Judicial Management Council

Guardianship Workgroup

Final Report

June 2018

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Contents

Final Recommendations at a Glance

Focus Area 1: The Use of Least Restrictive Alternatives that Address Specific Functional Limitations		**Options for Implementation**		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Establish a searchable, statewide repository for designations of health care surrogates and preneed guardians and durable powers of attorney (DPOAs).	Facilitate the ability of judges and others to locate less restrictive alternatives to guardianship and guardian advocacy (GA) and designations of preneed guardians.	✓		Collaborate with the clerks to establish the repository.
2. Require courts to maintain designations of health care surrogates, preneed guardians, and DPOA agents unless not in the person's best interest.	Ensure that decisions made by the persons when they had capacity or decisionmaking ability are respected.	✓		Encourage such maintenance through judicial education.
3. Require petitioners to explain why alternatives to guardianship and GA are insufficient and expand the types of alternatives that must be addressed.	Ensure that all less restrictive alternatives have been thoroughly considered and utilized whenever appropriate.		✓	
4. Require petitioners to specify whether a designation of preneed guardian exists and efforts made to locate such designation.	Increase the likelihood that preneed designations will be brought to the court's attention.		✓	
5. Educate teachers, parents, and students on the non-judicial process for the appointment of a parent or other person to represent an adult ESE student's educational interests when he/she cannot provide informed consent.	Ensure that families of students with a developmental disability are aware of this non-judicial alternative to guardianship and GA.			Request that the Florida Department of Education implement the recommendation.

Focus Area 2: Determinations of Incapacity		Options for Implementation		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Require notice at least 10 days before a hearing on capacity or on the appointment of a guardian that the proceeding will be contested.	Enable the court to consider referral of the matter to alternative dispute resolution (ADR) or to schedule sufficient hearing time and afford parties adequate preparation time.		✓	
2. Require orders appointing guardians and guardian advocates and letters of guardianship and GA to list all rights retained, removed, and delegated to the guardian or guardian advocate.	Ensure that it is explicitly clear as to which rights have been retained or removed and delegated to the guardian or guardian advocate.		✓	
3. Require a hearing for substitution of the court-appointed attorney.	Enable the court to ensure that the substitution is in the best interest of the alleged incapacitated person (AIP), ward, person for whom a guardian advocate is sought, or person under GA.		✓	
Focus Area 3: Restoration of Capacity		**Options for Implementation**		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Require a guardian or guardian advocate to attest at the filing of the annual plan that he/she has informed the ward or person under GA of his/her right to have removed rights restored and the process to obtain restoration.	Ensure that the ward or person under GA is continually apprised of the right to be restored to capacity or to have one or more rights restored at the earliest possible time.		✓	
2. Require the court to appoint an attorney for the ward within three days after a suggestion of capacity has been filed.	Enable the attorney to monitor the case to ensure it is proceeding in compliance with statute and to have greater case preparation time.		✓	

3. Encourage the use of Progressive Rights Restoration Plans (PRRPs) by guardians and guardian advocates.	Ensure appropriate steps are being taken to restore the removed rights of the ward or person under GA.			Promote use of PRRPs through training provided to guardians, guardian advocates, judges, and attorneys who practice in this area of law.
Focus Area 4: Assessment and Assignment of Costs Associated with Guardianship Administration		**Implementation Options**		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Establish a working group consisting of a cross-section of stakeholders to determine whether a statewide rate structure should be established for fees for guardian and GA services and whether guardians, guardian advocates, and attorneys should file annual projected fee budgets.	Address concerns that excessive fees are being assessed on the assets of the ward or person subject to GA.			Request creation of the working group by the Real Property, Probate, and Trust Law Section or Elder Law Section; Working Interdisciplinary Network of Guardianship Stakeholders (WINGS); or executive or judicial branch. OR Refer the issue to the legislature for study by its Office of Program Policy Analysis and Government Accountability.
2.a. Create standardized, statewide, free forms for petitions, orders, letters, and annual reports for guardianship and GA.	Facilitate self-completion of the petitions and reports by guardians and guardian advocates to reduce attorney fees for such completion and promote uniformity in court orders and letters.		✓	Request that the Real Property, Probate, and Trust Law Section create the recommended forms.

2.b. Encourage circuits to hold semi-annual training sessions for nonprofessional/family guardians and guardian advocates regarding how to complete annual reports and proper maintenance of documentation.	Reduce the nonprofessional/family guardians' need to hire professionals for assistance and increase front-end compliance with the annual reporting requirements, which could obviate costs to correct mistakes later and reduce workload for court and clerk staff.			Issue Supreme Court guidance encouraging circuits and/or Clerks of Court to provide training that reflects local requirements and/or request that WINGS create video training that reflects statewide requirements.
2.c. Encourage probate courts, as authorized by statute, to waive filing fees and court costs for guardianship and GA cases when the proposed guardian or guardian advocate is the public guardian, regardless of who files the petition.	Eliminate the possibility that a petitioner will not file a petition to determine incapacity or for appointment of a guardian advocate for a person of limited financial means due to the risk of having to pay filing fees and costs.			Issue Supreme Court guidance encouraging the waiver of such fees and costs.
3. Authorize an exception to the requirement that a guardian or guardian advocate, who is not compensated, be represented by an attorney for purposes of filing the annual plan if an annual accounting is not required.	Reduce costs for attorney fees related to the requirement that an attorney represent the guardian or guardian advocate for purposes of the annual plan.	✓	✓	
Focus Area 5: Post-Adjudicatory Proceedings and Responsibilities Related to Guardianship, Including the Rights Enumerated in Section 744.3215, Florida Statutes		**Implementation Options**		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Require all guardians and guardian advocates to use the "substituted judgment" standard for decisionmaking on behalf of the wards or persons under GA, except in specified circumstances when the "best interest" standard should be used.	Further the concept of "self-determination," which recognizes the rights of individuals to autonomy and to have control over their life choices.	✓		

2. Require guardians and guardian advocates to enable, rather than allow, wards or persons under GA to maintain contact with family and friends unless the court, rather than the guardian or guardian advocate, determines such contact may cause harm.	Ensure that wards or persons under GA are not improperly isolated from family and friends	✓		
3. Require certain procedures and timeframes to be followed when the court requires use of a designated financial institution as a depository for the guardianship assets.	Reduce delay in the transfer of the assets of the ward or person under GA.		✓	
4. Require the guardian and guardian advocate to list his/her home and mailing addresses, telephone number, and email address on separate addendum to the initial report, annual plan, and annual accounting and allow only the court and clerks to access the information.	Enable courts and clerks to have current contact information for guardians and guardian advocates while maintaining the information as confidential.	✓	✓	
Focus Area 6: Training Opportunities Available to Judges and Court Staff		**Implementation Options**		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Create a guardianship and GA bench guide.	Provide easy reference for judges to guardianship and GA law and procedure.			Request that the Education Committee of the Circuit Conference create a subcommittee of judges to draft the bench guide.
2. Design a more comprehensive court education guardianship and GA training program for judges and clerks and disseminate training materials via existing Intranet resources.	Ensure well trained judges and clerks.			Request that the Florida Court Education Committee consider a range of modalities to enhance education and appoint a Technology Chair to maintain Intranet resources.

3. Seek assistance from The Florida Bar and local bar associations to augment guardianship and GA training for judges, hearing officers, clerks, and attorneys.	Replicate successful circuit and local bar partnerships that have established "lunch and learn" programs for purposes of guardianship and GA education.			Provide information on how to create a local program to the circuits and in the bench book.
4. Require each judge and hearing officer assigned to guardianship and GA proceedings to certify that he/she has read the document entitled, "Judicial Determination of Capacity of Older Adults in Guardianship Proceedings for Judges."	Educate judges on the American Bar Association-created framework for capacity determination.			The Office of the State Courts Administrator (OSCA) or local Chief Judge could monitor compliance with this requirement.
5. Throughout the state, pair experienced guardianship judges who are willing to volunteer to serve as mentors with newly-assigned probate judges.	Ensure new judges have ready access to critical information, court resources, and one-to-one guidance immediately upon assuming the bench.			Recruit judges experienced in guardianship and GA to serve as volunteer mentors who would be available for telephone calls and email requests from new guardianship judges.
Miscellaneous: Recommendations Relating to Multiple Focus Areas		**Implementation Options**		
Recommendation	**Purpose**	**Amend Statute**	**Amend Rule**	**Other**
1. Require courts to consider referring guardianship and GA proceedings to mediation, eldercaring coordination, or other ADR processes. Establish a collaborative law process for guardianship and GA.	Encourage peaceful, early resolution of disputes which may result in more frequent use of less restrictive alternatives; promotion of less contentious relationships among parties; and lower costs to the parties and state.	✓	✓	
2. Encourage the chief judge of each circuit to grant an exception to the rotation requirement for judges who handle guardianship and GA cases and who want to continue serving the probate division.	Increase the pool of judges with significant experience in guardianship and guardian advocacy law.			The Supreme Court could issue guidance encouraging such exceptions.

Workgroup Creation, Charges, and Activities

On October 24, 2016, in order to better protect vulnerable people who are subject to guardianship and guardian advocacy, Chief Justice Jorge Labarga, under the umbrella of the Florida Supreme Court's Judicial Management Council, announced the establishment of a Guardianship Workgroup. The workgroup is charged with examining "judicial procedures and best practices pertaining to guardianship to ensure that courts are best protecting the person, property, and rights of individuals who have been judged to be incapacitated and persons who may have diminished capacity to function independently." In relation to the charge, the workgroup has been instructed to focus on the following areas:

1. The use of least restrictive alternatives that address specific functional limitations;
2. Determinations of incapacity;
3. Restoration of capacity;
4. The assessment and assignment of costs associated with guardianship administration;
5. Post-adjudicatory proceedings and responsibilities related to guardianship, including the rights enumerated in s. 744.3215, Florida Statutes; and
6. Training opportunities available to judges and court staff.

Under the leadership of Judge Olin W. Shinholser, Chair, workgroup efforts began immediately after its formation. Since November 2016, the workgroup has participated in multiple conference calls and held five in-person meetings on December 1, 2016, March 2, 2017, July 17, 2017, December 7, 2017, and March 22, 2018. An in-person meeting was scheduled in September 2017, but had to be cancelled due to Hurricane Irma.

Throughout this period, the workgroup conducted an extensive literature review (see Appendix A) and engaged multiple subject matter experts who included:

- Roberta Flowers, Professor of Law and Co-Director of the Center for Excellence in Elder Law, Stetson College of Law and Chelsea L. Ejankowski, candidate for a Juris Doctor at Stetson College of Law. They presented a white paper that compared and explained the differences between the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) and chapter 744, Florida Statutes.
- Michael McKeon, an attorney with the Office of Public and Professional Guardians (OPPG) and Anthony Palmieri, Deputy Inspector General and Chief Guardianship Investigator with the Palm Beach County Clerk and Comptroller. They presented on Florida's new standards of practice for professional guardians which were recently adopted by the OPPG and on the Statewide Investigation Alliance created by the Association of Clerks of the Court to investigate complaints made regarding professional guardians.

The workgroup also held two public hearings and conducted a survey regarding guardianship practices throughout the state.

The first public hearing was held at the Broward County Judicial Complex in Fort Lauderdale on December 11, 2017, and the second hearing was held at the Orange County Courthouse in Orlando on

February 1, 2018. Both were scheduled from 4:00 p.m. to 7:00 p.m. and were co-sponsored by this workgroup and the Supreme Court's Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). Financial support for the hearings was provided by the Real Property, Probate, and Trust Law Section of The Florida Bar.

More than 60 persons attended the public hearings, where they were asked to address one of the following questions:

1. If you could make one change in Florida's guardianship system, what would it be?
2. How can the courts improve their processes to better ensure the protection of the person, property, and rights of individuals who are under guardianship or who need assistance making decisions?

Comments related to the workgroup's six focus areas are noted below in the full discussion of the workgroup's recommendations.

The workgroup also developed a survey that was made publicly available online between January 8, 2018, and February 8, 2018. Notice of the survey was provided through the courts' social media accounts and to each Chief Judge and Trial Court Administrator in this state for provision to that circuit's probate judges and guardianship court monitors; the Florida Court Clerks and Comptrollers; the Real Property, Probate, and Trust Law Section and Elder Law Section of The Florida Bar; Florida State Guardianship Association; and public and professional guardians through the OPPG.

One hundred and fifty-three persons answered one or more of the survey questions, and the Florida Court Clerks and Comptrollers submitted a consolidated response. The following chart describes the professions of the respondents:

Profession	Number Responding	Percent of Total
Attorneys	71	46.41%
Judges	20	13.07%
Judicial staff	15	9.80%
Clerks of the Court and their staff (in addition to the single response from the Florida Court Clerks and Comptrollers)	33	21.57%
Others	14	9.15%

Survey results are provided below in the full discussion of the workgroup's recommendations.

This report synthesizes the workgroup's research, guidance from subject matter experts, input received from the public, and the workgroup's deliberations. It offers recommendations for enhancements to guardianship and guardian advocacy practices and procedures in Florida, with an eye toward improving the state's protection of the rights, independence, and dignity of persons subject to guardianship and guardian advocacy throughout the state.

Final Report Recommendations

The workgroup was charged with examining "judicial procedures and best practices pertaining to guardianship to ensure that courts are best protecting the person, property, and rights of individuals who have been judged to be incapacitated and persons who may have diminished capacity to function independently."[1] In relation to the charge, the workgroup was instructed to focus on six areas. The present situation and workgroup's recommendations for each focus area are discussed below.

Focus Area 1: The Use of Least Restrictive Alternatives that Address Specific Functional Limitations

Present Situation

Alternatives to Guardianship: With respect to guardianship, the legislature has stated, "It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed."[2]

To this end, Florida's Guardianship Law[3] requires the court, when it finds that an individual is incapable of exercising delegable rights,[4] to determine whether an alternative to guardianship would sufficiently address the individual's problems. The court's order on the petition to determine incapacity must specify whether such alternatives exist,[5] and the court:

- May not appoint a guardian if it finds that a sufficient alternative to guardianship exists.
- Must appoint a guardian to exercise the individual's delegable rights if it finds no sufficient alternative to guardianship exists.[6]

Alternatives to guardianship include supported decisionmaking; durable powers of attorney; trusts; advance directives[7] such as designations of health care surrogate; medical proxies; representative

[1] In addition to guardianship under chapter 744, Florida Statutes, the workgroup also considered guardian advocacy under section 393.12, Florida Statutes, during the conduct of its examination. Guardianship advocacy is discussed herein where relevant to the workgroup's recommendations.
[2] §744.1012(2), Fla. Stat.
[3] Ch. 744, Fla. Stat., entitled "Guardianship."
[4] §744.3215(3), Fla. Stat
[5] Fla. Prob. R. 5.550(d) (stating, "When an order determines that a person is incapable of exercising delegable rights, it shall specify whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person.").
[6] §744.331(6)(b), Fla. Stat.; *see also* §744.331(6)(f), Fla. Stat. and Searle v. Bent, 137 So. 3d 1028 (Fla. 2d DCA 2013) (A trust, trust amendment, or durable power of attorney may not be deemed an alternative to the appointment of a guardian when an interested person has filed a verified statement asserting that he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid and the court finds there is a reasonable factual basis for that belief. Appointment of a guardian does not, however, limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the agent.).
[7] An advance directive is "a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information,

payees; and others. A more comprehensive list of alternatives to guardianship including a description of each alternative is set forth in Appendix B.

To inform the court as to whether alternatives to guardianship exist, court rule requires a petition to determine incapacity and a petition for the appointment of a guardian to state "whether there are possible alternatives to guardianship known to the petitioner, including, but not limited to, trust agreements, powers of attorney, surrogates, or advance directives."[8] Courts may also search the records of the local clerk of court to determine whether a durable power of attorney has been recorded for an individual.[9]

Alternatives to guardianship may also be considered by the court after the appointment of a guardian. An interested person, including the guardian or the ward,[10] may file a verified petition stating that an alternative to guardianship exists that will sufficiently address the ward's problems.[11] The petition must "state: (1) the petitioner's interest in the proceeding; and (2) the facts constituting the basis for the relief sought and that the proposed alternative to guardianship will sufficiently address the problems of the ward and is in the ward's best interest." The court's order on the petition must "specify whether there is an alternative to guardianship that will sufficiently address the problems of the ward, the continued need for a guardian, and the extent of the need for delegation of the ward's rights."[12]

Guardian Advocacy: Guardian advocacy is another form of guardianship that is generally considered to be less expensive, less intrusive, and easier to implement.[13] It differs from guardianship under chapter 744 in that:

- It is available only for a person with a developmental disability.[14]
- It does not require a determination of incapacity as is required for guardianship; rather, the court may appoint a guardian advocate, unless a valid advance directive or durable power of attorney will sufficiently address the person's needs,[15] when the person:

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and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of [chapter 765, Florida Statutes]." §765.101(1), Fla. Stat.

[8] Fla. Prob. R. 5.550(a)(8) and 5.560(a)(9).

[9] §709.2106(6), Fla. Stat. (authorizing properly executed powers of attorney (POA) to be recorded by the clerk of court).

[10] "Ward" is defined to mean "a person for whom a guardian has been appointed." §744.102, Fla. Stat.

[11] §744.462. Fla. Stat.

[12] Fla. Prob. R. 5.685.

[13] Florida Developmental Disabilities Council, Inc. and Guardian Trust, Lighting the Way to Guardianship and Other Decision-Making Alternatives – A Manual for Individuals and Families (2017), p. 51, *available at* https://www.fddc.org/sites/default/files/LTW_FamilyManual2017%20-%201.pdf.

[14] In this context, "developmental disability" means "a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely." §393.063(12), Fla. Stat.

[15] §393.12(7), Fla. Stat. (stating that the court in a guardian advocacy proceeding must consider and find whether an advance directive or durable power of attorney will sufficiently address the needs of the person for whom the guardian advocate is sought and that a guardian advocate may not be appointed if the court finds that the advance directive or durable power of attorney provides an alternative to the appointment of a guardian advocate that will sufficiently address the needs of the person); Florida Rule of Probate 5.649(a)(8) requires a petition to appoint a guardian advocate to state

  - Lacks decisionmaking ability to do some, but not all, of the decisionmaking tasks necessary to care for his or her person or property; or
  - Has voluntarily petitioned for the appointment of a guardian advocate.[16]
- It does not require a guardian advocate to 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.[17] In contrast, as discussed *infra* in Focus Area 4, guardians under chapter 744 must be represented by an attorney pursuant to court rule.[18]

Designation of a Preneed Guardian: A competent adult may file a written declaration naming a person to serve as the declarant's guardian in the event of the incapacity of the declarant.[19] Additionally, the parents, if both living, or a surviving parent, "may nominate a preneed guardian of the person or property or both of [a] minor child by making a written declaration that names such guardian to serve if the minor's last surviving parent becomes incapacitated or dies."[20] For an adult, the declaration may be filed with the clerk of court and, for a child, the declaration must be filed with the clerk of court.[21]

In the case of an adult, the clerk must produce a filed declaration when a petition for incapacity is filed for the adult and, in the case of a minor, the clerk must produce the declaration upon the death of the last surviving parent or when a petition for incapacity of the last surviving parent is filed.[22] Production of the declaration constitutes a rebuttable presumption that the preneed guardian is entitled to serve as guardian; however, the court is not "bound to appoint the preneed guardian if the preneed guardian is found to be unqualified to serve as guardian."[23]

Appointment of a Guardian: When it is necessary to appoint a guardian, the court is required to "appoint any . . . preneed guardian, unless the court determines that appointing such person is contrary to the best interests of the ward."[24] If a preneed guardian is unavailable, the court may appoint "any person who is fit and proper and qualified to act as guardian, whether related to the ward or not." Statute specifies preferences that must be applied and considerations that must be undertaken by the court in making the appointment.[25]

Public Hearings: During the Ft. Lauderdale and Orlando public hearings, comments were made about the use of less restrictive ways to provide decisionmaking assistance. Topics addressed included:

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whether the petitioner has knowledge, information, or belief that the person with a developmental disability has executed an advance directive under chapter 765, Florida Statutes, or a durable power of attorney under chapter 709, Florida Statutes.

[16] §393.12(2), Fla. Stat.
[17] §393.12(2)(b), Fla. Stat.
[18] Fla. Prob. R. 5.030(a).
[19] §744.3045(1), Fla. Stat.
[20] §744.3046(1), Fla. Stat.
[21] §§744.3045(3) and 744.3046(3), Fla. Stat.
[22] §§744.102(16) and 744.3045, Fla. Stat.
[23] §§744.3045(4), Fla. Stat.; see also §744.3046(4), Fla. Stat.
[24] §744.312(1), Fla. Stat.
[25] §744.312(2) and (3), Fla. Stat.

- The need for public, legal, and judicial education regarding the determination of least restrictive alternatives to guardianship decisionmaking options and ways to match the needs of the person with the appropriate option.
- The importance of providing decisionmaking assistance that promotes self-determination, dignity, and respect for individuals with disabilities.
- Concern that there is no independent oversight when less restrictive alternatives are used to grant authority over an individual's financial affairs which may lead to exploitation and abuse.
- The need to ensure that existing less restrictive options, such as preneed designations, are noted and, wherever possible, effectuated.

Recommendations:

1. Establish a searchable, centralized, statewide repository for durable powers of attorney, designations of health care surrogates, and designations of preneed guardians.

   Commentary – Durable powers of attorney may be recorded by the clerk of court. Similarly, designations of preneed guardians by an adult may be filed for recording by the clerk and, for a minor, must be filed for recording by the clerk. When these documents are recorded, the court may locate them by searching the clerk's records for a particular county. Currently, however, no centralized, statewide repository for such recordings exists. Accordingly, a court may not become aware of a recording if it occurred in another county, the petitioner fails to identify the existence of the filing in the petition to determine incapacity or to appoint a guardian or guardian advocate, or other parties in the case fail to produce it.

   Statute does not authorize the recording of a designation of health care surrogate with the clerk of court. As such, a court will only become aware of the designation if apprised by the petitioner or other parties.

   Statutorily authorizing the recording of designations of health care surrogate and creating a searchable, centralized, statewide repository for those designations, durable powers of attorney, and designations of preneed guardians would increase the ability of courts to locate these possible alternatives to guardianship.

   Implementation: The courts and clerks of court could collaborate and voluntarily establish a statewide repository. Alternatively, legislation could be sought to require the repository by statute. Legislation would be necessary to authorize the filing of designations of health care surrogates with the clerks of court and to create a public record exemption to protect the privacy of a person filing such designation.

   Survey: (n = 105) Sixty percent of respondents to the survey indicated they would support the creation of the statewide repository for durable powers of attorney and designations of health care surrogates, while 17 percent of respondents did not support such creation, and 23 percent of

respondents indicated no opinion.[26] The survey response from the Florida Court Clerks and Comptrollers indicated that it would support such creation, but only if it were created through the clerks.

2. Require a court, when considering the appointment of a guardian or guardian advocate, to maintain any legally sufficient, less restrictive designation by the person who is incapacitated or in need of a guardian advocate, unless such maintenance would not be in the best interest of that person. Factors to be considered by the court in determining whether to maintain the less restrictive designation include, but are not limited to, whether the designee is licensed, certified, or otherwise credentialed as competent to perform the necessary tasks.

   Commentary – When a court finds a person to be incapacitated or in need of a guardian advocate, current law requires it to appoint a guardian when no alternative to guardianship sufficiently addresses the person's needs, or to appoint a guardian advocate when an advance directive or durable power of attorney will not sufficiently address the person's needs. The workgroup members noted that, in their experience, courts frequently authorize the guardian or guardian advocate to exercise all delegable rights, even if another individual has been validly designated to represent the person as to certain rights in a durable power of attorney, an advance directive, or other designation. The court, however, could maintain the designation as to certain delegable rights while allowing the guardian or guardian advocate to exercise the remaining delegable rights, thereby respecting decisions made by the person when he or she had capacity in the case of guardianship or had decisionmaking ability in the case of guardian advocacy.[27]

   Implementation: Statutory amendment would be necessary to require a court to maintain a designation unless it would not be in the person's best interest. Although a judge may currently maintain a valid designation, statute does not require such maintenance. Additionally, judicial education on this issue would likely increase the probability that courts would maintain valid designations.

   Survey: (n = 108) Sixty-six percent of respondents to the survey indicated that they support the recommendation, while 18 percent of respondents did not support the recommendation and 16 percent of respondents indicated no opinion.[28] The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

[26] When the survey was distributed, the workgroup's recommendation addressed only the inclusion of durable powers of attorney and designations of preneed guardians in the statewide repository. As such, the survey did not address the inclusion of designations of health care surrogates.

[27] See, e.g., Footnotes 6 and 15 and §744.3115, Fla. Stat. (providing that, in any proceeding in which a guardian is appointed, the court must determine if the ward, before incapacity, executed a valid advance directive under chapter 765, Florida Statutes; if yes, the court must specify what authority, if any, is exercised over the ward's health care decisions by the guardian and the surrogate; the court may revoke or modify the surrogate's authority after notice to the surrogate and other appropriate parties; and any order revoking or modifying the authority of the surrogate must be supported by specific written findings of fact).

[28] When the survey was distributed, the workgroup's recommendation addressed only the inclusion of durable powers of attorney and designations of preneed guardian in the statewide repository. As such, the survey did not address the inclusion of designations of health care surrogates.

3. Require the petitioner in a petition to determine incapacity, a petition for appointment of a guardian, or a petition for appointment of a guardian advocate to explain why alternatives to guardianship are insufficient and expand the types of alternatives that must be addressed.

   Commentary: Pursuant to court rule, petitioners must specify whether:
   - There are possible alternatives to guardianship known to the petitioner in a petition to determine incapacity or in a petition for appointment of a guardian; or
   - An advance directive or a durable power of attorney has been executed by the individual with a developmental disability in a petition to appoint a guardian advocate.

   Although the court must determine whether the specified alternatives to guardianship or guardian advocacy are sufficient, the petitioner is not required to explain why he or she believes the alternatives are insufficient. Requiring a petitioner to provide such explanation in the petition would assist the court in making its determination and provide greater notice to the other parties of the alleged insufficiency.

   Additionally, statute and court rule refer only to durable powers of attorney, advance directives, and trusts as potential alternatives to guardianship or guardian advocacy; however, other alternatives such as supported decisionmaking exist (see Appendix B). Requiring the petitioner and court to explore such alternatives could avoid the necessity for guardianship or guardian advocacy in some cases.

   Implementation: Florida Rules of Probate 5.550(a)(8), 5.560(a)(9), and 5.649(a)(8), respectively addressing the above-referenced petitions, could be amended to require petitioners to explain why alternatives to guardianship are insufficient and to expand the types of alternatives that must be considered. If standardized forms for the petitions are created as recommended in Focus Area 4, Recommendation 2. a., such forms would assist in implementation of this recommendation.

   Survey: This recommendation was made after the survey was distributed; thus, a question regarding this issue was not asked.

4. Require the petitioner in a petition for appointment of a guardian or guardian advocate to specify whether he or she is aware of the existence of a designation of preneed guardian and, if not, to identify his or her efforts in determining whether a designation exists.

   Commentary: When a guardian or guardian advocate must be appointed, the court is required to appoint a preneed guardian unless the court determines that appointing such person is contrary to the best interests of the person. If a designation of preneed guardian is filed with the clerk of court, the clerk is statutorily required to produce it. A designation of preneed guardian for a minor must be filed for recording with the clerk, while a designation of preneed guardian for an adult may be filed for recording with the clerk.

If a designation is not filed with the clerk, or if it is filed in a county other than where the guardianship proceeding is filed, the court may not become aware of the designation. Requiring a petitioner to address the existence of the designation and efforts made to determine its existence would increase the likelihood that such designations will be located and effectuated.

Implementation: Florida Rules of Probate 5.560 and 5.649, respectively addressing the above-referenced petitions, could be amended to require petitioners to address the existence of the designation and efforts made to determine the existence thereof. If standardized forms for the petitions are created as recommended in Focus Area 4, Recommendation 2. a., such forms would assist in implementation of this recommendation.

Survey: (n = 107) Sixty-five percent of respondents to the survey indicated that they support the recommendation, while 15 percent of respondents did not support the recommendation and 20 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

5. Educate teachers, parents, and students on the non-judicial process for the appointment of a parent or other appropriate individual to represent the educational interests of adult ESE students who do not have the ability to provide informed consent for their educational programs and who are unable to appoint other individuals to provide such consent.

Commentary: When a student with a disability in Florida reaches the age of 18, the student's educational decisionmaking rights under the Individuals with Disabilities Education Act (IDEA) and Florida law transfer from the parent to the student, unless the student has been determined incompetent or a guardian advocate has been appointed. If the student does not have the ability to provide informed consent with respect to his or her educational program and is unable to appoint another individual to provide informed consent, the parent may use statutory procedures to:

A. Have the student declared incompetent and the appropriate guardianship established in accordance with chapter 744, Florida Statutes;
B. Have a guardian advocate appointed in accordance with section 393.12, Florida Statutes;
C. Be appointed to represent the educational interests of the student throughout the student's eligibility for Free and Appropriate Public Education (FAPE); or
D. Have another appropriate individual appointed to represent the educational interests of the student throughout the student's eligibility for FAPE if the parent is not available in accordance with section 393.12.[29]

Under options A. or B. above, a parent must go to court to have the student placed under guardianship or guardianship advocacy for the parent to exercise the student's educational decisionmaking rights. In contrast, under options C. or D., a parent or other appropriate individual may be appointed through a school district process to represent the student's educational interests without going to court or being required to hire an attorney.

[29] Rule 6A-6.03311(8), Florida Administrative Code.

According to representatives of the Florida Department of Education (FDOE), options C. and D. are implemented individually by each of the state's 67 school districts; i.e., there is no uniform, statewide process or forms for implementation of these options, and parents or others must contact their local school district to determine how to become appointed by the school district to represent an adult student's educational interests.

Notwithstanding the availability of the above-described non-judicial process, workgroup members noted that, in their experience, parents and others have been told by a school district to pursue guardianship or guardian advocacy instead of being advised of the non-judicial process. To ensure statewide awareness of the non-judicial process, the workgroup recommends that:

- All teachers be trained on their district-specific appointment process.
- Links to each district's appointment process and forms be placed on the Exceptional Student Education (ESE) portion of the district's website and provided to each student who is 16 years of age or older, as well as to his or her parents during the student's individual education plan meeting.
- Links to each district's appointment process and forms be placed on the FDOE's website pages that relate to ESE.

Providing this information to students and parents will ensure that less restrictive, less expensive, non-judicial decisionmaking alternatives are first considered by families and it may result in fewer filings for guardianship or guardian advocacy.

Implementation: The courts could request that the FDOE implement the recommendation.

Survey: Following distribution of the survey, the recommendation was significantly revised.

Focus Area 2: Determinations of Incapacity

Present Situation

Guardianship: Any adult may execute a petition to determine the capacity of another person. The petition must be verified, must state certain identifying information for the petitioner and alleged incapacitated person (AIP), and must, among other things, allege that the petitioner believes the AIP to be incapacitated. With respect to incapacitation, the petitioner must explain which rights enumerated in section 744.3215, Florida Statutes, he or she believes the AIP is incapable of exercising.[30]

Section 744.3215 addresses the rights of an incapacitated person and specifies the rights that:

- May be removed and delegated to the guardian, e.g., the rights to contract, apply for government benefits, manage property, consent to medical and mental health treatment, and other specified rights.
- May be removed but not delegated to a guardian, e.g., the rights to marry, vote, travel, and other specified rights.
- Are retained by the person, e.g., the rights to have an annual review of the guardianship report and plan, be treated humanely and protected against abuse, have a qualified guardian, and other specified rights.

A petition for appointment of a guardian,[31] if applicable, must also be filed with the petition to determine capacity.[32] Copies of both petitions and a notice of filing the petitions[33] must be served on the AIP, counsel for the AIP, and all next of kin.[34]

After the petitions are filed, the court must appoint:

- An attorney to represent the AIP. The AIP may substitute the court-appointed attorney with his or her own counsel.[35]
- A three-member examining committee within five days after the filing. Each member must examine the AIP and file a written report of the examination with the clerk within 15 days after appointment to the committee. The clerk of court must serve each examining committee member's report on the petitioner and the attorney for the AIP within three days after receipt

[30] §744.3201(1) and (2), Fla. Stat.
[31] The required contents of a petition for appointment of a guardian are specified in section 744.334, Florida Statutes, and Florida Rule of Probate 5.560(a). A petition may also seek the appointment of an emergency temporary guardian (ETG). Different procedures apply to ETG proceedings. See §744.3031, Fla. Stat.
[32] §744.3201(3), Fla. Stat.
[33] The required contents of a notice of filing are specified in section 744.331(1), Florida Statutes, and Florida Rule of Probate 5.550(b)(1).
[34] §§744.3201(3) and 744.331(1), Fla. Stat.; Fla. Prob. R. 5.550(b)(2)-(3).
[35] §744.331(2)(a) and (b), Fla. Stat.

of the report.[36] If a majority of the examining committee members conclude that the AIP is not incapacitated in any respect, the court shall dismiss the petition.[37]

Following the appointment of the examining committee, the court must set a date for the adjudicatory hearing on the petition to determine incapacity. The hearing must be conducted at least 10 days, but no more than 30 days, after the filing of the last report of the examining committee members.[38]

The petitioner and AIP may object to the introduction into evidence of all or any portion of the examining committee members' reports by filing and serving a written objection on the other party at least five days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the report's admissibility.[39, 40]

If the court determines at the adjudicatory hearing that the partial or total incapacity of the AIP has been established by clear and convincing evidence, the court must enter a written order determining such incapacity.[41] In determining incapacity, the court may only remove those rights that it finds the person does not have the capacity to exercise. A person is determined to be incapacitated only with respect to those rights specified in the order.[42]

A guardian must be appointed by the court for the incapacitated person if no alternative to guardianship will sufficiently address the person's problems.[43] The court will appoint:

- A "plenary guardian" to exercise all delegable legal rights and powers of the incapacitated person if the court has found that he or she lacks the capacity to perform all of the tasks necessary to care for his or her person or property; or[44]
- A "limited guardian" to exercise the legal rights and powers specifically designated by court order entered if the court has found 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.[45]

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[36] §744.331(3), Fla. Stat.
[37] §744.331(4), Fla. Stat.
[38] §744.331(5)(a), Fla. Stat.
[39] §744.331(3)(i), Fla. Stat.
[40] In Shen v. Parkes, 100 So.3d 1189 (Fla. 4th DCA 2012), the court ruled that the reports of the examining committee members constitute hearsay. Accordingly, if a hearsay objection is made to the report, the examining committee member must be called to testify in order for the report to be admitted unless another hearsay exception is applicable. In 2017, legislation was adopted to require an objection to an examining committee report to be made at least five days before the adjudicatory hearing so that an examining committee member will be required to attend the adjudicatory hearing only if necessary to address the objection to his or her report. *See* Chapter 2017-16, L.O.F.; House Bill Analysis for CS for HB 399 (2017) at p. 3, *available at* https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0399f.JDC.DOCX&DocumentType=Analysis&BillNumber=0399&Session=2017.
[41] §744.331(5)(c) and (6), Fla. Stat.
[42] §744.331(6), Fla. Stat.
[43] §Id.
[44] §744.102(9)(b), Fla. Stat.
[45] §744.102(9)(a), Fla. Stat.

A "guardian" is statutorily defined as "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."[46] Three types of guardians exist in Florida:

- Non-Professional/Family: If an incapacitated person has a family member or friend who can and will serve as the guardian, the court usually appoints such person as the guardian. In practice, this type of guardian is referred to as a family guardian.
- Professional: A "professional guardian" is a person who "has at any time rendered services to three or more wards as their guardian," except that a person who serves as a guardian for two or more relatives is not considered a professional guardian.[47] If an incapacitated person does not have family or friends who can and will serve, the court may appoint a professional guardian who may be paid from the person's assets.
- Public: If an incapacitated person does not have family or friends and is of limited financial means, the court may appoint a public guardian, if available. Currently, the OPPG within the Department of Elder Affairs[48] contracts with 17 local Offices of Public Guardianship throughout the state for the provision of public guardian services.[49, 50]

For purposes of regulation, all three types of guardians are subject to the powers, duties, and responsibilities specified throughout chapter 744, except that professional and public guardians are subject to the oversight of the OPPG and additional regulation, education, and registration requirements.[51]

A court's order appointing a guardian must state the nature of the guardianship as either plenary or limited. If the guardianship is limited, the order must state that the guardian may exercise only those delegable rights that have been removed from the incapacitated person and specifically delegated to the guardian. The order shall state the specific powers and duties of the guardian.[52]

The court must also issue letters of guardianship to the guardian which state:

- Whether the guardianship pertains to the person or the property or both;
- Whether the guardianship is plenary or limited, and, if limited, the order must state the powers and duties of the guardian;
- Whether and to what extent the guardian is authorized to act on behalf of the incapacitated person with regard to any advance directive previously executed by the ward.[53, 54]

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[46] §744.102(9), Fla. Stat.
[47] §744.102(17), Fla. Stat.
[48] The OPPG was created in 2016 and replaces the Statewide Public Guardianship Office within the Department of Elder Affairs. §744.2001, Fla. Stat.
[49] Department of Elder Affairs, OPPG, Who We Are, *available at* http://elderaffairs.state.fl.us/doea/spgo.php.
[50] Florida Developmental Disabilities Council, Inc. and Guardian Trust, Lighting the Way to Guardianship and Other Decision-Making Alternatives – A Manual for Individuals and Families (2017), p. 64, *available at* https://www.fddc.org/sites/default/files/LTW_FamilyManual2017%20-%201.pdf.
[51] §§744.102(17) and 744.2001(2)(a), Fla. Stat.
[52] §744.2005, Fla. Stat.
[53] §744.345, Fla. Stat.
[54] See also §744.3115, Fla. Stat. (stating that the court, if an advance directive exists, must also specify in its order and letters of guardianship what authority, if any, the guardian shall exercise over the incapacitated person with regard to

Guardian Advocacy: Any adult person who is a resident of this state may petition to appoint a guardian advocate for a person with a developmental disability. The petition must be verified, must provide certain identifying information for the petitioner and person with a developmental disability, and must, among other things, allege that the petitioner believes that the person needs a guardian advocate and specify the factual information on which such belief is based. Further, the petition must:

- Specify the exact areas in which the person lacks the decisionmaking ability to make informed decisions about his or her care and treatment services or to meet the essential requirements for his or her physical health or safety;
- Specify the legal disabilities to which the person is subject; and
- State the name of the proposed guardian advocate.[55]

Notice of the filing of the petition and a copy of the petition must be served on the person with a developmental disability, the person's next of kin, and the person's health care surrogate and agent under a durable power of attorney, if any.[56]

After the petition is filed, the court must:

- Appoint an attorney to represent the person with a developmental disability within three days after the filing. The person may substitute the court-appointed attorney with his or her own attorney.
- Set a date for holding a hearing on the petition to be held as soon as practicable. At the hearing, the court must 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.[57]

At the hearing, the court may appoint a guardian advocate, unless a valid advance directive or durable power of attorney will sufficiently address the person's needs,[58] when the person:

- Lacks decisionmaking ability to do some, but not all, of the decisionmaking tasks necessary to care for his or her person or property; or
- Has voluntarily petitioned for the appointment of a guardian advocate.[59]

If the court finds that the appointment of a guardian advocate is required, the court must enter a written order appointing the guardian advocate and containing the findings of facts and conclusions of law on which the court made its decision, including:

- The nature and scope of the person's lack of decisionmaking ability;
- The exact areas in which the individual lacks decisionmaking ability;
- The specific legal disabilities to which the person with a developmental disability is subject;

health care decisions and what authority, if any, the surrogate shall continue to exercise over the incapacitated person with regard to health care decisions).

[55] §393.12(3), Fla. Stat.

[56] §393.12(4)(a), Fla. Stat.

[57] §393.12(5) and (6)(a) and (d), Fla. Stat.

[58] See Footnote 15.

[59] §393.12(2), Fla. Stat.

- The name of the person selected as guardian advocate and the reasons for the court's selection; and
- The powers, duties, and responsibilities of the guardian advocate, including bonding of the guardian advocate, as provided in s. 744.351.[60]

The guardian advocate appointed for a person with a developmental disability must be a person or corporation qualified to act as guardian, with the same powers, duties, and responsibilities required of a guardian under chapter 744 or those defined by court order under section 393.12.[61]

The court must issue letters of guardian advocacy to the guardian advocate.[62]

Public Hearings: Comments were made indicating that greater specificity is needed for letters of guardianship and guardian advocacy, particularly with respect to identifying the precise financial authority delegated.

Recommendations:

1. Require notice from any interested person at least 10 days before a hearing on the issue of capacity or appointment of a guardian that the proceeding will be contested by an interested person, as well as a statement explaining the basis for the challenge.

   Commentary: Notice by an interested person that he or she will contest the issue of capacity or appointment of a guardian is not currently required. Requiring such notice along with the basis of the challenge would enable the parties to adequately prepare for the adjudicatory hearing with relevant witnesses and other evidence and would enable the court to consider referring the matter to an alternative dispute resolution process and schedule sufficient time to resolve the matter at the hearing. This requirement would also align with the requirement that an objection to an examining committee member report must be made at least five days before the adjudicatory hearing so that an examining committee member may be compelled to attend the adjudicatory hearing only if necessary to address the objection to his or her report.[63]

   Implementation: Florida Rules of Probate 5.550 and 5.560, relating to the petition to determine incapacity and the petition for appointment of a guardian, respectively, could be amended to implement this recommendation.

   Survey: (n = 102) Fifty-eight percent of respondents to the survey indicated that they support the recommendation, while 20 percent of respondents did not support the recommendation and 22 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

[60] §393.12(8), Fla. Stat.
[61] §393.12(10), Fla. Stat.
[62] §393.12(7)(c) and (d), Fla. Stat.; Fla. Prob. R. 5.649(e).
[63] See Footnote 40.

2. Require the Order of Appointment of Guardian, Order of Appointment of Guardian Advocate, Letters of Guardianship, and Letters of Guardian Advocacy to list all rights of the incapacitated person delineated in section 744.3215, which were removed from and retained by the incapacitated person, as well as the rights that were delegated to the guardian or guardian advocate.

   Commentary: Under current law, the orders of appointment of guardian and guardian advocate and the letters of guardianship and guardianship advocacy must state the rights removed from the incapacitated person and the powers and duties of the guardian and guardian advocate. Current law does not, however, expressly require such orders and letters to address all rights delineated in section 744.3215, which are categorized by rights of the incapacitated person that are retained, removed and delegable, and removed but not delegable. As a result, a lack of clarity regarding precisely which rights have been retained or delegated sometimes arises. Requiring the orders and letters to expressly address all rights delineated in section 744.3215 would clarify the role of the guardian and guardian advocate and decrease the possibility of misinterpretation as well as clarify which rights are retained by the person.

   Implementation: The rules in Part III. Guardianship of the Florida Rules of Probate could be amended to implement the recommendation. If standardized forms for orders and letters are created as recommended in Focus Area 4, Recommendation 2. a., such forms would assist in implementation of this recommendation.

   Survey: (n = 101) Seventy-nine percent of respondents to the survey indicated that they support the recommendation, while 12 percent of respondents did not support the recommendation and nine percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

3. Require a hearing on the record for substitution of the court-appointed attorney for an AIP or a person for whom guardian advocacy is sought.

   Commentary: AIPs and persons for whom a guardian advocate is sought are presumed competent to contract and retain their statutory rights to employ counsel of their choice unless the AIP or person for whom a guardian advocate is sought is found to be incapacitated with respect to the right to contract.[64] The Florida Guardianship Practice guide notes that this authorization, "[i]n practice, . . . can create a problem when a person with influence over a ward attempts to take control of the guardianship proceedings on behalf of a ward by using influence to employ counsel for the ward. As a practical matter, courts frequently address this issue by allowing the ward's choice of counsel to appear in proceedings, but keeping court-appointed counsel in place to monitor and participate in the proceedings."[65]

[64] §§393.12(5) and 744.331(2)(b), Fla. Stat.; Holmes v. Burchett, 766 So.2d 387 (Fla. 2d DCA 2000) (holding that a person is presumed competent to contract unless incompetency is established by due process of law; trial court failed to establish Holmes's incapacity by due process of law when it did not conduct an adjudicatory hearing before finding that Holmes did not have the capacity to contract and retain counsel of her choice).

[65] The Florida Bar, Florida Guardianship Practice, 9th Edition, 12.17.

Although a court may now conduct hearings on a motion to substitute counsel, hearings are not always held, e.g., a hearing may not be held when all parties stipulate to the substitution. Requiring a court to always conduct such hearings and have a record will enable it to more thoroughly review the issue, determine whether the capacity of the person to make the substitution should be evaluated, confirm the competency of the substituted attorney in the area of guardianship, and otherwise ensure that the substitution is in the best interest of the AIP or person for whom a guardian advocate is sought.

Implementation: The rules in Part III. Guardianship of the Florida Rules of Probate could be amended to implement the recommendation.[66]

Survey: (n = 101) Fifty-nine percent of respondents to the survey indicated that they support the recommendation with respect to guardianship under chapter 744,[67] while 31 percent of respondents did not support the recommendation and 10 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

[66] During the final development of this report, an issue relating to the payment of attorney fees and costs arose with respect to motions for substitution in guardianship and guardian advocacy proceedings, but due to deadlines, members were unable to discuss and address it. Specifically, it was suggested that a rule be adopted to provide notice to petitioners and attorneys of scenarios in which the attorney may not be entitled to payment of his or her fees and costs by the ward or person subject to guardian advocacy, e.g., an attorney selected by the ward or person as the substitute for the court-appointed counsel may not be entitled to fees and costs if he or she is not approved for substitution.

[67] Since the survey was distributed, the recommendation was revised to include guardian advocacy.

Focus Area 3: Restoration of Capacity

Present Situation

Process for the Restoration of Capacity in Guardianship: A person who has been determined to be incapacitated retains the rights to have continuing review of the need for restriction of his or her rights and to be restored to capacity at the earliest possible time.[68] Any interested person, including the ward, may file a suggestion of capacity, which must state that the ward is currently capable of exercising some or all of the rights that were removed.[69]

When a suggestion of capacity is filed, the court must immediately:

- Send notice of filing to the ward, the guardian, the attorney for the ward, if any, and any other interested persons designated by the court.
- Appoint a physician to examine the ward. The physician must file his or her examination report with the court within 20 days after the appointment.[70]

An objection to the suggestion of capacity must be filed within 20 days after service of the notice. If an objection is:

- Timely filed or if the medical examination suggests that full restoration is not appropriate, the court must set the matter for hearing and appoint an attorney for the ward if he or she does not have an attorney. At the hearing, the court must make specific findings of fact and, based on a preponderance of the evidence, enter an order that denies the suggestion of capacity or restores all or some of the removed rights. The ward has the burden of proving by a preponderance of the evidence that restoration is warranted.
- Not filed and the court is satisfied that the medical examination establishes by a preponderance of the evidence that restoration of all or some of the ward's rights is appropriate, the court must enter an order restoring all or some of the removed rights in accordance with the findings.[71]

Process for the Restoration of Rights in Guardian Advocacy: Any interested person, including the person with a developmental disability, may file a suggestion of restoration of rights which must state that the individual with a developmental disability is currently capable of exercising some or all of the rights that were delegated and provide evidentiary support for the filing of the suggestion.[72]

[68] §744.3215(1)(b) and (c), Fla. Stat.
[69] §744.464(1) and (2)(a), Fla. Stat.
[70] §744.464(2)(b) and (c), Fla. Stat.
[71] §744.464(2)(e) and (3), Fla. Stat.
[72] Evidentiary support includes, but is not limited to, a signed statement from a medical, psychological, or psychiatric practitioner by whom the person with a developmental disability was evaluated and which supports the suggestion for the restoration. §393.12(12), Fla. Stat.

If the petitioner is unable to provide evidentiary support due to the lack of access to such information or reports:

- The petitioner may instead state a good faith basis for the suggestion for the restoration of rights; and
- The court must immediately set a hearing to inquire of the petitioner and guardian advocate as to the reason and enter orders as appropriate to secure the required documents.[73]

When a suggestion of restoration of rights is filed:

- The court must appoint counsel for the individual with a developmental disability within three days after the filing; and
- The clerk must immediately send notice of the filing to the individual with a developmental disability, the guardian advocate, the attorney for the individual, the attorney for the guardian advocate, if any, and any other interested person designated by the court.[74]

An objection to the suggestion must be filed within 20 days after service of the notice. If an objection is:

- Timely filed, or if the evidentiary support suggests that restoration of rights is not appropriate, the court shall set the matter for hearing. At the hearing, the court must enter an order denying the suggestion or restoring all or some of the rights that were delegated to the guardian advocate.
- Not filed, and the court is satisfied with the evidentiary support for restoration, the court must enter an order of restoration of rights that were delegated to a guardian advocate, which the person with a developmental disability may now exercise.[75]

Duties of the Guardian and Guardian Advocate with Respect to Restoration: Each guardian or guardian advocate[76] who has authority over the person of the ward or individual with a developmental disability must, as appropriate under the circumstances, assist the ward or individual in developing or regaining capacity, if medically possible.[77] Additionally, in the annual plan that must be filed by each guardian or guardian advocate of the person, the guardian or guardian advocate must address the issue of restoration of rights and include:

- A summary of activities during the preceding year that were designed to enhance the capacity of the ward or individual;
- A statement of whether the ward or individual can have any rights restored; and
- A statement of whether restoration of any rights will be sought.[78]

[73] Id.
[74] §393.12(12)(a) and (b), Fla. Stat.
[75] §393.12(12), Fla. Stat.
[76] Guardian advocates are subject to the same powers, duties, and responsibilities required of a guardian under chapter 744, Florida Statutes. §393.12(10), Fla. Stat.
[77] §744.361(13)(d), Fla. Stat
[78] §744.3675(3), Fla. Stat.

Public Hearings: Very few comments were made at the public hearings regarding restoration of capacity. Generally, the speakers suggested that restoration of rights should be easier than the removal of rights.

Recommendations:

1. Require a guardian and guardian advocate to attest at the filing of the annual plan that he or she informed the ward or person under guardian advocacy about his or her right to have removed rights restored and the process to obtain restoration.

   Commentary: Although statute requires guardians and guardian advocates with authority over the person to assist the ward or person in developing or regaining capacity and to report on restoration matters in the annual plan, statute does not specifically require the guardian or guardian advocate to inform the ward or person of his or her right to restoration or to explain the process to obtain restoration. Adopting such requirement will help ensure that the ward and person is continually apprised of the right to be restored to capacity at the earliest possible time.

   Implementation: Section 744.3675(3), Florida Statutes, could be amended to implement the recommendation.

   Survey: (n = 97) Fifty-eight percent of respondents to the survey indicated that they support the recommendation, while 30 percent of respondents did not support the recommendation and 12 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

2. Require the court to appoint an attorney for the ward within three days after a suggestion of capacity has been filed.

   Commentary: Currently, the court is not required to appoint an attorney for the ward when a suggestion of capacity has been filed until an objection is timely filed or the medical examination suggests that full restoration is not appropriate. Requiring the court to appoint an attorney within three days after the filing of the suggestion of capacity will afford the ward earlier representation, thereby providing the attorney with the ability to monitor the case to ensure that it is proceeding in compliance with statute and to have greater time for interaction with the court-appointed examiner and ward and for case preparation.

   This requirement would also align with the requirement that an attorney be appointed for individuals under guardian advocacy within three days after a suggestion of capacity is filed.

   Implementation: Section 744.464(2), Florida Statutes, could be amended to implement the recommendation.

   Survey: (n = 99) Seventy-one percent of respondents to the survey indicated that they support the recommendation, while nine percent of respondents did not support the recommendation and 20

percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

3. In cases where appropriate, recommend that the guardian or guardian advocate develop a Progressive Rights Restoration Plan that is designed to help the ward or person under guardian advocacy take incremental steps toward restoration of one or more rights. The plan could be included as a part of the annual plan, as a means to document the guardian's or guardian advocate's activities to assist the ward or person under guardian advocacy in developing abilities or regaining capacity, and incorporated as a part of the restoration proceedings if such proceedings are pursued.

Commentary: "A Progressive Rights Restoration Plan is a strategy designed to help the person under guardianship [or guardian advocacy] take incremental steps towards restoring one or more rights."[79] Essential elements of the plan include, but are not limited to:

- Identifying the right or rights sought to be restored;
- Describing the incremental steps designed to develop abilities and who will perform those steps;
- Listing the person(s) responsible for monitoring the progress of those steps, if any;
- Setting benchmarks and assessment points that measure significant accomplishments; and
- Setting target dates for completion.[80]

The plan may be used:

- As part of the restoration proceedings as an alternative to immediate restoration of one or more rights; e.g., if it appears that the court is not going to a restore a particular right during a restoration proceeding, the attorney could propose to the court an incremental plan to give the person increasing responsibility with respect to the right. For example, the court could approve a plan for increasing responsibility for the payment of bills, stay the restoration proceeding for a specified period, and, after the period expires, evaluate the person's progress with timely bill payment. If the person successfully progresses, the court may restore the person's right(s).
- As part of the Annual Plan, as documentation of the guardian's or guardian advocate's activities during the preceding year that were designed to enhance the capacity of the ward or develop the abilities of the person under guardian advocacy.[81]

Implementation: Use of Progressive Rights Restoration Plans could be promoted through training that addresses such plans and that is provided to guardians, guardian advocates, judges, and attorneys who practice in this area of the law. Alternatively, legislation could be sought to address the use of such plans.

[79] Florida Developmental Disabilities Council, Inc. and Guardian Trust, Developing Abilities and Restoring Rights, A Manual for Legal Professionals, p. 19, *available at* http://www.fddc.org/sites/default/files/media/2016Guide_cjm.pdf.
[80] Id.
[81] Id.

Survey: (n = 100) Sixty percent of respondents to the survey indicated that they would support a statutory or rule change that gives a judge the discretion to approve or implement a plan that incrementally restores rights, while 24 percent of respondents did not support the recommendation and 16 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it does not support the recommendation.

Focus Area 4: Assessment and Assignment of Costs Associated with Guardianship Administration

Present Situation:

Introduction: Fees and costs for guardians and attorneys in connection with the administration of guardianship are governed principally by section 744.108, Florida Statutes. Except where the person under guardianship has been declared indigent, such charges are paid out of the assets of the ward's estate.[82] As discussed below, practices of the courts regarding guardianship fees and costs vary throughout the state.

As used in the "Present Situation" for this focus area, unless otherwise indicated, the term "guardian" refers to both a guardian and a guardian advocate and the term "ward" refers to both a ward and a person under guardian advocacy.

Fees and Costs of Guardians and Attorneys Generally: Section 744.108, Florida Statutes, provides that "[a] guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward."[83] The guardian of the property may pay, or be reimbursed for, the fees and costs of guardianship from the ward's estate. Subject to limited exceptions,[84] statute does not require prior court approval for such payment or reimbursement.[85]

Despite the lack of a statutory requirement for prior court approval, courts in some Florida circuits require the filing of a petition for fees and costs and court approval before allowing payment from the ward's estate.[86] Further, some circuits impose a fee schedule or caps for guardian and attorney fees.[87]

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[82] §§27.511(6)(c), 744.108(8), and 744.331(2) and (7)(a), Fla. Stat.

[83] §744.108(1), Fla. Stat.

[84] See e.g., § 518.112(3)(a), Fla. Stat. (providing that a guardian, as fiduciary, may only delegate specified investment functions to an investment agent after receiving court approval).

[85] §744.444, Fla. Stat.

[86] See §10:7. Fees in guardianship actions—Generally, Fla. Guardianship Law & Proc. § 10:7 (2d ed.) (stating "Although there is no statutory requirement that guardian's and attorney's fees be determined in advance by the court, this is widely misunderstood. . . . Courts in some counties require that payment of guardian's and attorney's fees only be allowed upon petition and order."); §3.3. Compensation of Guardians – In General, Florida Guardianship Practice, (9th ed.) (stating "*F.S.* Chapter 744 does not contain an absolute requirement that [guardian] fees receive prior court approval. *F.S.* 744.444(16) provides that fees may be paid by a guardian to attorneys and other specified persons without a court order. However, based on *F.S.* 744.444(16) and the statutory requirements for filing and approval of an annual report, some trial courts require court authorization for a guardian's fee to be paid. Some courts may require court orders approving fees, or the filing of a fee affidavit, in order to receive approval of an annual accounting."); §3.30. Compensation of Attorney – Fees Without Court Orders, Florida Guardianship Practice, (9th ed.) (similarly providing that some courts require authorization for an attorney fee payment, while other courts do not).

[87] See e.g., Probate & Guardianship Division– Information And Requirements, Twelfth Judicial Circuit, *available at* https://www.jud12.flcourts.org/Portals/0/Documents/Requirements/williams.pdf (nonprofessional guardian fees are $30 per hour for non-relatives and $15 per hour for relatives; professional guardian fees are $85 per hour if 25% or more of their caseload is certified to be indigent, and $60 per hour otherwise; legal fees are capped at $90 per hour for paralegals and $400 per hour for attorneys unless a higher rate is approved by the court); and Guardian Fee Workgroup Report

If fees for a guardian or an attorney are submitted to the court for determination, the court is required to consider whether the fees are reasonable, based on nine statutorily enumerated criteria.[88]

Although a court may reduce fees below the amount requested, it generally may not deny fees altogether, except in limited circumstances.[89] Based on the express language of section 744.108, guardians and attorneys are *entitled* to a reasonable fee for services rendered and to reimbursement for costs incurred on behalf of the ward. Due process—i.e., notice and a hearing[90]—must be provided in guardianship fee proceedings, including when the trial court reduces the amount of fees requested by the guardian, even if there is no challenge to the reduction.[91] Based on the substantiation provided by the petitioner and the factors enumerated in the statute, the trial court has discretion to determine a reasonable fee amount. This discretion is bound by the requirement that the amount awarded must be based on competent, substantial evidence.[92]

Approval, Thirteenth Judicial Circuit, *available at* http://www.fljud13.org/Portals/0/Forms/pdfs/012210FinalMemoapprovingchangesguardianshipfees.pdf?ver=2010-01-22-162144-517 (fees are $45 per hour for guardians with up to three years' experience, $60 per hour up to five years' experience, and $75 per hour for more than five years' experience); Third Amended Administrative Order re: Compensation for Professional & Other Guardians, Fifth Judicial Circuit, *available at* http://www.circuit5.org/wp-content/uploads/2017/10/a1998-12-a2.pdf (Professional guardians are paid $50 per hour if they have less than five years' experience and $55 per hour if they have five years or more experience in cases "which qualify them pursuant to F. S. §744.102 (17) Fla. Stat. as professional guardians." All other guardians are paid $15 per hour.).

[88] The nine criteria are:

(a) the time and labor required;
(b) the novelty and difficulty of the questions involved and the skill required to perform the services properly;
(c) the likelihood that acceptance of the particular employment will preclude the person from engaging in other employment;
(d) the fee customarily charged locally for similar services;
(e) the nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
(f) the results obtained;
(g) the time limits imposed by the circumstances;
(h) the nature and length of the relationship with the incapacitated person; and
(i) the experience, reputation, diligence and ability of the person performing the service.

§744.108(2), Fla. Stat.

[89] Thorpe v. Myers, 67 So. 3d 338, 343 (Fla. 2d DCA 2011) (citations omitted) (stating, "There are [three] exceptions to the general rule entitling a guardian to payment for services rendered, but these exceptions are limited. . . . First, a guardian cannot expect to be compensated for services rendered outside the scope of his or her appointment. . . . Second, a guardian guilty of theft or other breach of duty may forfeit the right to compensation. . . . Third, on occasion, usually when a family member is appointed, a guardian may agree to serve without compensation.").

[90] Shappell v. Guardianship of Naybar, 876 So. 2d 690 (Fla. 2d DCA 2004).

[91] Rabago v. Guardianship of Strobak, 146 So. 3d 149 (Fla. 5th DCA 2014).

[92] White v. Guardianship of Lubin, 150 So. 3d 1256 (Fla. 2d DCA 2014); In re Guardianship of Kesish, 98 So.3d 183 (Fla. 2d DCA 2012); In re Guardianship of Shell, 978 So. 2d 885 (Fla. 2d DCA 2008).

Attorney Fees and Costs – Particular Considerations: Florida Rule of Probate 5.030(a) requires all guardians, other than guardian advocates, to be represented by an attorney.[93] Statute specifies that a guardian advocate does not have to 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.[94]

A guardian or personal representative who is an attorney admitted to practice in Florida may represent himself or herself as guardian or personal representative under the rule. Separately from the rule, section 744.444(13), Florida Statutes authorizes a guardian to employ an attorney (or other professional) when reasonably necessary to advise or assist the guardian in the performance of his or her duties. As noted above, an attorney who provides services to a ward, or to a guardian on behalf of the ward, is *entitled* under the statute to a reasonable fee.[95] When an attorney guardian is awarded compensation, fees and expenses for legal services must be clearly distinguished from fees and expenses for guardian services.[96]

Included in the scope of allowable attorney fees are those costs and fees incurred by an attorney who has been appointed by the court, pursuant to section 744.331(2), Florida Statutes, to represent the AIP during proceedings to determine incapacity.[97] If the AIP is indigent, the state pays the appointed attorney's fee and shall thereafter have a creditor's claim against the guardianship property for any amounts paid.[98] Where the incapacity petition is dismissed or denied, and the court finds that the petition was filed in bad faith, the petitioner may be required to reimburse the State for any amounts paid under the statute.[99]

Unlike guardian fees, entitlement to attorney fees and costs is strictly limited to those fees and costs incurred in rendering services that benefit the ward or the ward's estate.[100] For example, in Thorpe, the trial court denied petitioners an award of attorney fees and costs from the ward's estate for work related to the petition to determine incapacity and for appointment of the guardian. The Second District Court of Appeal:

- Reversed in part holding that fees and costs related to the determination of the ward's incapacity and for the appointment of a guardian should have been awarded. According to the

[93] Guardian advocates are not required to retain 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. §393.12(2)(b), Fla. Stat.
[94] Id.
[95] §744.108(1), Fla. Stat.
[96] §744.108(3), Fla. Stat.
[97] §744.331(2) and (7), Fla. Stat.
[98] §744.331(7)(b), Fla. Stat.
[99] §744.331(7), Fla. Stat.
[100] Butler v. Guardianship of Peacock, 898 So.2d 1139, 1141 (Fla. 5th DCA 2005); Thorpe, 67 So.3d at 343 (stating, "In order for an attorney to be awarded fees from the ward's estate under section 744.108(1), the attorney's services must benefit the ward or the ward's estate. See *Butler*, 898 So.2d at 1141. The clause in section 744.108(1) requiring the demonstration of the beneficial nature of the services rendered applies to attorneys, not guardians. Thus, under the statutory language, a guardian is not required to demonstrate that his or her services conferred a benefit on the ward or the ward's estate as a prerequisite for obtaining a compensation award.").

court, "[a]s a direct result of these efforts, the Ward was determined to be totally incapacitated and the circuit court appointed plenary guardians of her person and property. Unquestionably, these services benefitted the Ward."

- Affirmed in part holding that fees and costs related to the "unproductive litigation over who would be appointed as guardian or other goals that did not benefit the Ward or her estate" were not payable by the ward's estate.[101]

At one time, attorney fees and costs incurred "on behalf of a ward" were held not to include fees and costs for work done to recover attorney fees.[102] However, the statute was subsequently amended to include entitlement to such fees explicitly.[103] Thus, attorney fees and costs to determine attorney fees for the guardian's attorney, an attorney appointed pursuant to subsection 744.331(2), or an attorney who has rendered services to the ward are now all recoverable from the ward's assets, unless the court finds them to be substantially unreasonable under the criteria of subsection 744.108(2). Such fees are to be paid from the assets of the guardianship estate.[104]

Other Guardianship Expenses: Apart from fees and costs for guardians and attorneys, other guardianship fees and expenses, such as mandatory education expenses, inventory audit fees, and annual accounting audit fees, are also to be paid, absent indigence, out of the guardianship estate.[105] The professional guardian bond and educational expenses should not be paid from the guardianship estate.

Annual Reporting: Florida Rule of Probate 5.695 and section 744.367, Florida Statutes, require a guardian of the property to file an annual accounting on or before April 1 of each year, unless the court requires or authorizes reporting on a fiscal year basis. The annual accounting must cover the preceding annual accounting period. If the court requires or authorizes reporting on a fiscal year basis, the annual accounting shall be filed on or before the first day of the fourth month after the end of the fiscal year.[106] The annual accounting must include:

- A full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period.
- A copy of the annual or year-end statement of all the ward's cash accounts from each of the institutions where the cash is deposited.[107]

The duty to file an annual accounting is excused if the ward receives income only from Social Security benefits and the guardian is the ward's representative payee for the benefits.[108]

[101] Thorpe, 67 So.3d at 343.
[102] Zepeda v. Klein, 698 So. 2d 329 (Fla. 4th DCA 1997).
[103] §744.108(8), Fla. Stat.; In re Guardianship of K.R.C. v. Weems, 83 So. 3d 932 (Fla. 2d DCA 2012).
[104] §744.108(8), Fla. Stat.
[105] §§744.3145(5), 744.365(6), and 744.3678(4), Fla. Stat.
[106] §744.367(2), Fla. Stat.; Fla. Probate R. 5.695(a)(2).
[107] §744.3678(2), Fla. Stat.
[108] §744.3678(5), Fla. Stat.

Florida Rule of Probate 5.695 and section 744.367, Florida Statutes also require a guardian of the person to submit an annual plan to the court. Unless the court requires filing on a calendar-year basis, annual plans must be filed within 90 days after the last day of the anniversary month in which the letters of guardianship were signed. The annual plan must cover the upcoming fiscal year, ending on the last day of such anniversary month. If the court requires filing on a calendar-year basis, the guardianship plan for the upcoming calendar year must be filed on or before April 1 of each year.[109] For an adult ward, the annual plan must include information concerning the ward's residence, medical and mental health conditions, treatment needs, and social condition, as well as information concerning restoration of the ward's rights.[110]

Copies of the accounting and annual plan must be served on the ward, unless the ward is a minor or is totally incapacitated, and on the attorney for the ward, if any.[111]

Public Hearings: During both public hearings, numerous comments were made about the assessment and assignment of costs associated with guardianship administration. Topics addressed included the following:

- The need for standardized fees statewide;
- The need for waiver of filing fees and court costs when the proposed guardian or guardian advocate is the public guardian regardless of who filed the petition;
- The need to facilitate the ability for guardians, guardian advocates, and family members to complete reports relating to the guardianship; and
- Inconsistency across the state as to both forms and fees and the need for standardization of both.

Concern was also expressed that attorneys may intentionally accumulate fees by pursuing unnecessary litigation after they learn about a person's assets.

Recommendations:

1. Establish a working group or similar entity consisting of a cross-section of stakeholders to determine whether a statewide rate structure should be established for fees for guardian and guardian advocacy services in Florida's guardianship system and whether guardians, guardian advocates, and attorneys should file annual projected fee budgets.

   Commentary: Due to concerns about the lack of consistency throughout the state regarding the assessment and payment of guardian and guardian advocate fees and, in turn, the potential for excessive fees, the workgroup recommends that, in determining whether a statewide rate structure is warranted, the working group's activities should include, but not be limited to:

[109] §744.367(1), Fla. Stat.; Fla. Probate R. 5.695(a)(1).
[110] §744.3675(1) and (3), Fla. Stat.
[111] §744.367(3), Fla. Stat.; Fla. Probate R. 5.695(b)

- A review of studies conducted by Florida circuits on the topic of guardian or guardian advocate fees, e.g., the Final Report by the Thirteenth Judicial Circuit Guardian Fee Workgroup issued August 3, 2009.[112]
- A review of the standards and recommendations relating to fees made by the Third National Guardianship Summit Standards and Recommendations.[113]
- Conducting a statewide survey of judicial circuits to determine guardian and guardian advocate fees currently being assessed, circuit practices with respect to determining the reasonableness of fees, and other relevant matters.

If it is determined by the working group that a statewide guardian fee structure is:

- Warranted, the working group should:
  - Determine the allowable fees and the basis upon which such fees may be assessed, e.g., a flat hourly rate for any service or rates differentiated by type of service; the guardian's or guardian advocate's years of experience, education, training, or certification; the complexity of the case; or other factors.
  - Determine whether the structure should also identify a reasonable amount of time for the conduct of certain guardian or guardian advocate services.
  - Consider whether the rate structure should vary by region or other division of the state based on cost of living differences, the region's or division's particular need to attract qualified persons to become guardians or guardian advocates, or other factors.
  - Indicate whether courts should be granted discretion to modify the rate structure and, if so, whether such discretion should be unrestricted or exercised only in specified circumstances.
  - Determine whether the statewide fee structure should be implemented through a Florida Supreme Court Administrative Order or if statutory or rule changes should be adopted.
  - Establish forms to be used statewide for fee-related matters, such as invoices issued by the guardian or guardian advocate.
  - Make any other guardian or guardian advocate fee-related recommendations found warranted.
- Not warranted, the working group should review section 744.108, and determine whether the criteria to be considered by the court in determining the reasonableness of a fee is adequate or should be modified, and make any other fee-related recommendations found warranted.

[112] Guardian Fee Workgroup Report Approval, Thirteenth Judicial Circuit, *available at* http://www.fljud13.org/Portals/0/Forms/pdfs/012210FinalMemoapprovingchangesguardianshipfees.pdf?ver=2010-01-22-162144-517.

[113] Third National Guardianship Summit Standards and Recommendations, Standards 3.1 through 3.3 and Recommendations 3.1 through 3.8, *available at* http://www.eldersandcourts.org/~/media/Microsites/Files/cec/Third%20National%20Guardianship%20Summit%20Standards%20and%20Recommendations.ashx.

Finally, regardless of whether the working group determines that a statewide fee structure is warranted or not, it should also consider if the following or similar requirements should be adopted in Florida law:

- Require the guardian, guardian advocate, and any attorney who is to be paid by the ward or person under guardian advocacy, within 90 days of appointment, to disclose in a specified written format to the court, ward, and person under guardian advocacy, the projected fee budget for the following 12-month period and require the court to approve the projected fee budget before any fees may be paid for that period.
- Authorize the guardian or guardian advocate to pay for services on a monthly basis according to the court-approved projected fee budget and require the guardian or guardian advocate to report to the court semi-annually on such payments and compliance with the budget.
- Require court approval of an amended projected fee budget for any fees that would exceed the court-approved budget before payment of such fees, and establish time limits for the filing of petitions seeking such court approval.

Implementation: There are several options for implementation of this recommendation including:

- A request could be made for the creation of an interdisciplinary working group by the Real Property, Probate, and Trust Law Section or Elder Law Section of The Florida Bar; WINGS; or executive or judicial branch; or
- The issue could be referred to the legislature for study by its Office of Program Policy Analysis and Government Accountability.

Survey: Three questions relating to this issue were asked on the survey.[114] The questions asked whether the survey respondent would support the following:

- Establishment of a statewide rate structure for fees for guardian services in Florida's guardianship system? (n = 96) Forty-nine percent answered yes, 41 percent answered no, and nine percent had no opinion. The Florida Court Clerks and Comptrollers responded no; however, they would support a rate structure imposed on a circuit or regional basis that considered cost of living differences throughout the state.
- Requiring the guardian and guardian's attorney within 90 days of appointment to disclose in a specified written format to the court and the ward, the projected fee budget for the following 12-month period, which the court must review and approve before any fees may be paid for that period? (n = 96) Thirty-four percent answered yes, 50 percent answered no, and 16 percent had no opinion. The Florida Court Clerks and Comptrollers responded no.
- Authorizing the guardian and guardian's attorney to be paid for services on a monthly basis according to the court-approved projected fee budget, and requiring the attorney or guardian to report to the court semi-annually on such payment and compliance with the budget? (n = 95) Thirty-two percent of respondents answered yes, 54 percent answered no, and 14 percent had no opinion. The Florida Court Clerks and Comptrollers responded no.

[114] Following distribution of the survey, the recommendation was reworded and revised to include guardian advocacy.

2. Implement a series of measures relating to the standardization of forms, training to complete the forms, and waiver of certain filing fees and court costs to reduce the costs of guardianship and guardianship advocacy.

   Commentary: Guardianship and guardian advocacy administration can be costly, especially for those of moderate or lower means. Whether the person is a young adult with a developmental disability, middle-aged person with an acquired disability, or an aging adult, integrating such expense into a person's cost of living can be difficult and can result in depletion of the estate. To mitigate these costs, the workgroup makes the following recommendations:

   a. Create and post standardized, statewide forms for a petition to determine incapacity, a petition to appoint a guardian, a petition for the appointment of a guardian advocate, an initial report, an annual accounting, and an annual plan on the websites of the Florida Supreme Court and each judicial circuit. Create standardized, statewide forms for the Orders of Appointment of Guardian and Guardian Advocate and Letters of Guardianship and Guardian Advocacy. Adopt a rule approving the use of such forms statewide.

      Commentary: Public access to standardized forms would facilitate self-completion without the assistance of an attorney or other professional. It would also reduce the cost of attorney time to draft pleadings, as only the standardized forms would have to be completed, which could be done by legal assistants. Court access to standardized forms for orders and letters will help ensure uniformity statewide.

      Implementation: A request could be made to the Real Property, Probate, and Trust Law Section of The Florida Bar for the creation of the recommended forms. Court rule would have to be amended to adopt the forms and approve use statewide.

      Survey: Two questions were asked relating to this issue on the survey:
      - Eighty-seven percent of respondents indicated that they support the recommendation as to the reporting forms, while seven percent of respondents did not support the recommendation and six percent of respondents indicated no opinion. (n = 96)
      - Eighty-nine percent of respondents indicated that they support the recommendation as to the petitions, while five percent of respondents did not support the recommendation and six percent of respondents indicated no opinion. (n = 96)

      The survey response from the Florida Court Clerks and Comptrollers indicated that it supports both recommendations relating to reporting forms and petitions.

   b. Encourage circuits to hold semi-annual training sessions for nonprofessional/family guardians and guardian advocates regarding how to complete annual reports and proper maintenance of documentation.

Commentary: Such training may alleviate the family guardians' need to hire professionals for assistance and may increase front-end compliance with the annual reporting requirements which could obviate costs to correct mistakes later.

Implementation: The Florida Supreme Court could issue guidance that encourages circuits to provide such training. Clerks of Court who audit the annual reports could also be asked to assist in providing the training. Additionally, WINGS could consider whether to create the training in a video format to be distributed statewide as part of its strategy to provide guardianship educational information to the public statewide. Such statewide video training, however, could not address differences in local circuit and county requirements with respect to annual reports.

Survey: (n = 96) Eighty-two percent of respondents indicated that they support the recommendation, while eight percent of respondents did not support the recommendation and 10 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it would support the recommendation only if the training were offered by or in collaboration with the clerks.

c. Encourage probate courts, pursuant to section 744.2008, Florida Statutes, to waive the filing fees and court costs for guardianship and guardian advocacy when the proposed guardian or guardian advocate is the public guardian,[115] regardless of who files the petition.

Commentary: A public guardian may serve as a guardian or guardian advocate when no family member or friend, other person, bank, or corporation is willing and qualified to serve as guardian and the AIP or person for whom guardian advocacy is sought is of limited financial means as defined in contract or rule of the Department of Elder Affairs.[116, 117] Statute authorizes the court in any proceeding for the appointment of a public guardian, or in any proceeding involving the estate of an individual for whom a public guardian has been appointed, to waive any court costs or filing fees.[118]

According to anecdotal reports, circuit and county practices vary greatly as to the frequency with which such waiver occurs. If the court does not waive the costs or fees, the petitioner or the regional office of the public guardian is held responsible for the payment.[119] To avoid any impediments to a petitioner in filing a petition for a determination of incapacity or a petition to

[115] Pursuant to section 28.345(1), Florida Statutes, a public guardian may not be assessed court-related fees and charges assessed by the clerks.
[116] §§744.1012(6) and 744.2007(1) and (3), Fla. Stat.
[117] Representatives of the Office of Public and Professional Guardians (OPPG) have indicated that determining whether a person is of limited financial means requires a case-by-case review that includes considerations such as Medicaid eligibility, medical needs, assets, and other matters.
[118] §744.2008(2), Fla. Stat.
[119] See §744.2008(1), Fla. Stat. (stating that "[a]ll costs of administration, including filing fees, shall be paid from the budget of the office of public guardian. No costs of administration, including filing fees, shall be recovered from the assets or the income of the ward."). Notwithstanding this provision, representatives of the OPPG and others have indicated that, in practice, petitioners are sometimes required to pay the filing fee.

appoint a guardian advocated for a person whose vulnerabilities make him or her eligible for public guardianship, the workgroup encourages courts to waive filing fees and court costs.

Implementation: The Florida Supreme Court could issue guidance encouraging circuits to waive such fees and costs. Additionally, judicial education instructing that such waiver may be granted may increase the likelihood of its use.

Survey: This recommendation was made after the survey was distributed; thus, a question regarding this issue was not asked.

3. Authorize exceptions to the requirement that a guardian or guardian advocate, who is not compensated for his or her services, be represented by an attorney for purposes of filing the annual plan.

Commentary: Pursuant to Florida Rule of Probate 5.030(a), guardians must be represented by an attorney and, pursuant to section 393.12(2)(b), Florida Statutes, guardian advocates must be represented by an attorney when required by the court or if delegated certain property rights. The workgroup recognizes that the cost of attorney fees imposes an additional financial burden that is particularly difficult to bear in cases where the ward or person under guardian advocacy is not indigent but is of modest means. In certain situations, an attorney may be unnecessary. To mitigate this issue, the workgroup recommends that attorney representation not be required for the filing of an annual plan when the guardian or guardian advocate does not receive compensation for his or her services and the case is exempt from an annual accounting by law or because the requirement was waived by the court.

Implementation: The rules in Part III. Guardianship of the Florida Rules of Probate could be amended to implement the recommendation for guardians and paragraph 393.12(2)(b) could be amended to implement the recommendation with respect to guardian advocates.

Survey: Three questions relating to this issue were asked on the survey. The questions asked whether the survey respondent would support exempting guardians[120] from being represented by an attorney when:

- The case is exempt from filing an annual accounting because the only source of income is social security or disability benefits? (n = 95) Sixty-nine percent answered yes, 28 percent answered no, and three percent had no opinion. The Florida Court Clerks and Comptrollers responded yes.
- The guardian submits periodic financial reports to the Department of Veterans' Affairs or the Social Security Administration? (n = 94) Fifty-four percent answered yes, 39 percent answered no, and seven percent had no opinion. The Florida Court Clerks and Comptrollers responded yes if the guardian only has to file an accounting with Veterans' Affairs or the Social Security Administration or no if the guardian has to file an accounting with the clerk.

[120] Following distribution of the survey, the recommendation was significantly revised.

- The guardian does not charge a fee, the guardianship estate does not consist of real property, and the value of the guardianship estate is less than $25,000? (n = 94) Forty-seven percent of respondents answered yes, 42 percent answered no, and 11 percent had no opinion. The Florida Court Clerks and Comptrollers responded no because the guardian must continue to file an accounting with the clerk, additional administrative support may be necessary to respond to the unrepresented guardian's need, and there may be significant monthly income and disbursements.

Focus Area 5: Post-adjudicatory Proceedings and Responsibilities Related to Guardianship, Including the Rights Enumerated in Section 744.3215, Florida Statutes

Present Situation

As used in the "Present Situation" for this focus area, unless otherwise indicated, the term "guardian" refers to both a guardian and a guardian advocate, and the term "ward" refers to both a ward and a person under guardian advocacy.

Powers and Duties of Guardians: Section 744.361, Florida Statutes, which applies to all guardians (nonprofessional/family, professional, and public guardians), sets forth the powers and duties of guardians. Among other things, this section provides that a guardian is a fiduciary who must act in good faith and who may exercise only those rights that have been removed from the ward and delegated to the guardian.[121] The section also addresses the requirements for guardians of persons to file specified plans and reports and it specifies the standards for protection and preservation of the ward's property for guardians of property.[122] Further, as discussed below, the section sets forth the standards for decisionmaking by the guardian on behalf of the ward as well as for allowing the ward to maintain contact with family and friends.[123]

Standards of Decisionmaking to be applied by Guardians: Statute requires guardians when making decisions that affect the ward to "[c]onsider the expressed desires of the ward as known by the guardian"[124] and also provides that a guardian "may not act in a manner that is contrary to the ward's *best interests* under the circumstances."[125] These provisions codify what is referred to in practice as the "best interests" standard of decisionmaking. Under this standard, the guardian must consider the ward's needs, safety, health, and welfare as the primary factors when making a decision on behalf of the ward.[126]

In recent years, another standard of decisionmaking known as "substituted judgment" has evolved. Under this standard, recommended by the 2011 Third National Guardianship Association's (NGA's) Summit, the guardian is required to substitute "the decision the [ward] would have made when the [ward] had capacity as the guiding force in any surrogate decision the guardian makes." The purpose of the standard is to promote "the underlying values of self-determination and well-being of the [ward]."

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[121] §744.361(1)-(3), Fla. Stat.
[122] §744.361(6), (7), and (10)-(12), Fla. Stat.
[123] §744.361(4) and (13)(a) and (b), Fla. Stat.7
[124] §744.361(13)(a), Fla. Stat.
[125] §744.361(4), Fla. Stat. (emphasis added).
[126] Florida Developmental Disabilities Council, Inc. and Guardian Trust, Lighting the Way to Guardianship and Other Decision-Making Alternatives – A Manual for Individuals and Families (2017), p. 20, *available at* https://www.fddc.org/sites/default/files/LTW_FamilyManual2017%20-%201.pdf.

The concept of "self-determination" recognizes the rights of individuals to autonomy and to have control over their life choices. Although guardianship is, by definition, incompatible with a complete ability to make all of one's own choices, the consensus in the national guardianship community now is that individuals under guardianship are entitled to exercise the maximum degree of self-determination in their individual situation.[127] The NGA does recognize, however, that substituted judgment should not be used "when following the person's wishes would cause substantial harm to the person or when the guardian cannot establish the person's goals and preferences even with support."[128]

Most recently in 2017, the OPPG adopted the substituted judgment standard in its rules governing the state's professional and public guardians. Under the new rule, such guardians must "consider the decision their Ward would have made when the Ward had capacity" and must use that decision as "the guiding force in any surrogate decision a guardian makes,"[129] unless following the ward's wishes would significantly impair his or her health or the guardian cannot determine the ward's goals and preferences, even with support.[130] If one of the two latter circumstances applies or if the ward has never had capacity, the professional or public guardian must instead apply the best interest standard which requires the guardian to:

- Consider the least restrictive course of action in providing for the needs of a ward;
- Consider the past practice of the ward and evaluate evidence of his or her choices; and
- Maximize what is best for the ward and consider the least intrusive, most normalizing, and least restrictive course of action possible, given the ward's needs.[131]

Contact with Family and Friends: Paragraph 744.361(13)(b), requires all guardians, as appropriate under the circumstances, to "allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward." With respect to professional and public guardians, OPPG rule requires such guardians to allow the ward to socialize with his or her family and friends in accordance with paragraph 744.361(13)(b).[132]

[127] See generally National Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination (2018); National Guardianship Association, *Standards of Practice* (2013), *available at* https://www.guardianship.org/standards/; American Bar Association, Guardianship and Supported Decision-Making, Bifocal Journal of the ABA Commission on Law and Aging, Vol. 38, Issue 2 (December 2016), *available at* https://www.americanbar.org/publications/bifocal/vol_38/issue_2_december2015/guardianship-supported-decision-making.html; and Florida State Guardianship Association, Standards of Practice for Florida Guardianship, *available at* https://www.floridaguardians.com/wp-content/uploads/2016/05/Standards-of-Practice-Final.pdf.

[128] National Guardianship Association, Standards of Practice (2013), *available at* https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf.

[129] Rule 58M-2.009(7)(e)1., Fla. Admin. Code

[130] Rule 58M-2.009(7)(e)2., Fla. Admin. Code

[131] Rule 58M-2.009(7)(f), Fla. Admin. Code

[132] Rule 58M-2.009(4), Fla. Admin. Code.

Bonding Requirements for Guardians of the Property: Except for public guardians[133] and certain financial institutions,[134] each guardian of the property must file a joint and several bond with surety[135] to be approved by the clerk. The bond shall be payable to the Governor, conditioned on the faithful performance of all duties by the guardian. The penal sum of the bond is to be fixed by the court and must be in an amount not less than the full amount of the cash on hand and on deposit belonging to the ward and subject to the control of the guardian, plus the value of other certain assets of the ward.[136]

With respect to such bonds, the court may:

- Increase or reduce the amount of bond or change or release the surety for good cause;
- Waive a bond or require the use of a designated financial institution if the petitioner or guardian presents compelling reasons; or
- Place all or part of the property of the ward in a designated financial institution under the same conditions and limitations specified in section 69.031, Florida Statutes, in lieu of a bond or in addition to a lesser bond.[137]

Section 69.031 addresses the use of designated financial institutions as depository for a ward's or an estate's assets when ordered by a court that has jurisdiction of any estate in process of administration by any guardian, curator, executor, administrator, trustee, receiver, or other officer. In deciding which financial institution to designate as the depository, the court must consider any bank, trust company, or savings and loan association proposed by the officer.[138] A financial institution designated by the court may accept or reject the designation and must file its acceptance or rejection with the court within 15 days after actual knowledge of the designation comes to the institution's attention.[139]

When assets are placed with the designated financial institution, the institution must file a receipt acknowledging the assets it has received for the estate and provide a copy to the officer.[140] After the designated financial institution files the receipt for assets, the court must waive or reduce the amount of the bond, so that it applies only to the part of estate, if any, remaining in the hands of the officer.[141]

[133] Public guardians, upon taking office, must file a bond with surety to be approved by the clerk. The bond purchased by the local office of the public guardian and shall be payable to the Governor, in the penal sum of $5,000 to $25,000, conditioned on the faithful performance of all duties by the guardian. §744.2102, Fla. Stat.
[134] Section 744.351(5), Florida Statutes, states, "Financial institutions as defined in s. 744.309(4), other than a trust company operating under chapter 662 which is not a licensed family trust company or foreign licensed family trust company, and public guardians authorized by law to be guardians are not required to file bonds."
[135] "Bond with surety" means "a bond with two good and sufficient sureties, each with unencumbered property not subject to any exemption afforded by law equal in value to the penal sum of the bond or a bond with a licensed surety company as surety or a cash deposit conditioned as for a bond." §45.011, Fla. Stat.
[136] §744.351(1) and (3), Fla. Stat.
[137] §744.351(1) and (6), Fla. Stat.
[138] §69.031(1), Fla. Stat.
[139] §69.031(4), Fla. Stat.
[140] §69.031(1), Fla. Stat.
[141] §69.031(2), Fla. Stat.

Guardian's Contact Information: Florida Rule of Probate 5.110 requires guardians to file a designation of street and mailing address prior to the issuance of letters of guardianship. If the guardian is an individual, the designation must also include his or her residential address. The guardian must also notify the court of any change in this information within 20 days of a change therein.[142]

Guardians are not currently required under the rules to provide contact information in the initial guardianship report, annual guardianship plan, or annual guardianship accounting, which are respectively addressed in Florida Rules of Probate 5.690, 5.695, and 5.696. Pursuant to section 744.3701(1), Florida Statutes, such reports, plans, and accountings may only be inspected by the court, the clerk, the guardian and the guardian's attorney, and other specified entities unless otherwise ordered by the court.

Public Hearings: Several comments were made at public hearings, stressing the importance of providing decisionmaking assistance that promotes self-determination, dignity, and respect for individuals with disabilities.

Recommendations:

1. Require all guardians to use the "substituted judgment" standard for:
    a. Medical decisionmaking if there is evidence of what the ward or person under guardian advocacy would have wanted; if not, then the decision should be based on the ward's or person's best interest.
    b. Non-medical decisionmaking if there is evidence of what the ward or person under guardian advocacy would have wanted and the decision promotes the ward's or person's best interest; if there is no evidence to support substituted judgment or if the decision does not promote the ward's or person's best interest, then the decision should be based on the ward's or person's best interest.

    Commentary: As discussed in the "Present Situation" section above, nonprofessional/family guardians are required to use the best interest standard while professional and public guardians, under rule that was recently adopted by the OPPG, are required to use the substituted judgment standard except in specified circumstances when the best interest standard applies.[143] The workgroup recommends requiring nonprofessional/family guardians, professional guardians, and public guardians to follow the substituted judgment standard described in the recommendation language above in order to further the concept of self-determination in this state.[144]

    Implementation: Legislation could be sought to amend section 744.361(4), Florida Statutes, which codifies the best interest standard of decisionmaking, to instead require all guardians and guardian advocates to use the above-described substituted judgment standard of decisionmaking.

[142] Fla. Prob. R. 5.110(a).
[143] See Footnotes 130-132.
[144] A comprehensive discussion of the substituted judgment concept can be found in Whitton, et. al., Surrogate Decision–Making Standards for Guardians: Theory and Reality, 2012 Utah L. Rev. 1491 (2012).

Additionally, conforming amendments should be made to other statutes referencing the best interest standard in Chapter 744, Florida Statutes.

Survey: (n = 94) Fifty-one percent of respondents to the survey indicated that they support the recommendation, while 17 percent of respondents did not support the recommendation and 32 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

2. Require guardians and guardian advocates to enable, rather than allow, wards or persons under guardian advocacy to maintain contact with family and friends unless the court, rather than the guardian or guardian advocate, determines that such contact may cause harm to the ward or person.

Commentary: Under current law, a guardian or guardian advocate must, as appropriate under the circumstances, allow a ward or person under guardian advocacy to maintain contact with family and friends unless the guardian or guardian advocate believes such contact may cause harm to the ward or person.[145] To better ensure that wards or persons under guardian advocacy are not isolated from family and friends, the workgroup recommends changing this requirement in the following two ways:

- The guardian or guardian advocate must enable, rather than allow, contact with family and friends, thus requiring the guardian or guardian advocate, if necessary, to assist the ward in making such contact.
- The guardian or guardian advocate must obtain court approval, rather than decide in his or her own discretion, to disallow contact with family and friends.

The specific amendment to statute that is recommended would strike paragraph 744.361(13)(b) and add the following language to another subsection: A guardian who is given authority over a ward's person shall enable the ward to maintain contact with family and friends unless the court determines that such contact may cause harm to the ward. The term "guardian" as used in the section 744.361 includes guardian advocates.[146]

Implementation: Legislation could be sought to amend section 744.361, Florida Statutes, to implement the recommendation.

Survey: (n = 92) Sixty-three percent of respondents to the survey indicated that they support the recommendation, while 29 percent of respondents did not support the recommendation and eight percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

[145] §744.361(13)(b), Fla. Stat.
[146] §393.12(10), Fla. Stat.

3. Require certain procedures and timeframes to be followed when the court requires use of a designated financial institution as a depository for the assets of a ward or person under guardian advocacy and create forms to be used by the parties and institution during the transfer of the assets to the institution.

   Commentary: Statute governing the use of a designated financial institution as a depository for the assets of a ward or person under guardian advocacy does not specify who must notify the financial institution of its designation nor does it specify the timeframe within which such notice must be provided. Additionally, statute does not specify a timeframe within which a designated financial institution must file a receipt for assets placed with the institution. Workgroup members indicated that the failure to specify such requirements can result in great delay or, at worst, result in the assets not being transferred as ordered by the court.

   Accordingly, the workgroup recommends that the following requirements be placed in law:

   A. Require the attorney for the party who proposes the financial institution designated by the court to receive assets under section 69.031, or the attorney for the ward or person under guardian advocacy if another party did not propose the designated financial institution, to provide notice by certified mail of the designation to the financial institution within five days after designation by the court; and
   B. Require the designated financial institution to file a receipt acknowledging the assets it has received for the estate and provide a copy to the guardian or guardian advocate and court within five days after placement.

   The workgroup also recommends that uniform forms be created for the: notice of designation of a financial institution which should indicate that the institution must file its acceptance or rejection with the court within 15 days after receipt of the notice; notice of acceptance or rejection by the designated financial institution; and notice by a designated financial institution of the receipt of assets and the amount received.

   Implementation: The Florida Rules of Probate could be amended to implement the recommendation.

   Survey: Three questions relating to this issue were asked on the survey. The questions asked whether the survey respondent would support the recommendation:

   - In A. above. (n = 93) Forty-two percent answered yes, 37 percent answered no, and 21 percent had no opinion. The Florida Court Clerks and Comptrollers responded yes.
   - In B. above. (n = 90) Seventy-three percent answered yes, 12 percent answered no, and 15 percent had no opinion. The Florida Court Clerks and Comptrollers responded yes.
   - Relating to the creation of uniform forms. (n=90) Seventy-three percent answered yes, 17 percent answered no, and 10 percent had no opinion. The Florida Court Clerks and Comptrollers responded yes.

4. Require the guardian and guardian advocate to list his or her home and mailing addresses, telephone number, and email address on separate addendum to the initial report, annual plan, and annual accounting and allow only the court and clerks to access the information.

   Commentary: Florida Rule of Probate 5.110(a) requires guardians to file their street, mailing, and residential addresses with the court and requires such information be updated within 20 days after a change. Notwithstanding this requirement, such information in practice is often not timely updated. Additionally, there is no requirement to provide an email address which is often a better mechanism by which to contact persons.

   To facilitate the ability of the courts and clerks in being able to timely contact guardians and guardian advocates, the workgroup recommends requiring guardians and guardian advocates to list their home and mailing addresses, telephone numbers, and email addresses on the initial report, annual plan, and annual accounting. The workgroup also recommends that such contact information be made available only to the court and clerks due to concerns about the safety of guardians and guardian advocates, particularly the safety of professional guardians and guardian advocates.

   Implementation: Florida Rules of Probate 5.690, 5.695, and 5.696 could be amended to require guardians and guardian advocates to provide the specified information. Statute or Florida Rule of Judicial Administration 2.420 could be amended to restrict access to only the court and clerks.

   Survey: (n = 94) Forty-five percent of respondents to the survey indicated that they support the recommendation, while 39 percent of respondents did not support the recommendation and 16 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it supports the recommendation.

Focus Area 6: Training Opportunities Available to Judges and Court Staff

Present Situation

As used in the "Present Situation" and "Recommendations" in this Focus Area, the term "guardianship" refers to both guardianship and guardian advocacy and the term "guardian" refers to both a guardian and a guardian advocate.

Florida's judicial branch education system is recognized as one of the best in the country. Resources received through the Court Education Trust Fund (CETF) are the primary source of the branch's education efforts. Under the direction of the Florida Court Education Council (FCEC), the education program provides and monitors critical programming to all state court judges and ancillary personnel, including the area of guardianship.

New trial and appellate judges, as well as magistrates (hearing officers), receive training and education through the Florida Judicial College (FJC). Advanced programs for experienced judges and quasi-judicial officers are provided through the Florida College of Advanced Judicial Studies (AJS). Additional education and training opportunities are offered at the annual education conferences held for county, circuit, and appellate court judges. The CETF also provides ongoing education and training for non-judicial court personnel. Training in guardianship areas is a part of the court education model, with emphasis on the Circuit Conference and AJS. In recent years, however, the CETF has seen a significant reduction in funds available for education programs. A challenge for implementing training opportunities in the area of guardianship is to do so with as little additional reliance on the CETF as possible so as to not jeopardize existing branch education programs.

Florida's judicial branch is committed to a blended learning model that utilizes online distance learning and intranet resources to augment in-person learning opportunities. For instance, the Office of Court Education often partners with the National Judicial College to offer webcasts on various topics. However, the FCEC continues to recognize in-person learning as being the optimum model for court education, highlighted by worthwhile hands-on interaction and exchange of ideas between participants throughout the State.

With this background, the following recommendations serve to make Florida's guardianship judges, hearing officers, and staff even better trained and educated. They also suggest a future in guardianship education that is more closely collaborative among members of the bench, as well as between the bench and the bar.

Public Hearings: Several comments were made at the public hearings, expressing a need for comprehensive training of judges, attorneys, clerks, and volunteers as to all aspects of the guardianship process.

Recommendations:

1. Create a guardianship bench guide.

   Commentary: Florida judges and hearing officers have traditionally used bench guides (or bench books) for easy reference to various sections containing summaries of multiple areas of relevance to in-court proceedings. These bench guides — as their name suggests — are generally maintained in the courtroom at the bench for the judge or hearing officer to refer to during a court proceeding. Formal bench guides are prepared in conjunction with the Publications Section of the FCEC. Florida's judiciary currently lacks a guardianship bench guide.

   A bench guide that includes sections addressing the following topics would assist guardianship judges and county court judges specially assigned to hear guardianship cases. It could also foster greater uniformity in the procedures and practices implemented by the judiciary statewide:

   - Person-centered planning and self-determination;
   - Matrix of various decisionmaking needs with corresponding legal options;
   - Currently available alternatives to guardianship including supported decisionmaking as well as alternatives that address functional limitations;
   - Use of a medical proxy as an alternative to an emergency temporary guardian;
   - Roles of attorneys and judges in guardianship;
   - The ten critical events in a plenary guardianship;
   - Examining committee responsibilities and reports;
   - Capacity versus competency;
   - Setting bonds;
   - Plenary versus limited guardianships;
   - Delegable and non-delegable rights;
   - Screening of guardians for eligibility and conflicts of interest;
   - Ability to appoint banks and trust companies as guardians of the property;
   - Guardian reporting requirements;
   - Guardian and attorney fees and costs and other guardianship expenses;
   - Restoration of rights;
   - Progressive Rights Restoration Plans; and
   - Termination of guardianships.

   Implementation: Due to recent reductions in the CETF, several positions in the Court Education Section of the Office of the State Courts Administrator (OSCA) have been frozen or eliminated. As a result, OSCA staff will have to increasingly rely on the Conference structure to create bench guides with decreasing staff oversight. As has been done with other bench guides, the Education Committee of the Circuit Conference may be able to create a subcommittee of local judges to draft and manage each of the sections proposed for the guardianship bench guide. By spreading the responsibility among several judges, the burden of creating the product should be ameliorated. While the creation of a bench guide would initially cause an increase in the workload of some

judicial resources (i.e., those judges actually creating and editing the bench guide), subsequent updates should be manageable within the court education structure currently existing.

Survey: (n = 17) Judges and Magistrates were asked whether they would use a bench guide on guardianship? Ninety-four percent responded yes and six percent responded no.

2. Design a more comprehensive court education guardianship training program, and encourage county court judges and clerks of court who handle guardianship matters to participate in the training. Additionally, make use of existing intranet services to disseminate forms, materials, and presentations related to guardianship, such as those used at the FJC or AJS.

   Commentary: Current guardianship training opportunities are generally focused on Circuit Judges and are offered primarily through the FJC, AJS, and the education program of the Conference of Circuit Judges. The comprehensive program scheduled at AJS is not offered frequently, and when offered has been limited to about 40 judges, with a strong wait list. Moreover, guardianship training is seldom offered to County Court Judges, although in mid-2017 about 31 County Court Judges statewide were involved to some degree in presiding over guardianship matters.

   Recently, a large minority of Florida's County Court Judges (142 out of 322) stated in an online needs assessment survey that they would consider taking guardianship training if offered through the Conference of County Court Judges education program. This suggests that many more County Court Judges may be willing to preside over guardianship matters if offered the relevant training, providing a broader competent judicial resource pool to tap in the future.

   OSCA currently makes education and training materials readily accessible to judges and court staff by maintaining an intranet page that serves as a repository of resource material across the various subject matter areas of the judiciary's jurisdiction. The addition of materials to the intranet, however, is sometimes irregular.

   Implementation: The FCEC could consider adding guardianship training to the "General Track" of the County Conference structure, but this may result in one less course being offered which might be in a field more traditionally falling within the jurisdiction of the County Court. Alternatively, the FCEC could consider opening the Circuit Conference probate track to County Court Judges who preside over guardianship matters; however, such training would require additional travel reimbursement not currently contemplated by the CETF or local jurisdiction.

   It is recommended that the FCEC assist in implementing this recommendation and consider a full range of training modalities to enhance guardianship education opportunities. Additionally, existing procedures under the FJC, AJS, and Circuit and County Conferences could facilitate creation of these programs within existing frameworks. Because all three of these education programs fall within the ambit of the FCEC, any possible conflict between competing programs can be addressed.

With respect to the use of existing intranet services to disseminate guardianship-related materials, a point person (judge) could be designated through the Conference of Circuit Court Judges or FCEC and tasked with ensuring that up-to-date materials pertaining to guardianship are quickly placed on the intranet in an easily accessible format, such as pdf or PowerPoint. A model for this position that could be followed would be to create a position of Technology Chair, or something similar, as has recently been done by the Conference of County Court Judges. This Technology Chair has been tasked with assisting the Office of Court Education team in integrating technology tools with existing education modalities. Because addition of these materials on the intranet deals with existing materials, the actual task of placing the materials on the intranet should not be burdensome.

Additionally, the FCEC could explore adding video links to past training presentations.

Survey: (n = 17) Judges and Magistrates were asked whether they would support:

- Designing a more comprehensive court education guardianship training program and encouraging county court judges, magistrates, and clerks of court working in the guardianship area to participate in the training. Ninety-four percent responded yes and six percent had no opinion.
- Using existing intranet services to disseminate forms, materials, and presentations related to guardianship, such as those presented at the FJC or AJS. One hundred percent responded yes.

3. Seek assistance from The Florida Bar and local bar associations to augment guardianship training for judges, hearing officers, clerks, and attorneys.

   Commentary: Some circuits have been successful in creating a relationship between the bench and local bar by hosting recurring CLE lunches and meetings to keep abreast of the law and changes in procedure. A successful program requires continuing support by the local judges presiding over guardianship cases. A particularly successful “lunch and learn” program has been implemented in Miami-Dade County, while attorneys and judges in Palm Beach County recently brought all stakeholders together for a panel discussion as part of the Circuit’s recurring Bench-Bar Conference.

   Implementation: Information on how to create a local program could be disseminated throughout the judiciary and made part of a guardianship bench guide.

   Survey: (n = 17) Judges and Magistrates were asked whether they support the recommendation. Eighty-two percent responded yes and 18 percent had no opinion.

4. Require each judge and hearing officer assigned to guardianship proceedings to certify that he or she has read the document entitled, "Judicial Determination of Capacity of Older Adults in Guardianship Proceedings for Judges," before his or her first hearing (the document may be found at https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf).

Commentary: The Judicial Determination of Capacity of Older Adults in Guardianship Proceedings for Judges is a publication created by the American Bar Association Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges. It contains less than 20 pages of text and offers 70 pages of model forms and worksheets. The publication was created to provide "a framework that judges may find useful and effective in capacity determination." It is available at no charge at the above-referenced link and given its concise nature it should not result in a burdensome task on the judge or hearing officer.

Implementation: This recommendation could be implemented through OSCA, as is similarly done now with the regular mentorship program for new judges, or through the local Chief Judge. An administrative order of the Florida Supreme Court may be necessary to effectuate this as an ongoing requirement.

Survey: (n = 17) Judges and Magistrates were asked whether they support the recommendation. Forty-two percent responded yes, 29 percent responded no, and 29 percent had no opinion.

5. Throughout the state, pair experienced guardianship judges who are willing to volunteer their time to serve as mentors with newly-assigned guardianship judges.

Commentary One of the components of the FJC is a one-year mentorship for new judges. Since 1991, newly elected and appointed trial court judges have been paired with more experienced members of the judiciary as part of Florida's Judicial Mentor Program. Designed to make the transition from the bar to the bench as seamless as possible, the Mentor Program ensures new judges have ready access to critical information, court resources and one-to-one guidance immediately upon assuming the bench.

Through the program, new judges are assigned a trained mentor judge within 48 hours of election or appointment. Mentors are expected to contact the new judges and schedule an initial meeting within a week of the assignment. The first meeting routinely takes place before the new judge begins to hear cases, and is set early so that the new judge may be afforded an opportunity to observe other judges handling matters over which he or she will later be expected to preside. Though not an exclusive resource, mentors are a primary contact for new judges during their first full year in office.

This mentorship program does not address specific subject matter; rather, it addresses a broad range of issues affecting the local judge. The results of a needs assessment survey conducted in early mid-2017, as well as other anecdotal information, reveal that many judges assigned to handle guardianship cases have little experience in the field. A mentorship program focused on guardianship would serve to fill a void that may exist in many parts of the State where interaction with local experienced judges might not be available.

Implementation: The recommendation could be implemented by recruiting judges who are experienced in guardianship to serve as volunteer mentors who would be available for telephone calls and email inquiries from new guardianship judges. The list of judges could be publicized, as is

similarly done for the Judicial Ethics Advisory Committee, which enables judges to call a judge in another part of the state to discuss a question. Another possibility could be to facilitate discussions through an online forum, such as currently exists on the County Conference website. Because the assistance of the mentor judge would be intermittent as questions arise, the participation as mentor should not result in any discernible increase in the mentor judge's work.

Survey: (n = 17) Judges and Magistrates were asked whether they support the recommendation. Eighty-eight percent responded yes, six percent responded no, and six percent had no opinion.

Miscellaneous Recommendations Relating to Multiple Focus Areas

Present Situation

Alternative Dispute Resolution Processes

Mediation: Mediation means a process wherein a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties with a mutually acceptable and voluntary agreement. The process is informal and non-adversarial and the parties to the mediation hold the decisionmaking power.[147] The mediator's responsibilities include, but are not limited to, helping the parties identify issues, fostering joint problem solving, and exploring settlement alternatives.[148] Under statute and court rule, judges have the authority to order most types of contested civil cases to mediation prior to trial.[149]

Mediation is used to address guardianship disputes. For example, the Thirteenth Judicial Circuit's website indicates that it conducts court-ordered mediation for disputes relating to the establishment and appointment of guardianship; guardianship relationships; the guardianship estate; and medical care and placement both before and after guardianship is established.[150]

Eldercaring Coordination: A dispute resolution process called eldercaring coordination has recently been piloted in Florida. Eldercaring coordination involves the resolution of conflicts through the use of a neutral person known as an eldercaring coordinator, who "assists elders, legally authorized decision-makers, and others who participate by court order or invitation to resolve disputes with high conflict levels in a manner that respects the elder's need for autonomy and safety."[151] Eldercaring coordination is of particular use when:

- Mediation is no longer productive;
- Alliances have been formed and family members are taking sides;
- Disputes are constant, rather than isolated issues to be resolved; or
- Conflict is historic, over years or decades.[152]

Eldercaring coordinators assist in dispute resolution in such situations by:

- Facilitating more effective communication, negotiation, and problem-solving skills;
- Offering education about elder care resources;

[147] §44.1011(2), Fla. Stat.
[148] §44.1011(2), Fla. Stat.
[149] §44.102, Fla. Stat.; Fla. R. Civ. P. 1.710.
[150] See Thirteenth Judicial Circuit, Guardianship Mediation, *available at* http://www.fljud13.org/CourtPrograms/MediationDiversionServices/GuardianshipMediation.aspx.
[151] Florida Eldercaring Coordination, Avenue to Peace from Disputes Surrounding Care of Elders, *available at* https://www.eldercaringcoordinationfl.org/what-is.html.
[152] Id.

- Facilitating the creation, modification, or implementation of an elder care plan if such a plan is necessary to reach a resolution;
- Making recommendations for resolutions; and
- Making decisions within the scope of a court order or with prior approval of the parties.[153]

Currently, eight Florida judicial circuits are piloting eldercaring coordination.[154]

Collaborative Law: Another recent development in alternative dispute resolution in Florida is a process known as collaborative law. The collaborative law process is defined in statute as "a process intended to resolve a collaborative matter without intervention by a tribunal and in which persons sign a collaborative law participation agreement and are represented by collaborative attorneys."[155] Under the Collaborative Law Process Act,[156] passed by the Legislature in 2016, a "collaborative matter" is "a dispute, a transaction, a claim, a problem, or an issue of resolution, including a dispute, a claim, or an issue in a proceeding, which is described in a collaborative law participation agreement . . . ."[157]

The Act describes the collaborative law process as "a unique nonadversarial process that preserves a working relationship between the parties and reduces the emotional and financial toll of litigation."[158] The collaborative law process may only be used to address matters arising under chapters 61 or 742, Florida Statutes, which govern premarital and marital agreements, divorce, annulment, child custody, child support, alimony, paternity, and other specified issues.[159] In 2017, the Florida Supreme Court adopted rules of procedure and professional conduct to accompany the Florida Collaborative Law Process Act.[160]

As the statute states, it is the public policy of the State "to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process."[161] Both the Collaborative Law Process Act and Family Law Rule of Procedure 12.745 note that the collaborative law process begins when the parties enter into a collaborative law participation agreement, regardless of whether a legal proceeding is pending.[162] All parties to a collaborative law

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[153] Id.
[154] Florida Eldercaring Coordination, Florida Pilot Sites, *available at* https://www.eldercaringcoordinationfl.org/florida-pilot-sites.html.
[155] A "collaborative attorney" is defined as "an attorney who represents a party in a collaborative law process." §61.56(1), Fla. Stat.
[156] §§61.55 to 61.58, Fla. Stat.
[157] §61.56(5), Fla. Stat.
[158] §61.55, Fla. Stat.
[159] §61.56(5), Fla. Stat.
[160] In re: Amendments to Rule Regulating The Florida Bar 4-1.19 and Florida Family Law Rule of Procedure 12.745 (Collaborative Process), 218 So. 3d 440 (Fla. 2017); R. Regulating Fla. Bar 4-1.19; Fla. Fam. L. R. P. 12.745. Both the Collaborative Law Process Act and the rules are based on the Uniform Collaborative Law Act and Rules (UCLA), which were adopted by the National Conference of Commissioners on Uniform State Laws. http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul; See also Robert Joseph Merlin, The Collaborative Law Process Rules: This Is How We Do It, Florida Bar Journal April, 2018, 92-APR Fla. B.J. 36.
[161] §61.55, Fla. Stat.
[162] §61.57(1), Fla. Stat.; Fla. Fam. L. R. P. 12.745(b)(1).

process must be represented by an attorney.[163] The successful collaborative law process ends by the parties signing a written settlement agreement resolving all or some of the disputed issues. If any issues are not resolved by the process, the written agreement must provide that the outstanding issues will not be solved by the collaborative law process.[164] Any party may unilaterally end the process at any time, with or without cause.[165]

Trial Court Administration: Pursuant to Florida Rule of Judicial Administration 2.215(b)(3), the chief judge for each circuit shall ensure the efficient and proper administration of all courts within that circuit and shall develop an administrative plan for the organization which is capable of effecting the prompt disposition of cases; assignment of judges and others; control of dockets; regulation and use of courtrooms; and periodic review of the status of the inmates of the county jail.[166]

Under the rule, the plan must also "be compatible with the development of the capabilities of the judges in such a manner that each judge will be qualified to serve in any division, thereby creating a judicial pool from which judges may be assigned to various courts throughout the state."[167] For this reason, judges are typically required to rotate court divisions to gain varied experience throughout their service according to schedules established by administrative order.

Public Hearings: During the public hearings, several comments were made regarding how effective alternative dispute resolution processes can be in guardianship. Successful examples included:

- Assisting a family in identifying less restrictive alternatives that met the person's decisionmaking needs instead of guardianship;
- Assisting a family before guardianship proceedings in identifying which family members would be responsible for certain guardianship duties and where the person would live, thereby shortening the legal process and reducing costs; and
- Facilitating communication between a ward, his family, and his professional; thus, creating a less contentious guardianship without court involvement and avoiding legal fees.

Recommendations:

1. <u>Require courts to consider referring guardianship and guardian advocacy proceedings to mediation, eldercaring coordination, or other alternative dispute resolution processes:</u>
    - <u>Before determining incapacity or the appointment of a guardian advocate to explore alternatives to guardianship and guardian advocacy; and</u>
    - <u>After an adjudication of incapacity or the appointment of a guardian advocate to resolve disputes.</u>

[163] §61.56(4), Fla. Stat.
[164] Fla. Fam. L. R. P. 12.745(b)(2)(B)
[165] Fla. Fam. L. R. P. 12.745(b)(2)(C)
[166] Fla. R. Jud. Admin. 2.215(b)(3).
[167] <u>Id.</u>

Establish a collaborative law process for guardianship and guardian advocacy in statute, which is similar to the Collaborative Law Process Act set forth in sections 61.55-61.58, Florida Statutes, and adopt rules of procedure and professional conduct.

Commentary: Greater implementation of alternative dispute resolution processes in guardianship and guardian advocacy cases will encourage the peaceful and early resolution of disputes and has the potential to result in:

- More frequent use of less restrictive alternatives, thereby maintaining the person's rights, independence, and dignity to the greatest degree possible.
- Maintenance of less contentious relationships among all parties.
- Lowering the expense caused by litigation for AIPs, wards, persons for whom guardian advocacy is sought, and persons under guardian advocacy.
- Lowering the burden on taxpayer-funded resources including OPPG, the courts, and the clerks.

For these reasons, the 2orkgroup recommends that courts be required to consider alternative dispute resolution processes in all guardianship and guardian advocacy matters. Further, the workgroup recommends that the fees assessed for such processes be made consistent with the fees assessed for alternative dispute resolution processes in other case types, e.g., section 44.108, Florida Statutes, specifies the amount of income-based fees that may be collected for court-ordered family mediation provided by a circuit court's mediation program.

Implementation: The rules in Part III. Guardianship of the Florida Rules of Probate could be amended to require courts to consider the above-described alternative dispute resolution processes and others that may develop over time. Statute would need to be amended to authorize use of the collaborative law process in guardianship and guardian advocacy proceedings.

Survey: (n = 92) Fifty-three percent of respondents to the survey indicated that they support the recommendation, while 27 percent of respondents did not support the recommendation and 20 percent of respondents indicated no opinion. The survey response from the Florida Court Clerks and Comptrollers indicated that it does not have sufficient information to render to a professional opinion.

2. Allow the chief judge of each circuit to grant an exception to the rotation requirement for judges who handle guardianship and guardian advocacy cases and who want to continue serving the probate division.

Commentary: Implementation of the recommendation could result in increasing the pool of judges with significant experience in guardianship and guardian advocacy law, which in turn could result in more efficient and effective case management and in more judges being able to serve as mentors if Recommendation 5 under Focus Area 6 is implemented.

Implementation: Currently, Florida Rule of Judicial Administration 2.215(b)(3) does not strictly prohibit a chief judge from granting exceptions to a rotation schedule; however, it does require that a circuit's administrative plan be compatible with the development of the capabilities of the judges in such a manner that each judge will be qualified to serve in any division. To assure chief judges that exceptions to a rotation schedule would be authorized in the guardianship and guardian advocacy areas, the Supreme Court could issue guidance that encourages such exceptions.

Survey: This recommendation was made after the survey was distributed; thus, a question regarding this issue was not asked.

Next Steps

Going forward, the workgroup notes that it is critically important for a consistent focus to be maintained with respect to ensuring that courts are best protecting the wellbeing of persons who have a guardian or guardian advocate and persons who need decisionmaking assistance. Some of the recommendations in this report will require close coordination among the three branches of government over time and the speed and success of these efforts should be monitored. Continued leadership by the judiciary in concert with WINGS and its more than 40-member group of stakeholders and steering committee members is expected to result in the multidisciplinary, collaborative development of comprehensive strategies that will work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of persons needing decisionmaking assistance.

APPENDIX A

List of Resources Available to Workgroup http://www.flcourts.org/resources-and-services/court-improvement/family-courts/guardianship-resources.stml

Associations & Agencies

American Bar Association (ABA)

- Adult Guardianship Handbooks by State - ABA (2012)
- Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers - American Bar Association and American Psychological Association
- Guardianship and Supported Decision-Making Law and Practice (multiple resources listed on left side of page)
- Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges
- Practical Tool for Lawyers: Steps in Supporting Decision Making
- Research and Recommendations on Restoration of Rights in Adult Guardianship - 2017
- Resolution on Supported Decision-Making (8-14-17)
- State Adult Guardianship Legislation - Direction of reform 2016
- Steps in Supporting Decision Making - ABA Practical Tool for Lawyers
- Third National Guardianship Summit Standards and Recommendations
- 2007 Guardianship Monitoring: A National Survey - Erica Wood and Naomi Karp, Stetson Law Review

American Bar Association (ABA) Commission on Law and Aging

- ABA Commission on Law and Aging

American Judges Association

- Journal of the American Judges Association - Articles on elder protection courts & surrogate decision makers

Center for Elders and the Courts

- Center for Elders and the Courts (NCSC) - Role and Responsibilities
- Center for Elders and the Courts (NCSC) - Monitoring / Fees and Services
- Center for Elders and Courts: WINGS State Replication guide (2014)
- Adult Guardianship Strategic Action Plan - December 2016, NCSC Center for Elders and the Courts

Center for Guardianship Certification

- Center for Guardianship Certification

Conference of Chief Justices and Conference of State Court Administrators

- Resolution urging social security administration to amend its regulations regarding representative payees

International Guardianship Network

- International Guardianship Network

National Academy of Elder Law Attorneys (NAELA)

- WINGS Network Information (with intro video by Eric Washington, Chief Judge, DC District Court of Appeals)
- WINGS by state

National Association of Court Management (NACM)

- Adult Guardianship Guide National Association of Court Management 2013-14
- How to Protect our Nation's Most Vulnerable Adults through Effective Adult Practices - NACM with Brenda Uekert (NCSC), (1 hour webinar)

National Center for Elder Abuse

- National Center on Elder Abuse: Florida Resource Directory

National Center for State Courts (NCSC)

- Justice Responses to Elder Abuse - NCSC FREE online course
- National Center for State Courts Guardianship Resource web page
- The Need for Improved Guardianship Data - Dr. Brenda Uekert, NCSC
- 2010 Adult Guardianship Court Data and Issues (Results) - CCJ/COSCA with NCSC

National Guardianship Association (NGA)

- Ethical Principles
- National Guardianship Association
- Right to Association - Position Statement - 2016
- Standards of Practice

National Guardianship Network

- National Guardianship Network

Social Security Administration

- 2014 Survey of State Guardianship Laws and Court Practices - Administrative Conference of the United States (ACUS) see web page: SSA Payee Webpage & Survey Questions (Appendix A) (The study conducted research on current state guardianship/conservatorship statutes nationwide, as well as survey state courts on their respective practices concerning the selection, monitoring and sanctioning of guardians/conservators.)

Uniform Law Commission

- Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act - 2011
- Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act Summary
- Uniform Guardianship and Protective Proceedings Act -10-16 draft (UGPPA)
- Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPA replaces UGPPA)

Florida Resources

- Best Practices Guardianship Audit - FCCC (2015)
- Best Practices Guardianship Audit - Appendix (2015)
- Clerk of the Courts' Presentation about Statewide Investigations Alliance - 2016
- Collaborative Law Process Rules
- Eighth Judicial Circuit Guardianship Checklists and Forms
- Eleventh Judicial Circuit - Guardianship Smart Forms & Checklists
- Examining Committee Reports as a Basis to Dismiss Petitions to Determine Incapacity: A Questions of Admissibility and Evidentiary Relevancy
- Expert Witnesses in Florida's Trial Courts
- Fiduciary Lawyer-Client Privilege - Proposed Amendment to Florida Evidence Code 2017
- Florida Commission on Access to Civil Justice - Reports
- Florida Courts Guardianship web page
- Guardianship Monitoring in Florida (2003)
- Palm Beach Guardianship Monitoring Program Offers Innovative Model - Bifocal - 2014
- Seventeenth Judicial Circuit
- Standards of Practice for Florida Professional Guardians - Office of Public and Professional Guardians
- Statewide Investigation Alliance: FL Department of Elder Affairs Office of Public and Professional Guardians & Clerks of Circuit Court 2016

- Statewide Investigations of Guardians Program
- Thirteenth Judicial Circuit Guardian Fee Workshop - Final Report, August 3, 2009

The Florida Bar - The Real Property, Probate and Trust Section (RPPTL)

- Chapter 745 Guardianship Code 6-2016.pdf - Revised Statutory Language proposed by RPPTL
- Professional Fiduciary Act language sent 11.19.2016 by RPPTL

Reports, Guides, & Other Resources

- Adult Guardianship Court Data and Issues Results from an Online Survey 2010
- Adult Guardianship Strategic Action Plan - December 2016, National Center for State Courts Center for Elders and the Courts
- Developing Abilities Legal Manual (Text Only - Final Version)
- Developing Abilities & Restoring Rights - User Guide
- Developing Abilities & Restoring Rights - Workbook
- Elder Law Task Force 2014 Report - Pennsylvania
- General Accounting Office Report - 2016
- Guardianship Fraud Hotline - 25 Red Flags
- Michigan Rights of Individual under Guardianship
- Minnesota Guardianship Information
  - Guardianship web page
  - MyMNConservator (MMC) - online conservator account reporting application
  - Guardianship/Conservatorship Training Video (Minnesota) (34 minutes)
- New Yorker article on Guardianship and the Elderly 4.1
- New Yorker article - Reply
- Ohio Guardianship Task Force
  - Ohio Adult Guardianship Education Program - the Ohio Judicial College offers education opportunities for guardian ad litems and guardians of adults.
  - Rules of Adult Guardianship education
    - Superintendence Rule 66.06 and Superintendence Rule 66.07 describes mandatory adult guardianship education for a one-time fundamentals course and continuing education requirements for each following year. To help meet this requirement, the Supreme Court of Ohio is offering free courses to guardians of adults.
- Pennsylvania Courts Report and Recommendations of the Elder Law Task Force
- Restoration of Capacity Study and Work Group Report - 2014
- Special Education Reform Comments - Quality Trust 7-3-14
- Special Education Reform Comments - Quality Trust 8-21-15

- Special Education Reform Comments - Quality Trust 5-26-16
- Special Education Reform Expansion Act - Washington DC
- Standards for Guardian Fees - Catherine Seal & Spencer Crona (HeinOnLine)
- State of Washington Grievance Report (2015) - Certified Professional Guardianship Board
- Surrogate Decision Making for Guardians
- Testamentary Capacity and Guardianship Assessments
- Utah Ad Hoc Committee on Probate Law and Procedure (2009) (PDF)

Other Guardianship Webinars and Videos

- DC Superior Courts - Brochures and Videos
- Utah Guardianship Training

APPENDIX B

Less Restrictive Alternatives to Guardianship[168]	
Type	**Description**
Supported Decision-Making	Through this process, persons with disabilities choose trusted others "to support them in making their own decisions and exercising their legal capacity. Supporters can be friends, family, professionals, advocates, peers, community members, or [others]. They may gather and present relevant information; help the person to understand and communicate the decision to third parties such as health care professionals and financial institutions; or assist in implementing the decision."[169]
Banking Services	Decision-making assistance for money management issues may be provided through banking options such as joint bank accounts that allow another person to assist with the payment of bills or prepaid debit cards to control spending.[170]
Durable Power of Attorney	A power of attorney (POA) is "a writing that grants authority to an agent to act in the place of the principal, whether or not the term is used in that writing." A durable power of attorney (DPOA) provides that the POA remains in force even if the person becomes incapacitated at a later time.[171] A POA and DPOA may be recorded with the clerk of court.[172]
Representative Payee	A representative payee is a person or entity appointed by the Social Security Administration to receive the Social Security or Supplemental Security Income benefits for a person who cannot manage or direct the management of his or her benefits. A representative payee's primary duties are to use the benefits to pay for the current and future needs of the beneficiary, and to save any benefits not needed for current expenses.[173]
Advance Directives	An advance directive is "a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of [chapter 765, Florida Statutes]."[174]

[168] Florida Developmental Disabilities Council, Inc. and Guardian Trust, Lighting the Way to Guardianship and Other Decision-Making Alternatives – A Manual for Individuals and Families, *available at* https://www.fddc.org/sites/default/files/LTW_FamilyManual2017%20-%201.pdf.
[169] ABA Urges Supported Decision Making as Less-Restrictive Alternative to Guardianship, 38 No. 6 Bifocal 95 (July-August 2017).
[170] Footnote 168 at p. 32.
[171] §§709.2102(4) and (9) and 709.2104, Fla. Stat.
[172] §709.2106(6), Fla. Stat.
[173] Social Security Administration, Frequently Asked Questions (FAQs) for Representative Payees, *available at* https://www.ssa.gov/payee/faqrep.htm.
[174] §765.101(1), Fla. Stat.

Medical Proxy	A medical proxy is an adult who has not been designated to make health care decisions for an incapacitated person, but who is statutorily authorized to make health care decisions for the person.[175]
Trusts	A trust is a fiduciary obligation or relationship in which one person, called the trustee, holds a property interest for the benefit or use of another person.[176]
Special Needs Trust	A special needs trust is established to enable a person with a physical or mental disability to qualify or maintain eligibility for public benefit programs while being able to use property in the trust for the person's own benefit. The trust is administered by a trustee who manages the assets and income of the trust. The beneficiary of the trust cannot be the trustee. The assets of the trust are for the benefit of the person with the disability; however, the person with the disability has no power or authority to manage the trust assets.[177]
ABLE Accounts	"The Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act, a federal law enacted in December 2014, authorizes each state to establish a program that offers **tax-free** savings and investment options to encourage individuals with a disability and their families to save private funds to support health, independence, and quality of life." "The Florida legislature passed the Florida Achieving a Better Life Experience Act, which was signed into law by Governor Rick Scott on May 21, 2015. This state law establishes ABLE United, to oversee the state of Florida's qualified ABLE program, which is called ABLE United." "Generally, funds in (or withdrawn from) an ABLE United account are disregarded when determining Supplemental Security Income (SSI) or Medicaid eligibility."[178]

[175] §§765.101(19) and 765.401, Fla. Stat.
[176] Trusts are governed by Chapter 736, Florida Statutes, entitled the "Florida Trust Code."
[177] Footnote 168 at pp. 39-43.
[178] ABLE United, Save for a Better Life Experience, *available a*t http://www.ableunited.com/learn/about-able/.