

Guardianship, Guardian Advocacy and the Alternatives

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Agenda

- Overview
- Alternatives to Guardianship
 - Supported/Shared Decision Making
 - Substituted Decision Making
- Guardian Advocacy
- Guardianship
- Next Steps and what else do they need to know?
- Resources





Why Do Parents Have to Do Something at 18?

- Everyone is presumed competent at the age of 18 unless a judge determines otherwise.
- What are some of the fears of parents regarding children with disabilities?
 - Parents will no longer be able to make medical decisions or consent to treatment
 - My child may be exploited or taken advantage of in some way financially.
 - No one will help my child or let me help them.
 - I can no longer advocate for my child or protect them.
 - I can no longer advocate for my child at school.



How Can We Address Those Fears?

Fears

- Financial abuse
- Doctor won't talk to parents/discuss treatment, etc.
- No one to act on their behalf
- Behaviors and parents can't protect them
- Educators won't talk to parents, etc.

Possible Solutions

- Freeze credit (https://tinyurl.com/4eykay26)
- Sign a Release of Information/HIPAA Release
- Parents' own estate planning
- Registry through
 OCSD/identifying bracelet/seat
 belt/shoe tag, etc.
- FERPA







Florida Developmental Disabilities Council, Inc.

Supported/Shared Decision Making





Supported/Shared Decision Making (SDM)

A tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices. A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters. (from the ACLU website)

The supporters agree to help the person with a disability understand, consider, and communicate decisions, giving the person with a disability the tools to make informed decisions. (from the ACLU website)

Supported Decision Making in FL now:

- Not currently the law in the state of Florida (there are active discussions about making this a law in Fla. Stat. § 709 or Fla. Stat. § 393)
- HB 73 (2023) now looking at adding language to Fla. Stat. § 393.12
- SDM has been raised in legislative sessions for 2021, 2022 and 2023



Potential Problems with Supported/Shared Decision Making:

- This is not currently the law in the state of Florida.
- People, agencies, and asset holders may not be familiar with this concept.
- It works until it doesn't.
- There could be a potential for fraud and undue influence, manipulation, coercion, or other abuse.
- This could be a boon for litigation.
- Proceed with caution!



Where Can I Learn More About This?

- •ACLU Disability Rights Program, www.aclu.org/disability
- National Resource Center for Supported Decision Making,

www.supporteddecisionmaking.org

- •Quality Trust for Individuals with Disabilities, www.dcqualitytrust.org
- •Florida Developmental Disabilities Council, Inc. www.fddc.org
- Disability Rights Florida disabilityrightsflorida.org

https://disabilityrightsflorida.org/disability-

topics/disability_topic_info/what_is_supported_decision_making



Substituted Decision Making





Durable Power of Attorney

Fla. Stat. § 709.2104

A power of attorney is a legal document <u>delegating authority from one person to another</u>. In the document, the maker of the power of attorney (the "principal") grants another (the Agent) the right to act on their behalf. What authority is granted depends on the provisions of the power of attorney.

What are some uses of a power of attorney? (Fla. Stat. § 709.2201 Authority of agent/709.2208 Banks and other financial institutions)

A power of attorney may be used to give another the right to sell a car, home or other property. It might be used to allow another to access bank accounts, sign contracts, handle financial transactions or sign legal documents for the principal. A power of attorney may give another the right to do almost any legal act that the maker of the power of attorney could do, including the ability to create trusts and make gifts.

Must a person be competent to sign a power of attorney? (Fla. Stat. § 765.101 Definitions (11) Informed consent (Principal means competent adult/Fla. Stat. § 765.302(1) Procedure for making living will "Any competent adult")

Yes. The principal must understand the power of attorney document at the time it is signed. The principal must understand the effect of a power of attorney, to whom the power of attorney is being given, and what property may be affected by the power of attorney.

(as explained in the Consumer Pamphlet, Florida Power of Attorney)

Health Care Surrogate

Fla. Stat. § 765.101 Definitions (21) Surrogate/Fla. Stat. § 765.202 Designation of a health care surrogate)

A Health Care Surrogate is a legal document that names another person as the Principal's representative to make medical decisions for the Principal if they cannot make such decisions for themselves. This can include specific instructions about any treatment the principal wants or does not want, similar to a living will. An alternate surrogate can also be designated.

Every competent adult has the right to make decisions concerning their health, including the right to choose or refuse medical treatment. Fla. Stat. § 765.102(1)

http://www.floridahealthfinder.gov/reports-guides/advance-directives.aspx



Can a Person With IDD Sign Advanced Directives in Florida?

Fla. Stat. § 393.12

- (7) ADVANCE DIRECTIVES FOR HEALTH CARE AND DURABLE POWER OF ATTORNEY.—In each proceeding in which a guardian advocate is appointed under this section, the court shall determine whether the person with a developmental disability has executed any valid advance directive under chapter 765 or a durable power of attorney under chapter 709.
- (a) If the person with a developmental disability has executed an advance directive or durable power of attorney, the court must consider and find whether the documents will sufficiently address the needs of the person with a developmental disability for whom the guardian advocate is sought. 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 which will sufficiently address the needs of the person with a developmental disability.

Potential Challenges with Substituted Decision Making:

Neither the Durable Power of Attorney nor the Health Surrogate gives the Agent the right to make decisions <u>against the will</u> of the Principal. (Fla. Stat. § 765.105 Review of surrogate or proxy's decision (1) (a) (d) and (e))

Examples:

If the Principal declines medical treatment, then the Agent cannot authorize that treatment nor force the Principal to accept that medical treatment.

Further, if the Principal makes poor financial decisions, the Durable Power of Attorney does not give the Agent the right to stop the Principal.





Guardian Advocacy

Guardian Advocacy Generally:

Fla. Stat. § 393.12 provides a streamlined legal process where the court removes certain rights from the person with an intellectual or developmental disability (IDD) and appoints a Guardian Advocate to make specific decisions for that person.

A legal process with all of the oversight and control of the court for the lifetime of the person with IDD <u>or</u> until the rights removed are restored to that person.

Guardian Advocacy

- Basis of Disability: Developmental Disability as defined in Fla. Stat. § 393.063(11)
- <u>Types</u>: Person and/or Property
 - Limited
 - Plenary (ish)
- Which rights can be taken away? Some, but not all (Fla. Stat. § 393.12 (2) (a))
 - Some circuits resolve by only taking away those that can be delegated vs. those that cannot.



Guardian Advocacy, (cont.)

- 1. Developmental Disability: (Fla. Stat. § 393.063(11)): a disorder or syndrome that is attributable to:
 - a. Intellectual Disability
 - b. Cerebral Palsy
 - c. Down syndrome
 - d. Phelan-McDermid syndrome
 - e. Prader-Willi syndrome
 - f. Spina Bifida

That constitutes a substantial handicap that can reasonably expected to continue indefinitely.



Guardian Advocacy, (cont.)

- **Is an attorney required?** (Fla. Stat. § 393.12(2)(b) Appointment of guardian advocate)
 - If the person with IDD has <u>property</u>, the Petitioner/Guardian <u>must</u> have an attorney.
 - If the person with IDD does not have property and the petitioner is seeking Gua Adv of the person only, the Petitioner/Guardian does not have to be represented by an attorney.
 - During the Guardian Advocacy proceedings, the Court will appoint an attorney for the person with a developmental disability to ensure that his or her best interests are protected during the process.

All Reports Relevant to the Person's Disability

- While not required, the best practice is to file a letter/report from the treating physician that person with IDD: (Fla. Stat. § 393.12/Fla. Prob. R. 5.649)
 - Has an Intellectual or Developmental Disability that manifested before the age of eighteen (Fla. Stat. § 393.063 (11)); and
 - that the individual is unable to handle his/her affairs related to finances and physical well-being; and
 - that he/she does need the assistance of a guardian advocate to meet the essential requirements for his/her physical health and/or safety.

The report should mirror a typical Examining Committee report that identifies where the individual lacks the decision-making ability to do (list) and what they do have the decision-making ability to do (list).



All Reports Relevant to the Person's Disability, (cont.) Fla. Stat. § 393.12(6)(d)

However, you can also provide any of the following:

- All reports relevant to the person's disability;
- Individual family or individual support plan;
- Individual education plan (IEP); or
- Other professional reports documenting the condition and needs of the person.



Delegable and Non-Delegable Rights

Fla. Stat. § 744.3215 (2-3) distinguishes two types of rights:

Non-Delegable	Delegable
 To marry To vote To have a driver's license To travel (without assistance or supervision) and To seek employment or retain employment. 	 To contract To sue and defend lawsuits To manage property or to make any gift or disposition of property To determine residence To consent to medical and mental health treatment; and To make decisions about social environment or other social aspects of life. To apply for government benefits



Rights Removed in Guardian of the Person vs. Property

	GUA of Person
Plenary	 Remove the right: To vote To marry To have a driver's license To travel To be employed To determine residence To consent to medical treatment To make social decisions.
Limited	Remove rights based on AIP's abilities and situation

	GUA of Property
Plenary	 Remove the right: To contract To sue/defend lawsuits To apply for government benefits To manage property or to make any gift or disposition of property
Limited	Remove rights based on AIP's abilities and situation.



Rights Retained in Guardian Advocacy and Guardianship Fla. Stat. § 744.3215(1)

- Annual review of the guardianship report and plan;
- To be restored to capacity at the earliest possible time;
- To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation;
- To have a qualified guardian (or guardian advocate);
- To remain as independent as possible;
- To be properly educated;
- To receive visitors and communicate with others; and
- To receive services and rehabilitation necessary to maximize their quality of life.



Rights Removed in Guardian Advocacy

Typically, <u>Orange County</u>, <u>Florida</u>, for Gua-Adv of the Person, only removes/delegates the following:

- To apply for government benefits;
- To determine residency and to consent to residential placement;
- To consent to medical and mental health treatment;
- To make decisions about social environment/social aspects of life; and
- To make decisions regarding education and educational and vocational rehabilitation entitlements.

Note: This can change based on the preference of each circuit and/or judge.



What Does the Local Circuit Court Require:

- •Some but not all: What if a person with a disability clearly does not possess the ability to exercise <u>any</u> rights?
- •ABLE accounts: Does the local circuit court/judge require Gua Advocacy of the Property as well if the individual with IDD has an ABLE account?
- •Does the circuit/court require them to account for special needs trusts? What if the trustee is a corporate trustee?
- •How does the local judge treat a non-felonious criminal background for the proposed Guardian Advocate? Or Bad credit?

2023 Florida Statutes

Chapter 393 <u>Title XXIX</u> **DEVELOPMENTAL DISABILITIES** PUBLIC HEALTH

Fla. Stat. § 393.12 Capacity; appointment of guardian advocate.—

- (1) CAPACITY.—
 - (a) A person with a developmental disability may not be presumed incapacitated solely by reason of his or her acceptance in nonresidential services or admission to residential care and may not be denied the full exercise of all legal rights guaranteed to citizens of this state and of the United States.
 - (b) The determination of incapacity of a person with a developmental disability and the appointment of a guardian must be conducted in a separate proceeding according to the procedures and requirements of chapter 744 and the Florida Probate Rules.

2023 Florida Statutes cont.

Fla. Stat. § 393.12 (2) APPOINTMENT OF A GUARDIAN ADVOCATE.—

(a) A circuit court may appoint a guardian advocate, without an adjudication of incapacity, for a person with developmental disabilities if the person lacks the decision making ability to do some, but not all, of the decision making tasks necessary to care for his or her person or property or if the person has voluntarily petitioned for the appointment of a guardian advocate. Except as otherwise specified, the proceeding shall be governed by the Florida Rules of Probate Procedure.

STANDBY GUARDIANS

- •Fla. Stat. § 744.304 Standby guardianship.—(1) Upon a petition by the natural guardians or a guardian appointed under Fla. Stat. § 744.3021, the court may appoint a standby guardian of the person or property of a minor. The court may also appoint an alternate to the guardian to act if the standby guardian does not serve or ceases to serve after appointment. Notice of a hearing on the petition must be served on the parents, natural or adoptive, and on any guardian currently serving unless the notice is waived in writing by them or waived by the court for good cause shown.
- •(2) Upon petition of a currently serving guardian, a standby guardian of the person or property of **an incapacitated person** may be appointed by the court. Notice of the hearing shall be served on the ward's next of kin.



Guardianship

Guardianship Generally

Fla. Stat. § 744.3201 Petition to determine incapacity/Fla. Prob. R. 5.550 Petition to Determine Incapacity

Fla. Stat. § 744.331 Procedure to Determine Incapacity

Fla. Prob. R. 5.560 Petition for Appointment of Guardian of an Incapacitated Person

- 1. Two legal proceedings:
 - 1. Incapacity: determination as to the level of capacity of the individual to manage their affairs with the assistance of an examining committee and a court-appointed attorney for the Alleged Incapacitated Person.
 - 2. Guardianship: legal proceeding where decision-making authority is delegated to another in the following areas:
 - a. Person
 - b. Property

(Fla. Stat. § 744.3215 Rights of Persons Determined Incapacitated)

Guardianship Generally, (cont.)

3. Continues for the lifetime of the Ward or until their rights are restored by the court.

(Fla. Stat. § 744.464 Restoration to Capacity/Fla. Prob. R. 5.681 Restoration of Rights with Person of Developmental Disability/Fla. Prob. R. 5.680 Termination of Guardianship)

Guardianship Generally, (cont.)

- Basis: Incapacity for any reason, i.e., Alzheimer's, auto accident, minor child Fla. Stat.
 § 744.
- Types: Person (medical, social, etc.) and/or Property (assets, government benefits).
- Rights removed: Any or all rights can be taken away from the Alleged Incapacitated Person (AIP)/Ward.
- Attorneys: Both the Guardian and the AIP/Ward <u>must</u> be represented by (separate) attorneys.
- Requires the court's <u>determination of incapacity</u> of the AIP.



Main Differences Between Guardianship and Guardian Advocacy

Guardian Advocacy		
Basis	Intellectual disability and/or developmental disability (Fla. Stat. 393.063(11))	
Type	Person and/or Property (if property, must have an attorney)	
Rights removed	Some, but not all	
Attorneys	Gua Adv need not have one, but the person with IDD will	
Cost	\$100 to \$3,500 to establish	
Incapacity	Letter from treating physician, etc.	
Timing	30-60 days	

Guardianship		
Basis	Incapacity for any reason (Fla. Stat. 744.102(9))	
Type	Person and/or Property	
Rights Removed	Any or all rights can be removed	
Attorneys	Both Guardian and AIP must have attorneys	
Cost	\$6,000 to \$9,000 to establish	
Incapacity	3 member examining committee	
Timing	3-5 months	





Which is the right choice?

How Do Parents Decide What To Do?

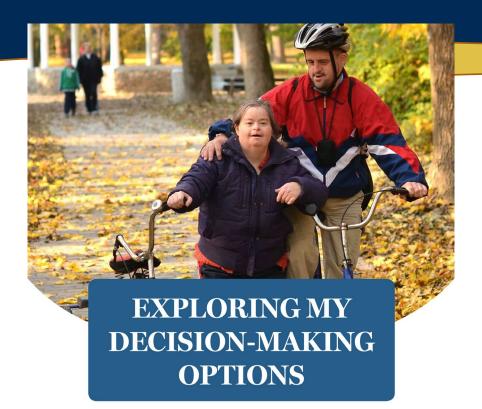
- Prior to the age of 18, everyone is presumed incompetent.
- Over 18, everyone is presumed competent unless the court rules otherwise.
- So, presume competency, but also know that you have to pick the **least restrictive alternative** that meets the needs of their loved one.
- How do parents decide what is right for their loved one?
 - https://www.stetson.edu/law/wings/
 - Recommendation from treating physician and/or trusted partners, which may include teachers, therapists, et al.



How Do Parents Decide What To Do? (cont.)

- •How strong is their understanding of an individual who may be non-verbal but can still make decisions for themselves and are fully competent?
- •Be the Light: Elizabeth Bonker's 2022 Valedictorian Speech at Rollins College Commencement https://www.youtube.com/watch?v=8g5aJExZQwg











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Exploring My Decision-Making Abilities

Name of Individual:	Relationship to individual (circle one): Self Family Friend Guardian Other: How long have you known the individual?			
Date Completed:				
For each question below, mark the level of support you think you need whei various decision-making options available under Florida law, refer to pa refer to Lighting the Way to Guardianship and Other Decision-Making Altern:	ges 1 - 6 of the Overvi	iew of Decision-Making	Options. For more detail	led information,
DETERMINE IF ANY SUPPORTS ARE NEEDED		I CAN DECIDE WITHOUT SUPPORT	I NEED SUPPORT TO DECIDE	I NEED SOMEONE TO DECIDE FOR ME
SELF-ADVOCACY				
Can I express my own choices and preferences?				
Can I ask my family, friends or circle of support for help?				
Can I receive services that provide support?				
Can I communicate approval to share information with family members, and friends who are not legal guardians?				
Can I plan what my day looks like?				
Can I understand and communicate permissions regarding legal documents like a basic phone or Internet contracts or power of attorney?				
Can I choose someone I want to support me with making my own decisions if r	eeded?			
Can I pick someone to make decisions on my behalf if I cannot do it myself?				
Can I understand my right to vote?				
EMPLOYMENT				
Can I choose a job or identify volunteer work I'd like to do?				
Can I apply for and find a job or volunteer work?				
Can I seek accommodations if needed for a job or volunteer work?				
MONEY MANAGEMENT				
Can I manage my money?				
Can I apply for benefits I am eligible to receive?				
Can I make everyday purchases?				
Can I pay bills on time?				
Can I tell if someone is taking my money and not using it in my best interest?				





DETERMINE IF ANY SUPPORTS ARE NEEDED	I CAN DECIDE WITHOUT SUPPORT	I NEED SUPPORT TO DECIDE	I NEED SOMEONE TO DECIDE FOR ME
HEALTH CARE MANAGEMENT			
Can I make decisions about where, when, and what to eat?			
Can I take medicines as directed?			
Can I understand the need to maintain personal hygiene and dental care?			
Can I make and communicate decisions regarding medical treatment, including the consequences of not accepting treatment?			
Can I understand health consequences associated with high risk behaviors (such as drug and alcohol abuse, tobacco use, unprotected sex, etc.)?			
Can I alert others and seek medical help for serious health problems?			
Can I make my medical appointments (such as doctor, dentist or therapist?)			
Can I make an advance directive (for example, identify wishes regarding life-prolonging procedures, such as CPR or artificial feeding)?			
Can I make medical choices in urgent care situations or in an emergency?			
Can I explain what my medications are for?			
Can I make choices about drugs or alcohol?			
RELATIONSHIPS			
Can I understand the need to consent to sex?			
Can I choose where and when (and if) I want to practice my faith?			
Can I make choices about what to do and who to spend time with?			
Can I understand that how I talk with and touch others depend on the type of relationship I have with them, such as family, friends, co-workers, support staff, boyfriend/girlfriend?			
PERSONAL SAFETY			
Can I avoid common dangers like traffic, sharp objects, hot stoves, or poisonous products?			
Can I recognize when someone is taking advantage of me, hurting me or abusing me?			
Can I protect myself or seek assistance in protecting myself?			
Can I know who to contact if I am in danger, being exploited, or being treated fairly?			
Can I make emergency preparation plans?			
SOCIAL AND COMMUNITY LIVING			
Can I access community resources like church or a local recreational center?			
Can I understand what is involved with maintaining a home that is safe?			
Can I understand and make choices about the supports I want or need?			
Can I understand how to follow the law and how not to break the law?			

CONGRATULATIONS!

You have taken quality time to thoroughly consider your abilities and potential needs for decision-making assistance.

Since abilities change over time, you may want to revisit this chart periodically. The decision-making options provided are not legal advice.

You have the choice to seek a Florida attorney for legal advice about any of the options described.



What Are the Next Steps?





Determine What is Right For Their Loved One With IDD

- If <u>Supported/Shared Decision Making</u> is the right choice for their family, do their research and be aware of how best to support their family member.
 - "Lighting the Way to Guardianship and Other Decision-Making Alternatives A Manual for Individuals and Families" manual available online www.fddc.org



What is Right For Their Loved One? (cont.)

- If <u>Substituted Decision Making</u> is best, then determine the need for the following:
 - Power of Attorney, Health Care Surrogate, etc.
 - Please encourage them to use a reputable attorney to prepare the documents.
 - •Use the list on our website of attorneys who volunteer for Low Down and/or
 - •Florida Bar Referral Service, https://www.floridabar.org/public/lrs/

What is right for their loved one? (cont.)

If <u>Guardian Advocacy</u> is best, consider the following:

- Can they work through the process independently using the materials available, including the step-by-step guide?
- Do they need an attorney to review the paperwork before submitting it to the clerk of the courts?
- Do they need an attorney to prepare the paperwork and guide them through the process, but they can do the rest independently?
- Do they need/ Would they prefer that an attorney handle the entire process for the family?

If **Guardianship** is best, then an attorney is required.

Guardian Advocacy

What does the process look like? (practically):

- 1. File the initial pleadings with the court to get started.
- 2. Fingerprints are done for the FDLE criminal background check.
- 3. Credit check is completed.
- 4. Notice to other family members is sent.
- 5. Court appointment of an attorney and elisor to represent the individual with IDD (chosen by the court or proposed by the family).
- 6. Hearing before the court on the petition, etc. (may be Zoom or optional).



Guardian Advocacy (after appointment)

Once appointed as the Guardian Advocate, they would follow the rules for the duties and obligations per Fla. Stat. § 393.12(10) which are then detailed in Chapter 744.



Can the Gua Adv Change Their Mind in the Future?

- Absolutely!
- Guardian advocacy may be right for their loved one with IDD now but they may need to transition to guardianship in the future.

OR

- What if their loved one continues to grow and mature and no longer needs help (or as much help)?
 - What do they do?
 The Gua Adv/attorney/Protected Person files a Suggestion of Restoration of Rights, and the court appoints a doctor to examine the Ward.
 The court-appointed doctor then makes recommendations to the court about which rights can be restored to the Ward.

Do They Have to be the Guardian Advocate Forever?

- What if the Guardian Advocate can't (what if they die) or doesn't want to be a Guardian/Advocate anymore?
 - Stand By or Successor Guardian Advocates

Resources

Davey Law Group: https://www.daveylg.com/low-down-on-law/

7th **Circuit (Flagler, Putnam, St. Johns, and Volusia Counties)** https://www.clerk.org/probate.aspx

18th Circuit (Brevard County)

https://flcourts18.org/court-programs/probate-and-guardianship/brevard-probate-and-guardianship-forms/

5th Circuit (Lake County)

https://www.lakecountyclerk.org/documents_and_forms/guardian_advocate_forms.aspx

WINGS Decision Making Toolkit: https://www.stetson.edu/law/wings/media/decision-making-options-toolkit.pdf



Thank You!



Use the QR code to learn more



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