

The ITP team annually discusses and documents the student’s level of educational performance, including how the disability affects the student’s involvement and progress in the general curriculum. The effect of the disability may then become the priority educational need of the student. The corresponding measurable annual goals, including benchmarks or short-term objectives, are developed to address the needs stated in the present level of educational performance statement.

Remember, local school districts and individual schools in Florida vary in terms of how they comply with these federal and state requirements, particularly in private schools or when students are home-schooled.

Families are reminded that planning for the eventual independence of their children should be an ongoing process. Other planning tools that could be used are MAPS and P.A.T.H. (see reference under Principal #1 - Person-Centered Planning).

Keep IEPs, ITPs and any other assessments since they may be useful in accessing services and benefits. They can also be helpful when working through identifying what tools to use for decision-making assistance. It will be particularly useful if you seek legal counsel. Additionally, it should be noted that IEPs, ITPs and any evaluative assessment conducted over the school life of a child with a disability may be used as evidence in a judicial proceeding to determine guardian advocacy or guardianship (Section 744.331(3)(a), Florida Statutes).

When an adolescent turns age 18, the parents no longer have the right to attend IEP or ITP meetings without their child’s consent. Additionally, after age 18, the child decides whether he or she will remain in school – not the parent. That is why it is so important to establish, implement, and revise as necessary your child’s IEP or ITP. By doing so, parents will increase the opportunity for their child’s successful transition to adulthood.

There are instances in which a family member has received erroneous information from a school official or other source that an adolescent approaching his or her 18th
birthday should be placed under guardianship of a parent, and that the family member should contact an attorney. Furthermore, the family member may mistakenly believe that the granting of guardianship is an automatic process and is accomplished by simply completing a form, such as a durable power of attorney. Nothing could be farther from the truth!

As will be explained in greater detail in this manual, a diagnosis of a disability is not, by and of itself, grounds for guardianship. The real question is whether, due to conditions that cause functional limitations, the individual is unable to understand the nature and effects of their decisions. According to Campbell, Sketchley, and Weihammer (2008, p. 8) “[e]ven when it is clear that a person is functionally impaired and needs decision-making assistance, guardianship may still not be appropriate. Decision-making assistance can be addressed by less costly and less intrusive measures.”

**Adults with Cognitive Impairments**

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

- an **acquired disability** (for example, traumatic brain injury, spinal cord injury, age-related dementia, etc.),
- a change in circumstances for a person with an existing disability (for example, Down syndrome with early onset of Alzheimer’s disease),
- mental health issues (for example, depression, schizophrenia or other severe mental illness).

If a loved one is exhibiting any **cognitive impairment**, consider an evaluation by a qualified medical professional to determine if the impairment is treatable before addressing any of the decision-making options presented in this manual. Even if one of the decision-making options is used, the person’s health should be constantly monitored for signs of improvement so that less restrictive decision-making options can be used, including the possibility of restoring the person’s rights (Brummel-Smith, 2009).

Medical professionals and psychologists have many tools to assess functional, cognitive and neuropsychological symptoms and disorders. The use of these tools should be considered by the self-advocate, family members, and professionals involved in protecting the rights of the individual (Assessment of Older Adults, 2008).
Section 2
Options for Providing Decision-Making Assistance Other Than Guardianship
# Civil Rights Chart

<table>
<thead>
<tr>
<th>Civil Rights (alphabetically)</th>
<th>Can be Given to someone else by the Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commit a Person to a facility, institution or licensed service provider without formal placement proceeding</td>
<td>X</td>
</tr>
<tr>
<td>Contract</td>
<td>X</td>
</tr>
<tr>
<td>Counsel (an Attorney), To be represented by</td>
<td></td>
</tr>
<tr>
<td>Court Access, To have</td>
<td></td>
</tr>
<tr>
<td>Dissolution of Marriage, Petition to</td>
<td>X</td>
</tr>
<tr>
<td>Driver's License, To apply for</td>
<td></td>
</tr>
<tr>
<td>Education, To receive a proper</td>
<td></td>
</tr>
<tr>
<td>Employment, Seek or retain</td>
<td>X</td>
</tr>
<tr>
<td>Experimental Biomedical or Behavioral Procedures or Experiments, Consent to participate in</td>
<td>X</td>
</tr>
<tr>
<td>Freedom from Abuse, Neglect and Exploitation</td>
<td></td>
</tr>
<tr>
<td>Governmental Services, Apply for</td>
<td>X</td>
</tr>
<tr>
<td>Humanely Treated with dignity and respect</td>
<td></td>
</tr>
<tr>
<td>Independence, To remain as independent as possible</td>
<td></td>
</tr>
<tr>
<td>Lawsuits, Sue and defend</td>
<td>X</td>
</tr>
<tr>
<td>Living Arrangements, Right to decide</td>
<td>X</td>
</tr>
<tr>
<td>Marry</td>
<td></td>
</tr>
<tr>
<td>Medical, Dental, Surgical and Mental Health Treatment, Consent to</td>
<td>X</td>
</tr>
<tr>
<td>Money and Property, Manage</td>
<td>X</td>
</tr>
<tr>
<td>Parental Rights, Consent to termination of</td>
<td></td>
</tr>
<tr>
<td>Rehabilitation and Services, To receive necessary</td>
<td></td>
</tr>
<tr>
<td>Social Aspects of Life, Consent to</td>
<td>X</td>
</tr>
<tr>
<td>Sterilization or Abortion, Consent to</td>
<td>X</td>
</tr>
<tr>
<td>Travel</td>
<td></td>
</tr>
<tr>
<td>Vote</td>
<td></td>
</tr>
</tbody>
</table>
The chart on the previous page identifies those civil rights that can be assigned to someone else using one or more of the formal decision-making options presented in this section.

The seven options presented in this section can be used to provide assistance with decision-making that are alternatives to guardian advocacy and guardianship. These options will be explained by using the least restrictive concept – beginning with the least restrictive option and ending with the most restrictive option. The following chart graphically shows these options, as well as guardian advocacy and guardianship.

- Option 1: Makes Own Decisions
- Option 2: Banking Services
- Option 3: Power of Attorney
- Option 4: Representative Payee
- Option 5: Advance Directives
- Option 6: Medical Proxy
- Option 7: Trust
- Option 8: Guardian Advocacy
- Option 9: Guardianship
With the exception of Option 6, Medical Proxy, the overall theme of the first seven options shown in the diagram on the previous page all share the same focus:

- You decide who will assist you in making decisions (legal representative),
- You decide how your legal representative assists you,
- You decide when your legal representative assists you, and
- You decide when a legal representative will no longer represent you.

If there is a question about your ability to make a decision, a court may have to decide whether you have the capacity to make decisions and whether guardian advocacy or guardianship would be a more appropriate way to provide decision-making assistance.

Review the seven options described below and then consider some specific situations where these options would be appropriate to use.

**Option 1 - Make My Own Decisions**

Just because someone has a disability does not mean he or she needs formal decision-making assistance. We all rely on assistance in making decisions in our lives on a daily basis: choosing a new doctor, buying a new car, deciding where and with whom to live. This assistance may come from our family or friends (circle of support), or it may come from professionals in a specific area. Regardless of where it comes from, we all involve others to assist us in various ways and with various decisions. Depending on our skills, knowledge and ability, we rely on these people to varying degrees for assistance.

Using our circle of support is one of the least considered ways to provide decision-making assistance for persons with disabilities. Why is this? For younger people with disabilities, many believe it is because learning to make decisions and participating in the decision-making process is not emphasized enough, particularly during the transition years of 14 through 18 years of age. Making bad decisions or not having opportunities to learn how to make decisions should not be the basis for deciding that someone needs a legal representative.

You can use your circle of support for assistance, or you can choose someone to make the decision for you through a legal representative.

**Learning Activity**

James is 19 years old and has a checking account. James works part-time and deposits all his earnings in his account. He still lives at home and mainly uses this money for entertainment and clothing. His parents help him manage the account by looking over the bank reconciliations every three to four months. However, in the last two months James has had four overdrafts. Think of ways to help James learn how to better manage his money.
We all make good choices and bad choices. We have the right to maintain the ability to make our own decisions regardless of the quality of our decisions. Making our own decisions is certainly the least restrictive option and allows us to decide when we will consult others for advice and assistance. However, it can leave a person with a disability vulnerable should he or she have an emergency and need someone else to exercise his or her rights. The next six options will address that possibility and also present more formal options to those needing help with decision-making.

### Option 2 - Banking Services

The following list shows the various ways money can be managed in checking and savings accounts within banks and credit unions.

- Assigning someone as **power of attorney (POA)** to officially act for the owner of the account (Chapter 709, Florida Statutes). The power of attorney has no ownership in the account.

- Creating a joint bank account that has two or more persons depositing or writing checks. While there is no real legal protection, a person with limited banking ability may willingly use a joint account and accept help from the other signee(s) who handles and pays the bills.

- Establishing direct deposit/direct payment to facilitate simple banking procedures. In fact, Social Security prefers this method because it is simple, safe and secure.

- Internet/online banking can be used, for example, if someone has difficulty writing checks.

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

A Power of Attorney (POA) is a legal instrument that gives one adult legal authority to act for another adult. The person giving the authority is called the "principal." The person who is given the authority to act for the principal is called the “attorney-in-fact” or “agent.”

A power of attorney is “durable” if it specifically provides that it will remain in force even if a person is subsequently incapacitated. The Durable Power of Attorney (DPOA) can cover simple tasks like writing or endorsing checks. It can also involve more complex matters like selling real estate. A DPOA can be very specific or very general. It can authorize just one task, like selling a car, or, it can give your agent the power to do everything you can now do for yourself. An attorney will be able to help you understand how you can tailor the DPOA to fit your wishes and needs. Some attorneys recommend using DPOAs to allow an agent to access medical records and make health care decisions. It is important to note that an individual can waive HIPPA protection and allow someone access to the individual's medical records and/or medical information.

When someone signs a DPOA, he or she delegates decision-making authority to another, but does not lose the right to continue to make his or her own decisions. A
person may revoke (cancel) the authority given to another by providing written notice to the attorney-in-fact and to anyone who has received a copy. A good recordkeeping practice is to keep a list of the people to whom you give a copy in the event the DPOA is revoked so that you have a complete notification list.

Many people use either a power of attorney or durable power of attorney to protect their rights depending on their particular needs. For example, assume you have purchased a new car and decided that you can get more money selling your old car rather than trading it in. You are going on a two-week vacation, and your cousin has offered to advertise the car for you and sell it if he can. You give him a POA to sell your car, the time frame for which he can do this, as well as a minimum price you are willing to accept. Five days into your vacation, your cousin calls and has a buyer. Because he has your POA, he can accept the money from the buyer and sign the title for transfer from you to the new buyer.

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

Although these options look good, there are potential challenges with giving someone a POA or DPOA that should be considered:

- Will service providers accept the POA or DPOA? Banks, doctors and others may question whether you (the principal) have the capacity to give someone else the authority to exercise your right(s). This is a particular challenge for persons with intellectual challenges, like persons who have an acquired brain injury and persons whose abilities are declining with age.

- Abuse, exploitation, or coercion by the attorney-in-fact are extremely important dangers to consider when choosing an “attorney-in-fact.”

- If a person’s decision-making capacity is questioned and a petition is filed in court, the rights and powers granted in the POA or DPOA may be suspended until the court makes a ruling on the person’s capacity. Courts are now required to consider whether POAs, DPOAs and other less restrictive alternatives are sufficient to meet the person’s needs rather than to establish guardianship.

There are two ways to revoke a DPOA:

1. Provide written notice to the attorney-in-fact and anyone who reasonably relied on it. For banks and other financial institutions, there are additional rules to provide notice of revocation.

2. Death of the principal.

Filing guardianship proceedings suspends the authority of the agent until the guardianship proceedings have been acted upon, with the exception of health care powers which must be specifically suspended by the court.

For additional information regarding POAs and DPOAs, please visit The Florida Bar’s website at www.floridabar.org or call (850) 561-5767 or (850) 561-5773.
Option 4 - Representative Payee

Representative payee is an individual or agency who receives and manages your federal benefits. It is necessary to notify the Social Security Administration and complete the necessary paperwork to establish your representative payee. The representative payee receives your monthly benefit payment and is required to report how the money is spent for your benefit.

For additional information visit the following federal government website: www.ssa.gov/pubs/10076.html.

Option 5 - Advance Directives

An advance directive documents how you want your health care rights handled and who you want to exercise your medical rights when you are unable to make those decisions. Documenting and delegating your wishes today means your family will not have to make heart-wrenching decisions later. Everyone should have an advance directive unless he or she lacks the capacity to make those decisions. The term “advance” is used because the directions are given before they are needed. Advance directive refers to several different legal options including a living will and health care surrogate designation.

A living will is a written or oral statement signed in the presence of two witnesses that expresses your instructions on life-prolonging procedures, such as cardiac resuscitation or artificial feeding. It also allows you to express spiritual, personal or emotional wishes. A living will comes into effect when you lose 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 health care surrogate designation is the naming of another person to make health care decisions for you. The health care surrogate designation must be signed by you in front of two witnesses. It allows the surrogate to make health care decisions, apply for public benefits and access medical records. The surrogate is named in advance, but the surrogate designation does not take effect until the treating physician decides you are incapacitated.

The Florida Agency for Health Care Administration (AHCA) also provides information on its website at www.floridahealthfinder.org. This website addresses common questions and answers related to living wills and health care surrogate designations.

Aging with Dignity is an organization that publishes the document “Five Wishes.” This is an easy-to-use document that anyone can use to plan how they want to be cared for should he or she become seriously ill. This advance directive gives a person control over future medical decision-making should he or she later become incapacitated. Knowing your directions will be followed will not only give you peace of mind, but will also help family members.
The order form for “Five Wishes” can be obtained on the organization’s website: www.agingwithdignity.org/5wishes.html or by calling toll free 1-888-5WISHES (1-888-594-7437). This publication is available in either English or Spanish for $5.00, or twenty-five copies for $1.00 per copy.

**Option 6 - Medical Proxy**

A medical proxy is an option that can be used when someone has not established an advance directive or a medical durable power of attorney, 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:

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 who meets certain criteria.

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

**Option 7 - Trusts**

A trust is a legal relationship where a person has a legal obligation to manage property for the benefit of another person. Basically, a trust is a fancy word for an arrangement where one person is in charge of another person’s property, which can include cash, real estate, stocks, jewelry or anything of value.

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

1. The settlor (sometimes referred to as the “grantor”) is the person who initially sets up the trust.

2. The trustee is the person who manages the property.

3. The beneficiary is the person who gets the benefit of the property.

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

The settlor directs how the trustee manages the trust assets in the trust document. Trustees can be individuals or institutions (for example, banks or trust companies).
There will likely be successor trustees which will step in if something happens to the first trustee.

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

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

**Revocable Trusts**

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

During the settlor’s lifetime, the trust is revocable, meaning property can be transferred into and out of the trust by the owner, and amendable, so that the terms of the trust relating to distributions, naming of trustees and other provisions can be altered. However, at the time of the settlor’s death, the trust becomes irrevocable.

There is no magic number (value of assets) which determines whether or not to set up a revocable trust. Instead, it is the type of assets and the circumstances of the individual and his or her family which will often dictate the most appropriate documents for the individual’s personalized plan. Revocable trusts do not allow someone to keep his or her own funds while still qualifying for or maintaining public benefits.

**Irrevocable Trusts**

Irrevocable trusts are trusts which cannot be changed once the trust is established (however, under Florida’s new Trust Code there are ways to modify irrevocable trusts, if necessary). Generally, irrevocable trusts are used for estate tax planning purposes and occasionally, in protecting assets to pay for long-term care. Because irrevocable trusts may lack flexibility, an irrevocable trust will only be used to address specific needs. For example, special needs trusts, which are irrevocable, are used to protect eligibility for public (government funded) benefits for persons with disabilities.

**Special Needs Trusts**

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

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

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

1. Self-Settled Special Needs Trusts

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

1. A personal injury settlement where funds are directly received by the person with a disability, or his or her guardian.
2. An inheritance.
3. Accumulated assets (such as wages or gifts).

Types of Self-Settled Special Needs Trusts

• Under Age 65 Disabled Trust (d4A):

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

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

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

• Income Trust (d4B):

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

These trusts can be established by the Medicaid applicant’s parent, grandparent, legal guardian, the court or by the applicant himself or herself.

This trust does not allow the applicant to qualify for SSI, food stamps, subsidized housing or other Medicaid programs.

• Pooled Trust (d4C):

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

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

Two examples of these pooled trusts are the Guardian Pooled Trust, www.guardianpooledtrust.org, and the Foundation for Indigent Guardianship Pooled Trust, toll free 1-888-310-3726.

2. Third Party Special Needs Trusts

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

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

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

Distributions From All Special Needs Trusts

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

Here are some examples of recommended expenditures:

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

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

- pay cash to the beneficiary;
- pay cash to the family of the beneficiary who is under the age of 18;
- make payments of rent, mortgage, real estate taxes, homeowner’s insurance, utilities, food and shelter (this will be counted as income) without knowing exactly how such payments might affect SSI eligibility; or
- buy or give groceries to the beneficiary without knowing exactly how such payments might affect SSI eligibility.
Trusts can seem intimidating, particularly when first introduced to them. The truth is, trusts are not as complicated as one may think. It is important to seek an attorney who specializes in this area. Trusts can greatly help individuals with disabilities. Education and knowledge are the tools to feeling comfortable and confident in the use of trusts.
Learning Activities

So far, we have explained the civil rights available to all persons. We have identified principles we should take into consideration when we are matching a person’s needs with the available decision-making options. We have also identified options that can be used to delegate certain rights to another adult and identifying them in a specific order (from least restrictive to more restrictive). The chart on page 18 identifies the rights that can be assigned to someone else.

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

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

________________________________________

________________________________________

________________________________________

________________________________________

Lou Ann is 17 and wants to be a child care worker. She has been diagnosed as having a cognitive disability. Her family is concerned that she does not understand the rights and responsibilities she is about to assume upon reaching age 18. What actions would you recommend Lou Ann and her family explore and which of the seven options previously discussed should be considered?

________________________________________

________________________________________

________________________________________

________________________________________

Juan Carlo is 56 and was not allowed to attend school when he was younger. At 16 he moved to an intermediate care facility (ICF) about 200 miles south of his family’s hometown. He has lived there for 40 years. His family visits at least once a month. He has an older sister who lives about 250 miles north of their family home. His dad recently passed and his mom (who is 86) is considering moving north to the same
town as her daughter. The family is discussing whether Juan Carlo should move, too. His sister, Maria, has asked him if he would like to move and he was unsure. What actions would you recommend Juan Carlo and his family explore and which of the seven options previously discussed should be considered?

Florence is 81. She was married and raised two children following graduation from college in 1933. Her husband of 47 years handled all the couple’s financial dealings but died five years ago. Immediately upon his death, Florence added her older daughter as a co-signer on her checking account. Florence has transitioned well to paying all her bills, but her daughter helps her reconcile her accounts. Florence is considering moving closer to her older daughter which will mean changing to a new doctor and dentist, deciding where to live, as well as changing banks. She is somewhat comfortable making decisions, but would like assistance in certain areas. What actions would you recommend Florence and her family explore and which of the seven options previously discussed should be considered?

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

Some of these scenarios lend themselves to particular situations. For example, the option of banking services would be a consideration in the scenario on money management. However, medical proxy would not since it does not relate to financial management. When matching a person’s needs with the appropriate decision-making option, one size does not fit all!
## Civil Rights Chart

<table>
<thead>
<tr>
<th>Civil Rights (alphabetically)</th>
<th>Can be taken by Court during Incapacity Determination</th>
<th>Can be taken by Court and Given to Guardian or Guardian Advocate</th>
<th>Guardian or Guardian Advocate Needs Extra Court Approval To Do</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commit a Person to a facility, institution or licensed service provider without formal placement proceeding</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Contract</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Counsel (an Attorney), To be represented by</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court Access, To have</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dissolution of Marriage, Petition to</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Driver's License, To apply for</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education, To receive a proper</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment, Seek or retain</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Experimental Biomedical or Behavioral Procedures or Experiments, Consent to participate in</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Freedom from Abuse, Neglect and Exploitation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Governmental Services, Apply for</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Humanely Treated with dignity and respect</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Independence, To remain as independent as possible</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lawsuits, Sue and defend</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Living Arrangements, Right to decide</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Marry</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medical, Dental, Surgical and Mental Health Treatment, Consent to</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Money and Property, Manage</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Parental Rights, Consent to termination of</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rehabilitation and Services, To receive necessary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social Aspects of Life, Consent to</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Sterilization or Abortion, Consent to</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vote</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The previous section discussed the decision-making options available to people who can decide who will act for them and under what circumstances. This section explores the options available if a person's capacity to make decisions is questionable. For these options, a court must be involved.

The chart on the previous page itemizes all rights that can be taken by a court, given to another person (guardian advocate or guardian), and those rights that need extra court approval to perform. Additionally, in the Appendix, you will find a listing of all actions that require court approval and a list of some that do not.

The process, in which the court decides which rights are removed and who will make that person's decisions, is called **guardianship**. The person for whom a guardian is named is referred to legally as the **ward**. Guardianship is a legal way to protect a person's health, welfare and property. Guardianship requires that a judge decide which of your rights will be removed, who will now make decisions and when they will do so. For this reason, guardianship is a very serious step to take and should be used as a last resort. Only the rights that the person cannot exercise himself or herself should be removed.

This section will address guardian advocacy, as found in Section 393.12, Florida Statutes, and guardianship, as found in Chapter 744, Florida Statutes.

**Guardian Advocacy**

Florida is one of a few states that have developed a process specifically designed to meet the needs of persons with developmental disabilities - in Florida that process is guardian advocacy. While there are a few differences between guardian advocacy and guardianship, the authority given by the court and the responsibilities defined in the statutes are the same.

An appointment of a guardian advocate is made by a court to make decisions for a person who is incapable of making those decisions for himself or herself.

So what are the differences? Basically, the differences are in the legal process of obtaining a guardian advocate or a guardian.

- First, guardian advocacy is only available to individuals with at least one of the five developmental disabilities defined by Chapter 393, Florida Statutes. Another statutory requirement of guardian advocacy that is important to consider when determining which guardianship option is appropriate for you, relates to decision-making ability. Specifically, an individual in need of guardian advocacy must lack the decision-making ability to perform some, but not all of the tasks necessary to care for his or her person, property, or estate. This may limit the use of this option for persons with significant disabilities who are not able to exercise any of their delegable rights.

- Secondly, in order 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 person and make a written report to the judge, the judge can use educational evaluations, individual education plans, support plans, and habilitation plans to address the person's
area(s) of incapacity to determine whether the person “needs” to have a guardian advocate to exercise certain rights.

- The third difference is that a guardian advocate need not be represented by an attorney unless required by the court or if the guardian advocate is delegated any rights regarding property other than the right to be the representative payee for government benefits.

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

If the requirements for guardian advocacy cannot be met and no other appropriate alternative exists, then the guardianship process addressed in Chapter 744, Florida Statutes, should be followed. Whichever legal process is chosen, guardian advocacy or guardianship, the duties and responsibilities of the guardian advocate or guardian are the same as defined in Section 744.361 – 744.462, Florida Statutes. For this reason, the term “guardian” in the next subsection on guardianship refers to both guardian advocates and guardians.

In order to ensure the guardian advocate is acting in accordance with the law, there is a requirement that guardian advocates submit reports to the court. These reports help the court to supervise the affairs of the person under guardian advocacy and to monitor the action of the guardian advocate (see section Reports Required by the Court).

A failure on the part of the guardian advocate to comply with any requirement may result in the guardian advocate having to appear before the court to explain his or her failure to properly fulfill his or her duties. This may result in sanctions against the guardian advocate including removal as guardian advocate and criminal and/or civil penalties.

It is important for the guardian advocate to check with his or her attorney to determine what, if any, additional duties the local court may require.

The FDDC’s Planning Ahead Guide, Chapter 8, is another resource for additional information on guardian advocacy and guardianship. You can find this guide at www.fddc.org/sites/default/files/file/publications/PlanningAheadFinal.pdf.

Note: The Ninth Judicial Circuit has developed downloadable sample guardian advocate forms for use by the general public. This information can be obtained at www.ninthcircuit.org/research/orders/guardian.shtml.

## Guardianship

The term guardianship describes a legal relationship between the guardian and the ward. The term “ward” describes a person whom the court has declared legally incapacitated and has had some or all of his or her rights removed. (Do no confuse guardianship with the Guardian Ad Litem program, which is designed to improve the lives of abused and neglected children.)

It is important to understand that guardianship should be a last resort and established only in cases where lesser restrictive means of intervention are not possible.

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

The process for establishing a guardianship is as follows:

I. A petition is filed.

Any competent adult may file with the court a petition to determine another person’s incapacity.

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

- The petition must state next of kin, the name of the AIP’s attending physician along with the factual information on which the incapacity petition is based. The petition must be filed in the county where the incapacitated person resides at the same time as the petition for appointment of a guardian, and it must include those rights that the AIP is incapable of exercising, to the best of the petitioner’s knowledge.\footnote{§744.3201, Florida Statutes.}

- The fees generally associated with guardianship include filing fees, examining committee fees and attorney’s fees. If the person has assets the fees may be paid from these assets. If the person is indigent, the fees may be paid by the state.

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

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

a. The court appoints an attorney to represent the AIP. The AIP can substitute the court-appointed attorney with his or her own counsel. This attorney will represent the ward until the initial guardianship report has been reviewed and accepted by the court.

b. The AIP must be given notice of the petition to determine incapacity and petition for the appointment of a guardian. It must also be served upon the court-appointed attorney for the AIP and any of the AIP’s next of kin identified in the petition. The petitions must be read to the AIP in his or her primary language.\footnote{§744.331(1), Florida Statutes.}

c. A three-member examining committee is appointed (consisting of a physician, psychiatrist, and either another physician, psychiatrist, gerontologist, registered nurse, nurse practitioner, or licensed social worker or a lay person who, by knowledge, skill, experience, training or education, may advise the court in the form of an expert opinion) to evaluate and report on the AIP.\footnote{§744.331(3)(a), Florida Statutes.} Even though the examining committee consults the AIP’s attending physician, the attending physician may not...
serve on the examining committee. Members must have the required four-hour examining committee member training as mandated by Florida law and the required continuing education hours. (No examining committee is appointed in guardian advocacy proceedings.)

1. In some cases, the AIP cannot be transported to each of the offices of the examining committee members for the examination. In those cases, members of the examining committee will travel to the home, hospital or nursing home to perform the evaluation.

2. Each member of the examining committee reports on the physical, mental and functional condition of the individual and includes in the signed report a diagnosis, prognosis, and recommended course of treatment.

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

II. A hearing is held.

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

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

As a safeguard against frivolous, self-serving or vindictive petitions, if the petition to determine capacity is dismissed, the cost of the proceeding may be charged to the petitioner if the court finds that the petition was filed in bad faith.\(^4\)

III. A guardian will be appointed, if necessary.

If the court determines that the AIP is incapacitated and in need of a guardian, the guardianship begins when the judge signs the order of incapacity, the order appointing a guardian, and the letters of guardianship.

Guardian of Person and Guardian of Property

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

\(^4\) §744.331(7)(c), Florida Statutes
Guardian of the Person

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

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

- A guardian of the person has the responsibility of filing an initial guardianship plan and annual plans with the court. These reports are covered in more detail under the section “Reports Required by the Court.”

Guardian of the Property

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

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

- Once letters of guardianship have been issued, property belonging to the person under guardianship (i.e., bank accounts, investment accounts, automobiles, homes, etc.) may need to be retitled or registered in the name of the guardianship, but NOT in the guardian’s name only. As an example, the bank account or deed may read “John Doe, Guardian for Jane Smith.” The guardian of the property must use caution and avoid mixing the person's funds with the guardian's personal assets. It is also the guardian’s responsibility to provide the person’s social security number to any bank or brokerage firm so that any earned interest will be properly reported to the Internal Revenue Service.

- A guardian of the property does not have the authority to sell, transfer, mortgage or donate any of the person’s property without prior approval from the court. It will be up to the court to determine if any proposed transactions are appropriate for the person.

- A guardian of the property also has the responsibility of filing with the court a verified inventory and annual accountings. This responsibility may be waived by the court if the person receives income only from social security benefits and the guardian is the person's representative payee for the benefits. These reports are covered in more detail under the section "Reports Required by the Court."

Guardian of the Person and Property

A guardian of the person and property has been given the responsibility by the court to make decisions regarding both the personal and property rights of the person. It is the responsibility of the guardian of the person and property to file with the court all the required initial and annual reports.
Reports Required by the Court

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

These reports include:

1. Initial Guardianship Report
   Each guardian shall file with the court an initial guardianship report within 60 days after his or her letters of guardianship are signed. The initial guardianship report consists of an initial guardianship plan or a verified inventory, or both, depending on the rights delegated.
   
   A. Initial Guardianship Plan
      All guardians of the person are required to submit an initial guardianship plan as a component of the initial guardianship report. The initial guardianship plan must be based on the recommendations of the examining committee and must include provisions for medical, mental health, personal care services and the type of residential setting best suited for the welfare of the ward. The initial guardianship plan becomes the basis for the annual plan.
   
   B. Verified Inventory
      All guardians of the property are required to submit a verified inventory as a component of the initial guardianship report. The verified inventory must include a list of all the known assets and property belonging to the ward, the location of the assets and a list of any sources of income (for example, social security, pension, rental income, etc). The verified inventory becomes the basis for the annual accounting.

2. Annual Guardianship Report
   Unless the court requires filing on a calendar-year basis, a guardian shall file with the court an annual guardianship report within 90 days after the last day of the anniversary month the letters of guardianship were signed. If the court requires calendar-year filing, the guardianship report must be filed on or before April 1 of each year. The annual guardianship report consists of an annual plan or annual accounting, or both, depending on the rights delegated.
   
   A. Annual Plan
      A guardian of the person is required to complete and submit to the court the annual plan. The annual plan uses the initial guardianship plan as its basis and therefore must include the current location of the ward, the ward’s condition, the ward’s needs, and whether there are any changes expected in the upcoming year. The annual plan must also include a report by the ward’s physician that should include an evaluation of the ward’s condition and a statement of the current level of capacity in addition to any rehabilitative services planned for the upcoming year.
   
   B. Annual Accounting
      A guardian of the property is required to file an annual accounting and uses the verified inventory as its basis. The annual accounting must include a
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complete and accurate account of all receipts and disbursements of the
ward’s property made during the previous year. It shall also include a year-end
statement of all accounts of the ward from each financial institution where
assets are being held.

1. Simplified Annual Accounting

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

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

3. Final Report

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

- Resignation of Guardian

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

- Removal of Guardian

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

- Death of the Ward

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

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

- Restoration of the Ward’s Rights

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

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

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

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

Types of Guardians

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

Non-Professional/Family Guardians

Any competent adult who is a resident of Florida may serve as guardian. A non-resident of Florida may serve as guardian if he or she is directly related to the person with a disability or the adopted child or adoptive parents of the person.

• Florida Statutes prohibit the appointment of anyone as a guardian if they have been convicted of a felony, judicially determined to have committed abuse, abandonment or neglect against a child or have been found guilty, regardless of adjudication, in certain other offenses. In addition, a person who may be unable to perform his or her duties due to illness or incapacity may not be appointed.

• The court may require a non-professional guardian to submit, at his or her own expense, to a background investigation, which may include criminal and credit history checks. If the court determines that a criminal history and credit investigation is required, then the results of the investigations will be considered when the court appoints the guardian.

• A non-professional guardian is required to satisfactorily complete an eight-hour training and instruction course within four months of appointment. A guardian of the property for a minor is only required to receive four hours of training and instruction. Contact your local clerk of court’s office or check with your attorney for a listing of training courses in your area.

• Florida Probate Rules require that every guardian be represented by an attorney admitted to practice in Florida.
Professional Guardians

Professional guardians are required to obtain a minimum of 40 hours of instruction and training prior to becoming a professional guardian which is followed by a minimum of 16 hours of continuing education every two calendar years. The Statewide Public Guardianship Office (SPGO) must approve all training courses. A complete list of training courses for professional guardians is available at www.cebroker.com.

- A professional guardian is required to register with the Statewide Public Guardianship Office. The required registration form and the required registration fee must be submitted along with credit and criminal history reports, proof of having completed the required 40-hour professional guardianship course, and proof of a $50,000 Blanket Bond. A professional guardian is required to register annually with the Statewide Public Guardianship Office no later than 30 days prior to his or her bond anniversary date. A professional guardian must also provide proof of completion of 16 hours of continuing education requirements every two years since becoming a professional guardian.

- Florida Statutes require a professional guardian to post a blanket fiduciary bond with the clerk of the court within the local judicial circuit. The bond must be maintained by the professional guardian in an amount of at least $50,000 and must cover all individuals that the guardian has been appointed to represent.

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

- A professional guardian and employees of a professional guardian who have a fiduciary responsibility to a ward are required by Florida Statutes to submit to a credit history check at least every two years and a Florida Department of Law Enforcement (FDLE) criminal history check every two years unless completed electronically. If completed electronically, FDLE will automatically update the clerk of any changes and the clerk must notify the SPGO. Also, a FBI criminal history check is required every five years unless completed electronically. If completed electronically, FDLE will automatically update the clerk of any changes and the clerk must notify the SPGO. The criminal and credit background checks are a part of the annual professional guardian registration process.

Public Guardians

In Florida, the Statewide Public Guardianship Office designates Offices of Public Guardian. At the current time, public guardianship offices exist in various counties throughout the State of Florida with some of the offices providing service to more than one county.

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

A current list of local offices may be found on the Statewide Public Guardianship Office website at http://elderaffairs.state.fl.us.

If you have further questions about public guardianship or would like information on how to become a professional guardian, you may contact the Statewide Public Guardianship Office at (850) 414-2000 or write to:

Statewide Public Guardianship Office
4040 Esplanade Way, Suite 360-I
Tallahassee, FL 32399-7000

Guardian Responsibilities

There are certain ideals and standards that a guardian must follow. A guardian is given an important and sometimes overwhelming responsibility to virtually act in every aspect of the ward’s life on behalf of the ward. The duty of the guardian to act ethically is paramount and the failure to fulfill guardian responsibilities could result in removal by the court and/or imposition of civil and criminal penalties.

The following list of responsibilities should serve as a guide for all guardians.

• A guardian must exercise due care and diligence when making decisions on behalf of a ward.

• A guardian must be well informed or seek counsel so he or she can use the greatest degree of care and caution when making decisions on behalf of the ward.

• The guardian must always make sure that all the rights and liberties of the ward are fully protected in order to allow the ward opportunity for development and autonomy.

• Every Florida guardian must obtain the minimum hours of training required by statute, but should strive to receive as much additional training as possible and attend additional ongoing educational programs on his or her own initiative in order to be better able to serve the ward.

• The guardian must ensure that the ward is at all times maintained in the least restrictive environment, allowing the ward maximum freedom based on abilities.

• The guardian must provide informed consent for the provision of care and treatment of the ward. This must be accomplished with the least restrictive intervention possible, and the guardian should make it a priority to keep informed on new treatments and changes in the law to be able to make the best decision for the ward.

• The guardian must always exhibit the highest trust, fidelity, and loyalty in dealings with the ward, never forgetting or violating the fiduciary relationship that exists between guardian and ward.
• Every guardian must provide proper and careful management for the property and income of the ward and there must be no self-interest in any dealings.

• If the ward’s functioning improves at any time, the guardian must seek to restore the rights of the ward or otherwise limit the guardianship.

Types of Guardianships

Limited vs. Plenary 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 ward 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 ward.

Emergency Temporary Guardianship

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

• The court may appoint an emergency temporary guardian, on its own, if no petition for appointment of guardian has been filed at the time of an order determining incapacity. The authority of an emergency temporary guardian expires after 90 days or when a guardian is appointed, whichever occurs first.

• The authority of the emergency temporary guardian may be extended for an additional 90 days upon a showing that the emergency conditions still exist. Usually, any need for guardianship that goes beyond the initial 90 days would not be considered an emergency.

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

• If an emergency temporary guardian is a guardian for the property, the ETG final report must consist of a verified inventory of the property as of the date the letters of emergency temporary guardianship were issued, a final accounting that gives a full and correct account of the receipts and disbursements of all the property of the ward over which the guardian had control, and a statement of the property of the ward on hand at the end of the emergency temporary guardianship.

• If the emergency temporary guardian is a guardian of the person, the ETG final report must satisfy the requirement of the initial guardianship plan and summarize the activities of the temporary guardian with
regard to residential placement, medical condition, mental health and rehabilitative services, and the social condition of the ward to the extent of the authority granted to the temporary guardian in the letters of guardianship.

Foreign Guardianship

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

Standby Guardianship

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

Surrogate Guardianship

In a surrogate guardianship, a guardian may request permission from the court to designate a professional guardian to exercise the ward’s rights in the event the guardian is temporarily unavailable to act. The court’s designation cannot exceed 30 days.

Veteran Guardianship

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

Guardianship of Minors

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

§744.102 (7), §744.306, and §744.307, Florida Statutes.
the hearing on the petition for appointment of a guardian, unless otherwise directed by the court.

The natural guardian(s) is authorized, on behalf of a minor child, to settle, or complete a settlement of any claim, or cause of action, due the minor child for damages to his or her person or property, when the amount involved does not exceed $15,000. A legal guardianship is required when the amount of the net settlement to the child exceeds $15,000.6

Pre-Need Guardianship

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

Pre-need guardians for minors follow the same procedures as above, except that both parents must agree on the guardian. The parents must file the declaration with the clerk of the court. When a petition for incapacity of the last surviving parent or the appointment of a guardian upon the death of the last surviving parent is filed, the clerk produces the declaration. The court is not bound to appoint the pre-need guardian if he or she is found to be unqualified to serve.7

Voluntary Guardianship

A voluntary guardianship is one created without an adjudication of incapacity. The court appoints a guardian of the property although the ward is mentally competent, yet incapable of the care, custody, and management of his or her estate because of age or physical infirmity, and has voluntarily petitioned for the appointment. A certificate by a licensed physician, stating that he or she has examined the petitioner and that the petitioner understands the nature of the guardianship, is required. A guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward not more than 90 days before the annual report is filed with the court. The certificate must certify that the ward is competent to understand the nature of the guardianship and of the ward’s authority to delegate powers to the voluntary guardian. The ward’s delegation of authority must be filed with the petition. This form of guardianship is commonly used by individuals with physical disabilities.8

Restoration of Rights

A primary goal of guardianship law in the state of Florida is to protect the person with a disability and preserve his or her autonomy whenever possible. To ensure this, the guardian should always be cognizant of the ward’s progress and, if improvement is evident, the ward should be restored to capacity at the earliest possible time (Section 744.3215(c), Florida Statutes). If it appears from the annual guardianship report that

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6 §744.301, §744.3021, §744.387, Florida Statutes; Florida Probate Rule 5.555.
7 §744.3045(4), Florida Statutes.
8 §744.341, Florida Statutes.
any of the following conditions are met, then the court shall, after a hearing with appropriate notice, amend the plan or enter any other order necessary to protect the ward:

- The ward’s condition requires further examination.
- Any change of the proposed care, maintenance, or treatment is needed.
- The ward is qualified for the restoration of some or all rights.

The restoration of capacity begins by filing a suggestion of capacity (Section 744.464, Florida Statutes). This document can be filed by any interested person, including the guardian or the ward, and must state that the ward is now capable of performing some or all of the tasks and rights that had been removed by the court through the guardianship. When the suggestion of capacity is filed with the court, the court will appoint one physician to examine the ward. The physician’s report must be filed within 20 days of his or her appointment. When the suggestion of capacity is filed, the court will send notice of the suggestion and the appointment of a physician to the ward, the guardian, the attorney for the ward, and any other interested persons. Any party wishing to object to the suggestion of capacity must file the objection within 20 days of the served notice.

There are three typical recommendations that the physician can make following the suggestion of capacity:

- The physician can recommend full restoration. The court may order full restoration without a hearing, but if objections are filed, the court will set the matter for hearing and an attorney will be appointed to represent the ward.
- The physician may recommend partial restoration. The court must set the matter for hearing, whether there are objections or not, and an attorney will be appointed to represent the ward.
- The physician may recommend no restoration. The court must set the matter for hearing, whether there are objections or not, and an attorney will be appointed to represent the ward.

When the hearing commences, the ward has the burden to prove by a preponderance of evidence that he or she is now capable of exercising those rights previously removed by the court.

- If the ward is not the person that filed the petition, the interested person that filed the petition would have that burden.
- If the court grants a partial restoration of rights, the guardian must file a new initial guardianship plan within 60 days of the order.
- If the court grants a full restoration of rights, the guardian must file a petition for discharge and a final accounting (Section 744.527(1), F.S.). Although this rule only requires a report to be filed within a reasonable time, generally, the final accounting should be done within 30 days of the restoration to capacity. In addition, the guardian must prepare to transfer all of the assets to the ward. The final accounting and any hearings may be waived by the ward unless objections are made to the restoration by an interested party. Finally, final petitions for orders authorizing payment of guardian’s fees and costs and attorney’s fees and costs must be completed.
Successor Guardian

A successor guardian is appointed when a guardian resigns, dies, becomes incapacitated, or is removed. A successor guardian should learn as much as possible about the guardianship before accepting it and contact everybody involved in the current guardianship. Most importantly, the successor guardian should review the court file and meet with the ward.

There are several steps necessary to appoint a successor guardian:

1. When a guardian wants to resign, the guardian must file a petition for resignation and there must be an order from the court accepting the resignation. If the guardian dies or becomes incapacitated, anyone can notify the court.

2. A petition for appointment of a successor guardian must be filed with the court and include an application for appointment of guardian. Also, the successor guardian must execute a notarized oath to faithfully perform the duties of a guardian.

3. New letters of guardianship will be issued by the court authorizing the successor guardian to act on behalf of the ward.

A successor guardian must be appointed, and duly qualified, before a guardian can be relieved of his or her duties and obligations. The guardian must get a receipt from the successor guardian once the property is delivered to the successor guardian. The former guardian should keep his or her records of evidence of receipts and cancelled checks for at least three years after being discharged.

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

Termination of Guardianship

A guardianship can be terminated under the following circumstances:

- Restoration of ward’s rights
- Unable to locate ward after a diligent search
- In guardianship of property only, the ward has exhausted guardianship assets
- Death of the ward

If a ward dies, a guardian of the person is discharged upon the filing of a death certificate.

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

<table>
<thead>
<tr>
<th>Petitioner</th>
<th>Petitioner would be someone alleging the incapacity of another.</th>
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<tbody>
<tr>
<td>Petition to determine incapacity</td>
<td>No adjudication of incapacity</td>
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<tr>
<td><strong>Costs:</strong></td>
<td>AIP attorney’s fees and filing fees paid from AIP’s property if guardianship is established, unless AIP is indigent.</td>
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<tr>
<td>Petition for appointment of a guardian advocate/guardian</td>
<td>This option is available only to persons with developmental disabilities, who can perform some but not all decision-making tasks necessary to care for their person or property. Like Chapter 744, Florida Statutes, this petition must include specific information about the individual with a disability, as well as the person desiring to become the guardian advocate. It must specify the exact area(s) in which the person lack(s) the capacity to make informed decision(s) about his or her care and treatment. Statute specifies what must be included in the petition.</td>
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<tr>
<td><strong>Costs:</strong></td>
<td>Filing Fee (statute does not specify who pays)</td>
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<tr>
<td>Notice</td>
<td>Notice of petition must be given to: Person with a DD (served on and read)</td>
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### Statutory Authority

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<tr>
<th>GUARDIAN ADVOCACY</th>
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<tr>
<td>Sec. 393.12, F.S.</td>
<td>Chapter 744, F.S.</td>
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### Governing Court Rule

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<th>GUARDIAN ADVOCACY</th>
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<td>Florida Probate Rules</td>
<td>Florida Probate Rules</td>
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**GUARDIAN ADVOCACY**

- Someone alleging that a person with a developmental disability (DD) needs decision-making assistance in specified areas, or an
- Individual in need of a guardian advocate.

**GUARDIANSHIP**

- Person petitioning the court is:
- Petition to determine incapacity
- Petition for appointment of a guardian advocate/guardian
- Notice
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<tr>
<th>GUARDIAN ADVOCACY</th>
<th>GUARDIANSHIP</th>
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<tr>
<td><strong>Statutory Authority</strong></td>
<td>Sec. 393.12, F.S.</td>
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<tr>
<td><strong>Governing Court Rule</strong></td>
<td>Florida Probate Rules</td>
</tr>
<tr>
<td><strong>Examining Committee</strong></td>
<td>None</td>
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<tr>
<td><strong>Costs:</strong></td>
<td></td>
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<tr>
<td><strong>Adjudicatory hearing to determine incapacity</strong></td>
<td>None, however there is a hearing to appoint a guardian advocate. At the hearing, the court shall receive and consider all reports relevant to the person's disability, including the person's current individual family or individual support plan, the individual education plan, and other professional reports documenting the condition and needs of the person.</td>
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<tr>
<td><strong>Requirement that guardian have an attorney</strong></td>
<td>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.</td>
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<td><strong>Exception:</strong></td>
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<tr>
<td><strong>Exceptions from Reporting</strong></td>
<td>Guardian advocates are not required to file annual accountings if the only property is Social Security and the guardian is also the representative payee.</td>
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<tr>
<td><strong>Removal of Rights</strong></td>
<td>The individual retains all rights except those granted to the guardian advocate to exercise. Letters should be same as Chapter 744.</td>
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<td>GUARDIAN ADVOCACY</td>
<td>GUARDIANSHIP</td>
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<td><strong>Governing Court Rule</strong></td>
<td>Chapter 744, F.S.</td>
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<td><strong>Restoration of Rights</strong></td>
<td>Florida Probate Rules</td>
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<td>Any interested person, including the</td>
<td>Florida Probate Rules</td>
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<td>person with DD, may file a Suggestion</td>
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<td>of Restoration of Rights which must</td>
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<td>state that the person has regained</td>
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<td>the ability to exercise some of the</td>
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<td>rights that were given to the guardian</td>
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<td>advocate along with evidentiary support</td>
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<td>or a statement of the good faith reason</td>
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<td>for the belief. If no evidentiary support</td>
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<td>is attached, the court must immediately</td>
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<td>set a hearing wherein the court can</td>
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<td>consider all reports and testimony</td>
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<td>relevant to the person's decision-</td>
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<td>making abilities.</td>
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<td>review of the evidence submitted, the</td>
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<td>ward, may file a suggestion of capacity</td>
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<td>stating that the ward is currently</td>
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<td>capable of exercising some or all of</td>
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<td>the rights which were removed. The</td>
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<td>court will immediately appoint a</td>
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<td>physician to examine the ward and</td>
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<td>submit his report within 20 days.</td>
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<td>If an objection is timely filed, or if</td>
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<td>the medical examination suggests that</td>
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<td>full restoration is not appropriate,</td>
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<td>the court shall set the matter for</td>
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<td>hearing. If the ward does not have an</td>
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<td>attorney, the court shall appoint one</td>
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<td>to represent the ward.</td>
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Section 4
Legal Resources
Barriers to Accessing Legal Services

A survey of the legal needs of aging Floridians (Dinger, 2006) concluded that the two highest ranked barriers for seeking the advice of an attorney were issues dealing with matters of estate (65%) and guardianship and power of attorney (27%). Over 25% of respondents to the survey stated the need for an attorney, but did not go see one. The reasons for not visiting an attorney are listed below:

- 64% indicated that lawyers are too expensive.
- 23% believed they could solve the issue without assistance of an attorney.
- 19% were not sure that the problem was a legal one.
- 12% did not know where to get a lawyer.
- 2% were embarrassed to see an attorney.

Also, half of the respondents cited the need for a free legal hotline or access to low cost or free attorneys.

The statistics from that survey do not reflect the extent to which family members of people with disabilities do not seek the advice of attorneys. However, family members of people with disabilities responded similarly to an informal survey created to gather information for this manual with reasons for not seeing an attorney, including the need for free or low cost legal services.

Other reasons for individuals with disabilities not seeking the services of attorneys in Florida include lack of public transportation that accommodates persons with disabilities, language and cultural barriers, and access to courthouses and attorneys' offices. Former Chief Justice Fred Lewis of the Florida Supreme Court is a strong advocate for removing barriers that block access of persons with disabilities to Florida's judiciary. He says, “It breaks my heart when I pick up these little news clippings and read that someone can’t get to the courthouse over in the Panhandle and that individuals seem to be uncaring that people cannot use the facilities of the courthouse” (Pudlow, 2006).

Even practicing attorneys who have a disability may experience barriers when they appear in court on behalf of a client. One attorney stated that “He [the judge] assumed I could not be a lawyer because I was in a wheelchair” (Pudlow, 2006). If attorneys with a disability continue to experience such barriers, should we expect that Floridians with a disability will have any fewer barriers to overcome when seeking legal assistance?

Lawyers Are Too Expensive

Unfortunately, most people do not have insurance benefits that cover costs for legal services. The cost for any professional service is relative to the benefit received, and the same is true for legal services. For instance, if you committed a serious crime, you would be willing to pay the cost for a defense attorney. If you could not afford an attorney to defend you, a public defender would be provided at no cost. Also, if someone is attempting to remove a person’s civil rights by gaining guardianship of the person with a developmental disability and the person cannot afford an attorney,
a court will appoint an attorney to represent the alleged incapacitated person in the guardianship proceeding because no one can take someone’s civil rights away without due process.

Self-advocates and family members have a responsibility to become educated consumers of legal services. Rates vary among attorneys and many will provide low cost and limited pro bono services at no cost.

(See Additional Legal Resources in this section).

Solve The Issue Without Assistance Of An Attorney

Today, internet websites, office supply stores, and books offer resources for self-help forms and legal advice on how to make decisions without the assistance of an attorney. We can locate forms to file for divorce, transfer property, create a will, and prepare leases, to name a few. Although people will continue to use these self-help methods, it is important to seek the legal advice of an attorney to avoid problems in the future especially when impacting the person with a disability. With many of the decision-making options previously discussed, delegating authority to someone else using a “self-help form” may not be in the individual’s best interest nor take into consideration his or her capacity to make the decision to execute these particular documents.

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

• Talking to an attorney about the different options that meet your unique circumstances can avoid problems in the future, like making sure your documents meet your needs and choices are honored by others.

• Seek legal advice when you are prepared to write a will, designate a health care surrogate and create a living will or trust.

• Seeking legal advice can also help avoid those instances where relatives or others have abused the principle of informed consent by insisting that a family member with a disability turn over management of his or her property to another by signing a power of attorney.

• Instances of coercion and exploitation have led to federal and state legislation that protects a person with a disability. Seek legal advice from a competent and ethical attorney before turning over management of property in order to avoid these types of problems.

Not Sure The Problem Is A Legal One

Figuring out who owns the legal issue is paramount to answering this question. Is the legal issue one that parents may have because of concern for their child or an adult child may have about his or her aging adult parent with a disability? Or is the legal issue directly related to the safety and security of a person with a disability, including self-advocates?

For example, a family member may be concerned about eccentric living arrangements, erratic spending habits, or an observed “state of confusion” in a loved one to the
point of seeking legal assistance. This is not a legal issue for the family member to resolve, but rather a legal issue to be decided in consultation with the person with a disability. The legal issue and any potential remedy are owned by the person with a disability, not by the parent, relative, friend, or professional caregiver who raises the issue of incapacity.

There is an old legal maxim that ignorance of the law is no excuse. It is prudent to err on the side of assuming a potential legal problem when issues about capacity determination or managing property interests are involved.

**Do Not Know Where To Get An Attorney**

Unfortunately, many people do not know how to find an attorney who specializes in legal issues associated with persons with developmental disabilities, such as decision-making options, guardian advocacy, guardianship and related matters. One of the ways to find an attorney who specializes in this area is by asking other individuals with disabilities in your community, who may have had the need for legal services, who they would recommend. Advocacy groups in your area may also have recommendations. If you are on your own searching for an attorney, look in the yellow pages for attorneys who practice family and elder law. There are some attorneys who specialize in issues related to developmental disabilities and guardianship. Probate attorneys specialize in handling legal issues relating to wills, trusts, and estates.

(See Additional Legal Resources in this section).

**How to Prepare for a Meeting with an Attorney**

Before meeting with an attorney, think about your situation or the situation of your loved one and then consider these questions from your or your loved one’s perspective:

- What are the abilities and capacities?
- Who is in the circle of support?
- Is there trouble getting medical/dental care?
- Are there problems handling money?
- Are you being treated with respect by others?
- Do you live where you want to live?
- Are you involved in making decisions for yourself?

Do some research. Learn about the various decision-making options available in the areas you might need assistance.

- If you are a family member or relative, have you considered your motives for seeking legal assistance of another?
  - Have you discussed this with the person?
  - Is he or she in agreement?
  - Do you want to merely control the person, protect the person or are you trying to support the person to live in the most independent way possible?
Gather financial, medical and legal records.

- Do you/he or she already have a power of attorney?
- Do you/he or she have a living will?
- Do you/he or she have a guardian from another state or did you have one in Florida who has died?
- Do you/he or she receive Social Security or any other governmental benefits?
- Do you/he or she have an Individual Education Plan or a Support Plan?
- Do you/he or she have a checking account, savings account, own a home, etc.?

**Contact an Attorney**

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

**Your First Meeting**

At your first meeting, a good attorney will help you through the first few awkward moments of the initial meeting. He or she may ask about family or individual circumstances as a way of making you more comfortable. As your own good self-advocate you should ask and expect to be involved in the conversation, provide answers to questions asked and provide your personal information. The attorney should involve you in the conversation, but if he or she does not, you should politely speak up. Making occasional eye contact and speaking directly to all present in the meeting is important for establishing rapport and demonstrating respect. Also, make sure to ask the attorney to make copies of any documentation you bring to the meeting. Take a note pad so that you can use it during the meeting.

In this first meeting, you may discuss with the attorney:

- The situation and what you are trying to accomplish.
- The various options you found during your research. Ask questions about anything you did not understand and ask if there are any other options that you have overlooked.
- The information you have brought with you to the meeting.

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

- Ask the attorney for a recommendation for the specific situation. Ask why he or she came to that conclusion. If the recommendation is not one of the options you thought would work, ask why the attorney did not choose the one you thought was appropriate.
• Ask about the advantages and disadvantages of the attorney’s recommendations. Ask the same question for the option you thought was appropriate. Be sure to ask about time frames (How long will it take to put the option in place?). Ask what you will need to do to put this in place.

• Ask about the full cost of all of the options the attorney recommended and the ones you thought were appropriate (filing fees, court costs, attorney time, etc.). Ask if there would be an additional cost for calling the attorney with follow up questions. Ask if the attorney is a member of the Florida Bar’s low fee or disability law panel or does he or she provide pro bono (free) services.

• If you cannot afford the attorney’s fee, ask what local or regional resources are available.

• Ask the attorney, “What do I do next?”

Do not hesitate to ask questions and expect clear explanations. Let the attorney know if you do not understand what he or she is saying. Take detailed notes for later reference. Notice the demeanor of the attorney. Does he or she appear patient when responding to your questions? Ask how many similar cases he or she has handled. (For example, if the attorney is recommending a durable power of attorney, how many has he or she written? If recommending a guardian advocate, how many guardian advocacy cases has he or she handled?) Ask for references. You can always call The Florida Bar (1-800-342-8011) or go to The Florida Bar’s website, www.flabar.org, to find out if the attorney is in good standing.

After the meeting, review your notes. Think about your abilities. Consider your needs and the attorney’s recommendations and discuss this with your circle of support. Discuss whether you agree with the attorney’s recommendation(s). If you do not agree, explain your choice and why you think it is better than the one suggested by the attorney. Decide how to pay for the legal assistance you need. Follow the attorney’s next steps.

Paying for Legal Services

On occasion we may find ourselves seeking the advice of professionals, all of whom expect a fair payment for their services. This is equally true for accountants, physicians, engineers, attorneys, and other professionals. For some individuals and their families, insurance may be a source of financial relief, whereas others can afford to pay outright for these services.

There is a serious issue that underlies the need for legal assistance of an attorney that separates this service from other professional services. Accountants, physicians, and engineers do not have the legal ability to partially or completely remove the civil rights of a person with a disability. Only a court can make that decision! This single fact explains why legal representation is a fundamental guarantee for persons with a disability.

• Some self-advocates or families of persons with a disability have the ability to pay for legal services. Take for example a dual-career couple with an income in excess of $300,000 a year (she is an attorney and he is a physician). Due to a horrible swimming pool accident, their six
month old will live the rest of his life with irreversible brain damage from oxygen depletion. It is unlikely that this family will be eligible for free or low cost services for an attorney.

• Another family has a son who has been diagnosed with an IQ of 55. He will earn a certificate of attendance from the local school district and has functional abilities. The family has received confusing and contradictory information regarding his intellectual disability from school counselors, family physician, and other professionals. He will be 18 years old in six months. The family finances are below the poverty level; both parents have low paying service-related jobs and are responsible adults. It is likely that this family will be eligible for free or low cost services from an attorney.

To assist self-advocates and families in obtaining affordable legal services, attorneys or legal aid services may charge fees on a sliding scale basis. It is the responsibility of attorneys or legal aid services to establish a sliding scale fee structure and to communicate that information to potential clients.

For example, the Center for Guardian Advocacy (Brandon, FL) uses the following sliding scale for legal services related to uncontested guardian advocacy:

<table>
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<tr>
<th>Gross Household Income Over:</th>
<th>Scaled Fee</th>
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<tr>
<td>$ 100,000</td>
<td>$ 1,000</td>
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<tr>
<td>$ 75,000</td>
<td>$ 750</td>
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<td>$ 50,000</td>
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<td>$ 25,000</td>
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<tr>
<td>Less Than $25,000</td>
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It is important to note that sliding scales for fees will vary with the service organization offering legal services, as well as the type of legal assistance that is offered by the organization to the public.

Additional Legal Resources

The Florida Bar wants to make legal services readily available to individuals and families who need a lawyer. Many people are not acquainted with a lawyer. Others hesitate to see a lawyer because they have never used a lawyer’s services before. The Florida Bar Lawyer Referral Service and local bar association lawyer referral services are designed to make it easy for you to contact a lawyer.

Local bar associations administer 11 referral services operating in Florida’s major cities. The Florida Bar handles all other referrals from areas without a local service.

• If you need a lawyer, call the Lawyer Referral Service in your area (listed in the Yellow Pages in the telephone directory under “Attorneys” or “Attorney Referral Services”).

Your call will be answered by a lawyer referral staff member who will take your name, address and telephone number. You will be asked to
state your problem briefly. Any information you give will be held in the strictest confidence.

- If you cannot locate an attorney using this option, call The Florida Bar’s toll free number listed below. Lawyer Referral Service staff will give you the name, address, and telephone number of an attorney in your geographic area who handles the type of case you describe. The Florida Bar Lawyer Referral Service is open Monday through Friday 8:00 a.m. until 5:30 p.m.

Florida Bar Attorney Referral Service
651 E. Jefferson Street
Tallahassee, FL 32399-2300
1-800-342-8011

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

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

**Florida Bar Panels – Low Fee, Elderly, AIDS Law and Disability Law**

The Florida Bar Lawyer Referral Service has also established Low Fee, Elderly, AIDS Law, and Disability Law panels for clients in need. If your personal circumstances qualify you for referral to any of these panels, you will receive a free initial 30-minute office consultation.

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

Unlike regular lawyer referral service programs which operate in cities with local bar association lawyer referral service offices, the Disability Law Panel and AIDS Law Panel operate statewide. Attorneys who participate in this program make application through their local bar association or the Florida Bar if they live outside the 11 regional service areas (Source: Florida Bar Website www.flabar.org).

**Pro Bono Legal Assistance**

Many of the judicial districts in Florida have local bar associations that maintain a listing of attorneys who are available to provide pro bono legal services. Pro bono means that an attorney has agreed to volunteer his or her services without cost.

Each of the local bar associations listed below have an Internet website. If you do not have access to a computer with Internet access, ask a friend or relative who has access, or visit your local library. Most libraries in Florida have access to the Internet
and there is no charge for using their computers. (Please note that this is not an exhaustive list of county bar associations.)

<table>
<thead>
<tr>
<th>Bar Association</th>
<th>Website</th>
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<tbody>
<tr>
<td>Bay County Bar Association</td>
<td><a href="http://www.baycountybar.org">www.baycountybar.org</a></td>
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<tr>
<td>Brandon Bar Association</td>
<td><a href="http://www.brandonbar.org">www.brandonbar.org</a></td>
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<tr>
<td>Brevard County Bar Association</td>
<td><a href="http://www.brevardbar.org">www.brevardbar.org</a></td>
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<tr>
<td>Broward County Bar Association</td>
<td><a href="http://www.browardbar.org">www.browardbar.org</a></td>
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<tr>
<td>Clearwater Bar Association</td>
<td><a href="http://www.clwbar.org">www.clwbar.org</a></td>
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<td>Collier County Bar Association</td>
<td><a href="http://www.colliercountybar.org">www.colliercountybar.org</a></td>
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<td>Coral Gables Bar Association</td>
<td><a href="http://www.coralgablesbar.org">www.coralgablesbar.org</a></td>
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<td>Dade County Bar Association</td>
<td><a href="http://www.dadecountybar.org">www.dadecountybar.org</a></td>
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<td>Dade County Trial Lawyers Association</td>
<td><a href="http://www.dctla.org">www.dctla.org</a></td>
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<tr>
<td>Escambia Santa Rosa Bar Association</td>
<td><a href="http://www.esrba.com">www.esrba.com</a></td>
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<tr>
<td>Indian River County Bar Association</td>
<td><a href="http://www.irclaw.org">www.irclaw.org</a></td>
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<td>Lee County Bar Association</td>
<td><a href="http://www.leebar.org">www.leebar.org</a></td>
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<td>Orange County Bar Association</td>
<td><a href="http://www.orangecountybar.org">www.orangecountybar.org</a></td>
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<tr>
<td>Palm Beach County Bar Association</td>
<td><a href="http://www.palmbeachbar.org">www.palmbeachbar.org</a></td>
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<td>Sarasota County Bar Association</td>
<td><a href="http://www.sarasotabar.com">www.sarasotabar.com</a></td>
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<td>St. Lucie County Bar Association</td>
<td><a href="http://www.stluciecountybarassociation.com/">www.stluciecountybarassociation.com/</a></td>
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<tr>
<td>St. Petersburg Bar Association</td>
<td><a href="http://www.stpetebar.com">www.stpetebar.com</a></td>
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<tr>
<td>Tallahassee Bar Association</td>
<td><a href="http://www.tallahasseebar.org">www.tallahasseebar.org</a></td>
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<tr>
<td>Volusia County Bar Association</td>
<td><a href="http://www.volusiabar.org">www.volusiabar.org</a></td>
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If a local bar association for your area is not listed above, consult the yellow pages of your telephone directory for a listing under “Attorneys > Referral Services.”

**Senior Legal Helpline**

1-888-895-7873

The Senior Legal Helpline is a toll-free statewide helpline designed to increase access to legal advice and lawyer referrals for elder Floridians. The helpline serves Florida residents aged 60 and older who have questions regarding civil legal matters.

**Statewide Public Guardianship Office (SPGO)**

4040 Esplanade Way, Suite 360-I
Tallahassee, FL 32399-7000
850-414-2000
http://elderaffairs.state.fl.us
The Statewide Public Guardianship Office, housed within the Department of Elder Affairs, appoints local public guardian offices as directed by statute. These offices provide guardianship services to persons who do not have adequate income or assets to afford a professional guardian and there is no willing family or friend to serve. SPGO is also responsible for the registration of professional guardians.

For more information, please call SPGO at 850-414-2381 or 414-2000. To speak with a Public Guardian in your area, you may contact any of the local offices of public guardian throughout Florida.

You may also contact the Elder Help Line in your area by calling 1-800-963-5337.

**Center for Guardian Advocacy (CGA)**

309 N. Parsons Avenue  
Brandon, FL 33510  
813- 528-3876  
www.centerforguardianadvocacy.com/

The Center for Guardian Advocacy matches families with volunteer attorneys willing to assist with preparation of all the paperwork needed for the guardian advocacy legal process and follows up with an educational program (required by statute) for those appointed as guardian advocate.

Since CGA is a non-profit organization, the fee for service is based upon each family’s ability to pay. Installments are accommodated for those in need and for those unable to pay, the service may be provided free of charge. A portion of the fee collected is used to cover the volunteer attorney’s expenses. The balance of collected fees, along with charitable funds received, is used to pay CGA’s operating expenses.

CGA’s services are limited to uncontested guardian advocacy for persons with developmental disabilities in certain Florida counties. CGA’s volunteer attorneys have agreed to provide their services for only that limited purpose and will not address any contested matter, or other legal issue, under their agreement with CGA. Families confronted by such issues must seek independent legal counsel for assistance.

**Legal Services and Legal Aid**

Legal Services and Legal Aid offices can advise you in most areas of civil law (for example, consumer, employment, and landlord/tenant cases, social security, public benefits, and family law matters, such as dissolution of marriage). It should be noted that many of these services do not accept guardianship cases, but will assist with decision-making options, such as writing a will, advance directives, etc.

Legal Services and Legal Aid are available for persons of low income. Most Legal Services and Legal Aid offices base their eligibility criteria on both the income of the applicant and the size of the family of the person seeking assistance, and sometimes on other additional criteria, such as age (60 years old or older). Financial qualifications, office locations, hours of operation, and other valuable information can be found at the Florida Law Help website, www.FloridaLawHelp.org.

For additional information on low income legal services, visit the following websites:

- Florida Legal Services at www.floridalegal.org
- Florida Rural Legal Services, Inc., at www.frls.org
Glossary of Key Terms
This glossary should serve as a quick reference guide to terms used throughout this manual. You may want to consult state law for more specific definitions. These definitions are distilled from several sources: Assessment of Older Adults with Diminished Capacity (2008), National Guardianship Association’s “Guardianship Terminology,” the Florida Statewide Public Guardian Office Basic 40-Hour Guardianship Training Course (2006), and Guardianship Basics, a Handbook for Guardians (2009).

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

**Advance Directive** – a witnessed written document or oral statement that provides instructions and preferences should the individual be unable to make decisions. Examples of a written document may include a health care surrogate, living will and durable power of attorney.

**Agency for Persons with Disabilities (APD)** – a state agency working in partnership with local communities and private providers to assist people who have developmental disabilities and their families; provides assistance in identifying the needs of people with developmental disabilities for supports and services.

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

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

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

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

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

**Assisted Living Facility (ALF)** – a residential facility that provides personal care services to meet an individual’s personal needs. Less restrictive than a nursing home. ALF’s are licensed and regulated by the Florida Agency for Health Care Administration. See www.fdhc.state.fl.us/MCHQ/Long_Term_Care/Assisted_living/alf.shtml.

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

**Autism** – is generally diagnosed before the child’s third birthday; is characterized by impaired social interaction, problems with verbal and nonverbal communication, and unusual, repetitive, or severely limited activities and interests. Scientists are not certain what causes autism, but it is likely that both genetics and environment play a role.

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

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

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

**Circle of Support** – people you value in your life who help you to achieve your goals and dreams.

**Civil Right** – a fundamental power or privilege that is defined in state and federal law and that can be exercised by each citizen. Examples of civil rights are freedom of speech, press, and assembly; as well as freedom from disability discrimination for employment, education, housing, etc. The Reference section contains a list of all civil rights discussed in this manual.

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

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

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

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

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

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

**Family Guardian** – any family member related by blood or marriage who is appointed by the court. That person is eligible to receive compensation for his or her time and expense in the care of the ward.

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

**Final Accounting** – a report, filed by the guardian of the property, which is required promptly upon his or her termination as guardian. The report will include a final itemization of expenditures made on behalf of the ward. If it appears that the guardian has made a full and complete distribution to the persons entitled and has otherwise fulfilled his or her duties, the court shall approve the report. The guardian is authorized to retain from the ward’s funds, a sufficient amount to pay the final costs of administration.

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

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

**Guardian** – a person who has been appointed by the court to act on behalf of the ward in accordance with Chapter 744, F.S.; may be the guardian of the person or property, or both.

**Guardian Ad Litem** – a person who is appointed by the court having jurisdiction of the guardianship or a court in which a particular legal matter is pending to represent a person, usually child or vulnerable adult.

**Guardian Advocate** – a person appointed by the court to act on behalf of a person with a disability in accordance with Section 393.12, F.S. This appointment occurs without an adjudication of incapacity of the person with a disability.

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

**Guardian of the Property** – a guardian who possesses any or all powers and rights over the property of the ward.

**Guardianship** – the process designed to protect and exercise the legal rights of individuals whose functional limitations prevent them from being able to make their own decisions.

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

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

**Individual Education Plan (IEP)** – a written plan for each child with a disability that is developed, reviewed, and revised in accordance with IDEA and that must include:

- A statement of the child’s present levels of academic achievement and functional performance,
- A statement of measurable annual goals, including academic and functional goals designed to:
  - Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
  - Meet each of the child’s other educational needs that result from the child’s disability.
- A description of:
  - How the child’s progress toward meeting the annual goals described in 34 CFR 300.320(a)(2) will be measured; and
  - When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.
- A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practical, to be provided to the child, or on behalf of the child.
- A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments consistent with section 612(a)(16) of the Act; and if the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district wide assessment of student achievement, a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child [34 CFR 300.320(a)] [20 U.S.C. 1414(d)(1)(A)(i)] (U.S. Department of Education, Office of Special Education Programs 10.04.06).

**Individual Transition Plan (ITP)** – an individual education plan that begins not later than the first Individual Education Plan (IEP) to be in effect when the child turns
14, or younger if determined appropriate by the IEP Team, and updated annually thereafter. The transition IEP must include:

- Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- The transition services (including courses of study) needed to assist the child in reaching those goals [34 CFR 300.320(b)] [20 U.S.C. 1414(d) (1)(A)(i)(VIII)(aa) and (bb)] (U.S. Department of Education, Office of Special Education Programs 10.04.06).

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

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

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

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

**Least Restrictive Alternative** – the least intrusive service or treatment that can effectively and safely address a person's needs and stated preferences. Also, “least restrictive alternative” is a constitutional principle providing that the government may not pursue a legitimate purpose (such as protecting an individual who lacks capacity) through means that broadly stifle rights when the purpose can be achieved more narrowly. When there is a deprivation of rights and liberties for safety and protection, the less drastic means possible must be used.

**Legal Representative** – an individual or other body authorized under applicable law to consent to specified actions or decisions on behalf of an individual who lacks capacity to give such consent. A legally authorized representative could include, for example, a guardian, or an agent under a power of attorney. It may also include other named decision-makers and may be focused on particular decisions. For instance, a legally authorized representative under Medicare can enroll individuals in Medicare plans.

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

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

**Manage Property** – take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits and income.
**Medicaid Waivers** – programs designed by Medicaid to assist people with disabilities to live in their communities rather than in institutions (hospitals, nursing facilities or intermediate care facilities). The majority of Florida’s waivers are authorized by Title XIX of the Social Security Act, Section 1915(c) and referred to as home and community-based services waivers (HCBSWs) and provide targeted case management. To be a waiver participant, an individual must be medically qualified, certified for the waiver’s institutional level of care, choose to enroll in the waiver as an alternative to institutionalization, and be financially eligible based on his or her income and assets. For more information about Medicaid waivers in Florida visit http://ahca.myflorida.com/Medicaid/hcbs_waivers/index.shtml.

**Mental Retardation (See Retardation)** – in Florida, mental retardation is defined as intellectual functioning (IQ) below 70 accompanied by significant limitations in two or more adaptive skill areas both of which must occur prior to the age of 18.

**Minor** – a person under the age of 18.

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

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

**Petitioner** – a person or agency who makes a request to court. In the context of guardianship, the person who files the petition alleging that an individual lacks capacity and requires a guardian.

**Plenary Guardian** – a guardian appointed by the court to exercise all rights and powers of the ward as ordered by the court to care for the ward’s person and property.

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

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

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

**Preponderance of Evidence** – a general rule in civil litigation in which evidence is more probable than not (believable than not).

**Pro Bono** – providing or involving free legal services.

**Professional Guardian** – a person who has received compensation for services provided to three or more wards by acting as their guardian. A person serving as a guardian for two or more relatives is not considered a professional guardian.

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

**Public Guardian** – a guardian that provides services for an incapacitated individual who has limited financial means and no willing family member or friend to serve as
A public guardian must be designated as such by the Statewide Public Guardianship Office prior to the court appointing him or her to act as the guardian.

**Representative Payee** – an individual or organization that receives Social Security and/or Supplemental Security Income (SSI) payments for someone who cannot manage or direct the management of his or her money. Payees should use the funds for the current and foreseeable needs of the beneficiary and save any remaining funds for the beneficiary’s future use (Social Security Online: 2009).

**Retardation** – in Florida, retardation is defined as intellectual functioning (IQ) below 70 accompanied by significant limitations in two or more adaptive skill areas both of which must occur prior to the age of 18.

**Self-Advocate** – a person who effectively communicates, conveys, negotiates or asserts his or her own interests, desires, needs, and rights. It involves making informed decisions and taking responsibility for those decisions.

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

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

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

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

**Spina Bifida** – is a serious birth defect that occurs when the tissue surrounding the developing spinal cord of a fetus does not close properly. Spina bifida is part of a group of birth defects called neural tube defects. The neural tube is the embryonic structure that eventually develops into the brain and spinal cord and the tissues that enclose them. In individuals with spina bifida, a portion of the neural tube fails to develop or close properly, leaving a gap or split, causing damage to the nervous system and defects in the spinal cord.

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

**Statewide Public Guardianship Office (SPGO)** – is responsible for designating local offices of public guardian as well as the registration and education of professional guardians throughout Florida.
**Substituted Judgment** – the standard of surrogate decision-making that requires decisions in accordance with an individual's known values or preferences, as opposed to the “best interests” standard based on what a reasonable person would deem best under the circumstances.

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

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

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

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

**Verified Inventory** – a report, filed by the guardian of the property, that describes the ward’s assets. This inventory must be filed with the court within 60 days after being appointed guardian of the property.

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

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

**Ward** – a person who has some or all of his or her rights removed by the court and for whom a guardian has been appointed.
Appendix
<table>
<thead>
<tr>
<th>Civil Rights (alphabetically)</th>
<th>Can NEVER be taken away from The Person</th>
<th>Can be Given to someone else by the Person</th>
<th>Can be taken by Court during Incapacity Determination</th>
<th>Can be taken by Court and Given to Guardian or Guardian Advocate</th>
<th>Guardian or Guardian Advocate Needs Extra Court Approval To Do</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commit a Person to a facility, institution or licensed service provider without formal placement proceeding</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Contract</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Counsel (an Attorney), To be represented by</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Court Access, To have</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Dissolution of Marriage, Petition to</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Driver's License, To apply for</td>
<td>X</td>
<td></td>
<td>X</td>
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<tr>
<td>Education, To receive a proper</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
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<tr>
<td>Employment, Seek or retain</td>
<td>X</td>
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<td>X</td>
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<tr>
<td>Experimental Biomedical or Behavioral Procedures or Experiments, Consent to participate in</td>
<td>X</td>
<td></td>
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<td>Freedom from Abuse, Neglect and Exploitation</td>
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<td></td>
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<tr>
<td>Governmental Services, Apply for</td>
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<tr>
<td>Humanely Treated with dignity and respect</td>
<td>X</td>
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<tr>
<td>Independence, To remain as independent as possible</td>
<td>X</td>
<td></td>
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<tr>
<td>Lawsuits, Sue and defend</td>
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<td>Living Arrangements, Right to decide</td>
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<td>Marry</td>
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<tr>
<td>Medical, Dental, Surgical and Mental Health Treatment, Consent to</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
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<tr>
<td>Money and Property, Manage</td>
<td>X</td>
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<td>Parental Rights, Consent to termination of</td>
<td>X</td>
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<tr>
<td>Rehabilitation and Services, To receive necessary</td>
<td>X</td>
<td></td>
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<tr>
<td>Social Aspects of Life, Consent to</td>
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<tr>
<td>Sterilization or Abortion, Consent to</td>
<td>X</td>
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<td>Travel</td>
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<tr>
<td>Vote</td>
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</tbody>
</table>
Educational Resources

FDOE Exceptional Student Education Program Development and Services

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

Each school district is responsible for providing services to students who are eligible for the following exceptional student education (ESE) programs.

- Autism Spectrum Disorder
- Deaf or Hard-of-Hearing
- Developmentally Delayed (prekindergarten only)
- Dual-Sensory Impaired (Deaf-Blind)
- Emotional/Behavioral Disabilities
- Gifted
- Homebound or Hospitalized
- Mentally Handicapped (Educable, Trainable, and Profound)
- Physically Impaired with Orthopedic Impairment
- Physically Impaired with Other Health Impairment
- Physically Impaired with Traumatic Brain Injury
- Specific Learning Disabilities
- Speech and Language Impaired
- Visually Impaired (Blind and Partially Sighted)

School districts and schools develop their own programs to serve their students in the most effective way possible. The bureau provides training to school staff, district administrators, and others on important issues and current instructional practices; gives the districts information on state and federal law relating to the education of exceptional students; monitors the districts’ compliance with those laws; helps resolve conflicts between school districts and families of exceptional students; and provides any other technical assistance school districts need.

To contact the Bureau of Exceptional Education and Student Services within the Florida Department of Education:

Florida Department of Education (FDOE)
Bureau of Exceptional Education and Student Services
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400
Phone: (850) 245-0475
Fax: (850) 245-0953
The Bureau’s website and clearinghouse can be found at www.fldoe.org/ese/clerhome.asp, or call Clearinghouse Information Center at (850) 245-0477.

The Florida Diagnostic & Learning Resources System (FDLRS) is another FDOE resource. It provides diagnostic and instructional support services to district exceptional student education programs and families of students with exceptionalities statewide. To find more information, go to the following website: www.paec.org/fdlrsweb/ or call (850) 245-0477.
Five Wishes is an easy-to-use legal document that lets adults of all ages plan how they want to be cared for in case they become seriously ill. It gives people control over their medical care, as well as the peace of mind that comes from expressing their own wishes and knowing those of their loved ones.

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

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

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

Translation made possible with support from:
United Health Foundation

Medical Proxy and Declaration of Medical Proxy Form

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

(1) If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

(a) The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability as defined in Section 393.063, Florida Statutes, who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;

(b) The patient’s spouse;

(c) An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(d) A parent of the patient;

(e) The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;

(f) An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient’s activities, health, and religious or moral beliefs; or

(g) A close friend of the patient.

(h) A clinical social worker licensed pursuant to chapter 491, or who is a graduate of a court-approved guardianship program. Such a proxy must be selected by the provider’s bioethics committee and must not be employed by the provider. If the provider does not have a bioethics committee, then such a proxy may be chosen through an arrangement with the bioethics committee of another provider. The proxy will be notified that, upon request, the provider shall make available a second physician, not involved in the patient’s care to assist the proxy in evaluating treatment. Decisions to withhold or withdraw life-prolonging procedures will be reviewed by the facility’s bioethics committee. Documentation of efforts to locate proxies from prior classes must be recorded in the patient record.

(2) Any health care decision made under this part must be based on the proxy’s informed consent and on the decision the proxy reasonably believes the patient would have made under the circumstances. If there is no indication of what the patient would have chosen, the proxy may consider the patient’s best interest in
deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(3) Before exercising the incapacitated patient’s rights to select or decline health care, the proxy must comply with the provisions of Sections 765.205 and 765.305, except that a proxy’s decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient’s best interest.

(4) Nothing in this section shall be construed to preempt the designation of persons who may consent to the medical care or treatment of minors established pursuant to Section 743.0645.
Declaration of Medical Proxy

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

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

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

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

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

________________________________________             ______________
Medical Proxy Signature                                                     Date

STATE OF FLORIDA
COUNTY OF ______________
Sworn to (or affirmed) and subscribed before me this ____ day of ___________, ____, by
____________________________________.

___________________________________________
Notary Public Signature

______________________________
Print, Type or Stamp Commissioned Name of Notary

Personally Known _____ OR Produced Identification __________________________ Type of Identification
Produced ___________________.

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Actions of Guardians/Guardian Advocates

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

Court approval required to:

- Perform, compromise or refuse performance of a ward’s contracts that continue as obligations of the estate.
- Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment.
- Make ordinary or extraordinary repairs to guardianship property.
- Subdivide, develop or dedicate land to public use; dedicate easements.
- Enter into a lease for any purpose, with or without option to purchase or renew.
- Enter into a lease or arrangement for exploration and removal of minerals or other natural resources.
- Abandon property when, in the opinion of the guardian, it is valueless or it is so encumbered or in such condition that it is of no benefit to the estate.
- Pay calls, assessments, and other sums chargeable or accruing against, or on account of securities.
- Borrow money, with or without security, to be repaid from the property or otherwise and advance money for the protection of the estate.
- Compromise, extend or otherwise modify the terms of any obligation owing to the estate.
- Prosecute or defend claims to protect the estate and the guardian in the performance of guardian’s duties.
- Sell, mortgage or lease real or personal property including the homestead.
- Continue any unincorporated business or venture in which the ward was engaged.
- Purchase a home in Florida for the ward or the ward’s dependent family.
- Exercise options in an insurance policy of the ward.
- Pay reasonable funeral expenses of the ward up to $6,000.
- Make gifts of ward’s property.
- Execute a codicil to obtain the maximum charitable deduction when the ward’s will evinces such an objective.
• Create revocable or irrevocable trusts in connection with tax or estate planning.
• Disclaim an interest in property.
• Enter into contracts.
• Pay for the support health and maintenance of a minor ward when one or both of the ward’s parents are alive.

Although most courts require close supervision, the list of powers that the guardian may exercise without first seeking court approval can be found in Chapter 744.444, Florida Statutes.

Court approval NOT required to:

• Retain assets owned by the ward.
• Receive assets.
• Vote securities.
• Insure the assets of the estate against damage, loss or liability and insure himself or herself against the liability as the third person.
• Pay taxes and assessments on the ward’s property.
• Pay valid encumbrances against the ward’s property, prepayment excluded.
• Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial condition of the ward.
• Elect whether to dissent from a will or assert any other rights or choice available to a surviving spouse in the administration of a decedent’s estate.
• Hold a security in the name of nominee, or in another form, without disclosure to the ward.
References
References


