



Guardianship, Guardian Advocacy and the alternatives

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Agenda

- Overview
- Alternatives to Guardianship
 - Supported Decision Making
 - Substituted Decision Making
- Guardian Advocacy
- Guardianship
- Next Steps and what else do I 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 their children?

Parents will no longer be able to make medical decisions for them or consent to treatment.

They may be exploited or taken advantage of in some way financially.

No one will help them or let me help them.

I can no longer advocate for them or protect them.

I can no longer advocate for them at school.



How can we address those fears?

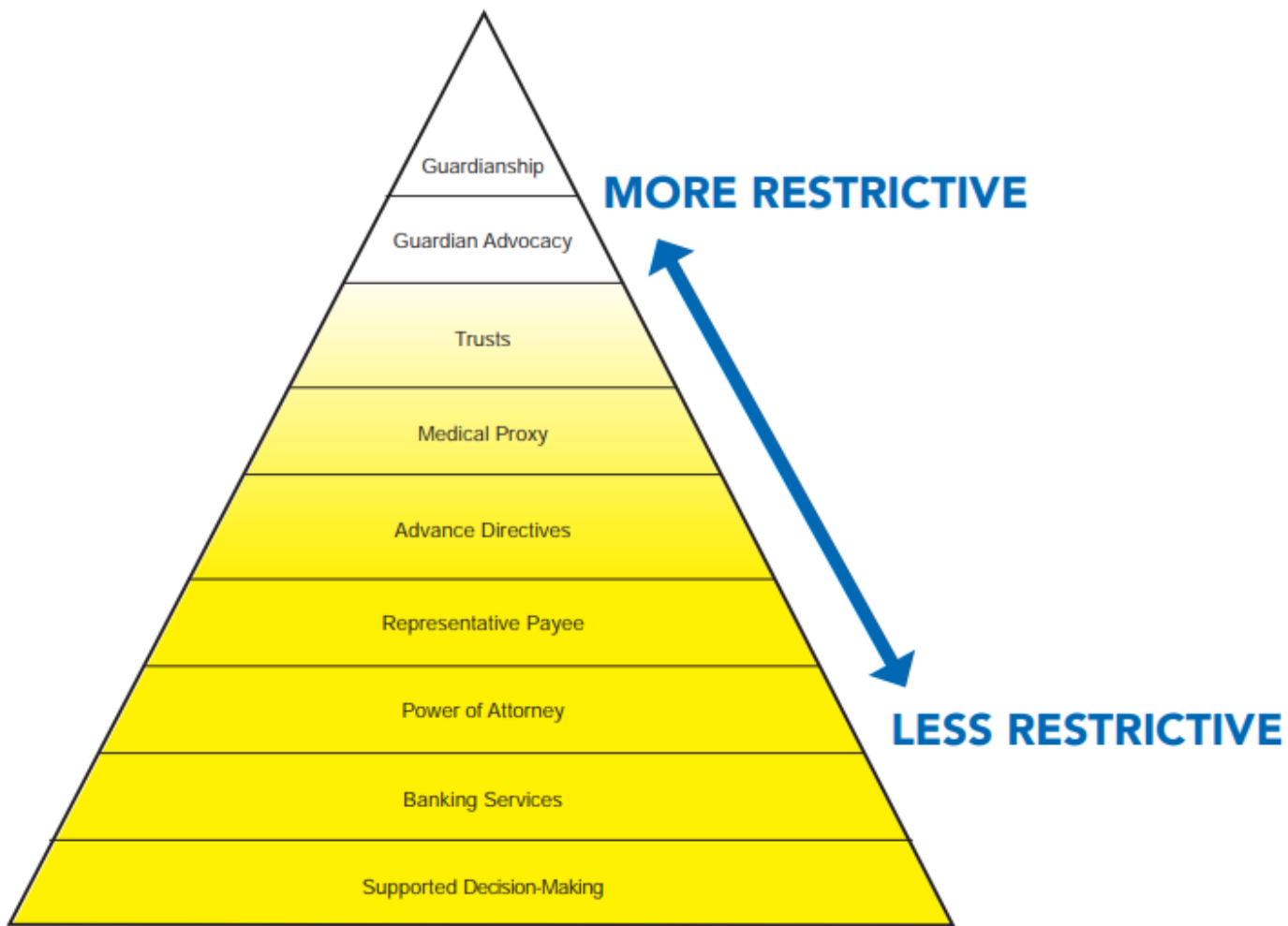
Fears

- 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 (www.consumer.ftc.gov)
- Sign a Release of Information/HIPAA Release
- Don't forget your own estate plan
- Registry through OCSD/identifying bracelet/seat belt/shoe tag
- Education Proxy





Florida Developmental Disabilities Council, Inc.



Supported Decision Making



Supported 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 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 ACLU website)

Where can I learn more?

- 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



Potential Problems with Supported Decision Making:

- Not the law in the state of Florida
- It works until it doesn't
- Proceed with caution





Substituted Decision Making



2022 Florida Statutes

(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.*



Durable Power of Attorney

A power of attorney is a legal document delegating authority from one person to another. 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?

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?

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

A Health Care Surrogate document 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 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.

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



Potential Problems with Substituted Decision Making:

Neither the Durable Power of Attorney nor the Health Surrogate gives the Agent the right to make decisions against the will of the Principal.

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:

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.

Legal process with all of the oversight and control of the court for the lifetime of the person with IDD or until the rights removed could be restored to that person.



Guardian Advocacy

- Basis of disability: Developmental Disability - Florida statutes, Chapter 393
- Types: Person and/or Property
- What rights can be taken away? Some, but not all
- Attorney required?
 - If the person with IDD has property, Petitioner/Guardian must have an attorney;
 - If the person with IDD does not have property and seeking person only, the Petitioner/Guardian does not have to be represented by an attorney.
- Requires a letter from treating physician that Protected Person/Ward:
 - has a Developmental Disability that manifested prior to the age of eighteen (18); and
 - that the individual is unable to handle his/her own personal matters 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.



Guardian Advocacy

- Attorney required?
 - If the person with IDD has property, Petitioner/Guardian must have an attorney;
 - If the person with IDD does not have property and seeking person only, the Petitioner/Guardian does not have to be represented by an attorney.
- Requires a letter from treating physician that Protected Person/Ward:
 - has a Developmental Disability that manifested before the age of eighteen (18); 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.



Guardian Advocacy

1. Intellectual Disability manifested prior to the age of eighteen (18)
2. List set forth in Chapter 393 of the Florida Statutes:
 - a. Autism Spectrum Disorder (ASD)
 - b. Cerebral Palsy
 - c. Down syndrome
 - d. Phelan-McDermid syndrome
 - e. Prader-Willi syndrome
 - f. Spina Bifida



2022 Florida Statutes

Chapter 393

DEVELOPMENTAL DISABILITIES

Title XXIX

PUBLIC HEALTH

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.



2022 Florida Statutes

(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.



Delegable and Non-Delegable Rights

FL Statute 744.3215 (2-3) distinguishes two types of rights:

| Non-Delegable | Delegable |
|---|--|
| <ul style="list-style-type: none">▪ To marry▪ To vote▪ To personally apply for government benefits▪ To have a driver's license▪ To travel; and▪ To seek employment or retain employment. | <ul style="list-style-type: none">▪ 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. |



Rights Removed in Guardian of the Person versus Property

| | GUA of Person |
|---------|--|
| Plenary | Remove the right: <ul style="list-style-type: none"> ▪ 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: <ul style="list-style-type: none"> ▪ 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 Outside the Legal Process:

- Education
- Privacy
- Have visitors and communicate with others
- Have annual and continuing reviews by the court





Guardianship

Guardianship generally:

1. Two legal proceedings:
 1. **Incapacity:** determination as to the level of capacity of the individual to manage their own 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
3. Continues for the lifetime of the Ward or until their rights are restored by the court.



Guardianship

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



Main differences between Guardianship and Guardian Advocacy

| Guardian Advocacy | |
|-------------------|--|
| Basis | Intellectual disability and/or developmental disability (FSS 393.063(9)) |
| 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 person with IDD will |
| Cost | \$100 to \$3,500 to establish |
| Incapacity | Letter from treating physician |
| Timing | 30-60 days |

| Guardianship | |
|----------------|--|
| Basis | Incapacity for any reason (FSS 744.102(9)) |
| Type | Person and/or Property |
| Rights Removed | Any or all rights can be removed |
| Attorneys | 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?

What now? How do I choose?

- 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 your loved one.
- How do I help clients decide what is right for their loved ones?
 - <https://flwings.flcourts.org/wp-content/uploads/decision-making-options-toolkit.pdf>
 - www.Turning18.org
 - Recommendation from treating physician, trusted partners which may include teachers, therapists, et al.





EXPLORING MY DECISION-MAKING OPTIONS



Florida's Working Interdisciplinary
Network of Guardianship Stakeholders



Florida Center for
INCLUSIVE COMMUNITIES

Florida's WINGS is supported by Grant No. 90EJIG0007-01-00 from the Administration for Community Living, U.S. Department of Health and Human Services (DHHS). Grantees carrying out projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration for Community Living or DHHS policy.





Florida's Working Interdisciplinary Network of Guardianship Stakeholders

Exploring My Decision-Making Abilities

| | |
|---------------------------|---|
| Name of Individual: _____ | Name of person completing this form (if not individual): _____ |
| Date Completed: _____ | Relationship to individual (circle one): Self _____ Family _____ Friend _____ Guardian _____ Other: _____ How long have you known the individual? _____ |

For each question below, mark the level of support you think you need when making and communicating decisions and choices. For general information about the various decision-making options available under Florida law, refer to pages 1 - 6 of the Overview of Decision-Making Options. For more detailed information, refer to *Lighting the Way to Guardianship and Other Decision-Making Alternatives* (https://www.fddc.org/sites/default/files/LTW_FamilyManual2017%20-%20%201.pdf).

| 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 needed? | | | |
| 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? | | | |





**Florida's Working Interdisciplinary
Network of Guardianship Stakeholders**

| 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 unfairly? | | | |
| 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 your loved one and your family
- If Guardianship is best, then select an attorney to assist you
- If Guardian Advocacy is best for your family, consider the following:
 - Can I work through the process on my own using the materials available including the step by step guide?
 - Do I need an attorney to review my paperwork before submitting it to the clerk of the courts?
 - Do I need an attorney to prepare my paperwork and guide me through the process but I can do the rest on my own?
 - Do I need/ Would I prefer that an attorney to handle the entire process for my family?



- If Supported Decision Making is the right choice for your family, then do your research and be aware of how best to support your family member.
 - “Lighting the Way to Guardianship and Other Decision-Making Alternatives A Manual for Individuals and Families” manual available online www.fddc.org
- If Substituted Decision Making is best, then determine the need for the following:
 - Power of Attorney, Health Care Surrogate, etc.
 - Use a reputable attorney to prepare your documents
 - Use the list on our website of attorneys who volunteer for Low Down; and/or
 - Florida Bar Referral Service



Guardian Advocacy

What does the process look like? (practically):

1. Petition for Appointment (and other legal documents that must be filed with the court).
2. Fingerprints are done for FDLE criminal background check
3. Credit check
4. Notice to other family members
5. Court appointment of attorney to represent individual with IDD (chosen by the court or proposed by family)
6. Hearing before the court on the petition, etc.



Can we change our mind in the future?

- Absolutely!
- Guardian advocacy may be right for your family right now, but you may still need to transition to guardianship in the future.
- What if my loved one continues to grow and mature and no longer needs help (or as much help)?
 - What do I 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, who then makes recommendations to the court about which rights can be restored to the Ward.
- What if I can't or don't want to be 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/>

Turning 18 (A joint collaboration between GAPS Legal PLLC and The Florida Bar Foundation)

<https://www.turning18.org/>



**Thank
You!**



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