

FAQ'S GUARDIANSHIP TRAINING

PLEASE NOTE: THE INFORMATION CONTAINED IN THIS FAQ'S GUARDIANSHIP TRAINING IS PROVIDED FOR GENERAL INFORMATIONAL PURPOSES ONLY AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE ON THIS SUBJECT MATTER. YOU SHOULD NOT ACT OR REFRAIN FROM ACTING ON THE BASIS OF ANY CONTENT INCLUDED IN THESE MATERIALS WITHOUT SEEKING INDEPENDENT LEGAL ADVICE.

1. Can a WSC be a Durable Power of Attorney for a client?

No. The Waiver Support Coordinator cannot act as the Durable Power of Attorney for a client. The WSC cannot assume control of a recipient's finances or assume possession of a recipient's checkbook, investments, or cash.

Prohibited Activities: iBudget Handbook, 2-75 (July 2017)

The provider, its board members, and its employees or subcontractors must be legally and financially independent from, and free-standing of, persons or organizations providing waiver services within the state of Florida other than support coordination and related administrative activities to recipients who receive services from APD.

The provider, its employees, or subcontractors must not:

- Be the legal representative, apply to be the legal representative, or be affiliated with an organization or person who is the legal representative of a recipient served by the provider.
- Be the legal representative or representative payee for any benefits received by a recipient served by the provider.
- Provide any waiver service other than support coordination.
- Assume control of a recipient's finances or assume possession of a recipient's checkbook, investments, or cash.

2. Can a Waiver Support Coordinator act as guardian for an individual they serve?

No. The Waiver Support Coordinator cannot act as guardian for an individual they serve.

Pursuant to 744.309 (3), Florida Statutes

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“ . . . A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest. The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.”

Additionally, in accordance with the Prohibited Activities in the iBudget Handbook, 2-75, a Waiver Support Coordinator must adhere to the following:

The provider, its board members, and its employees or subcontractors must be legally and financially independent from, and free-standing of, persons or organizations providing waiver services within the state of Florida other than support coordination and related administrative activities to recipients who receive services from APD.

The provider, its employees, or subcontractors must not:

- Be the legal representative, apply to be the legal representative, or be affiliated with an organization or person who is the legal representative of a recipient served by the provider.
- Be the legal representative or representative payee for any benefits received by a recipient served by the provider.
- Provide any waiver service other than support coordination.
- Assume control of a recipient's finances or assume possession of a recipient's checkbook, investments, or cash.

3. Can a group home owner have a Power of Attorney for health or financial matters?

Not expressly prohibited but strongly discouraged. While there is no law expressly preventing a person from executing a power of attorney that gives decision-making authority to the owner of a group home the person lives in, there are potential issues that may arise if there is an apparent or actual conflict of interest present. A person granted authority to act pursuant to a Power of Attorney (an “agent”, as defined in section 709.2102, Fla. Stat.), has a duty to act in a manner that does not create a conflict of interest that impairs the agent's ability to make impartial decisions that are made for the best interest of the person who subject to the power of attorney. See, §709.2114(a), Fla. Stat.

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If an agent's exercise of a power of attorney is challenged in a judicial proceeding on grounds that a decision made pursuant to a Power of Attorney was affected by a conflict of interest, and evidence is presented that the agent, or the agent's affiliate, had a personal interest in the exercise of the power (decision that was made), the agent has the burden to prove to the court, by clear and convincing evidence, that he or she acted solely in the interest of the person who granted them the power of attorney (the "grantor," "principal" or "ward"); or that the exercise of the power (decision) was, in good faith, made in the grantor's ("principal's") best interest, and the conflict of interest was expressly authorized in the Power of Attorney. See, § 709.2116(4), Fla. Stat. Additionally, rule 65G-2.009(4), Florida Administrative Code ("FAC") prohibits the provider and their employees from receiving any financial benefit by charging a fee against, borrowing, or otherwise using the personal funds of a client for their personal benefit. Rule 65G-2.009(4), Florida Administrative Code.

Rule 65G-2.012(2)(d), Florida Administrative Code goes on to state that "The provider, the provider's employees, and any family members thereof are prohibited from:

1. Being the named beneficiary of a resident's life insurance policy unless related to the resident by blood or marriage,
2. Receiving any indirect financial benefit from a resident's life insurance policy unless related to the resident by blood or marriage; and,
3. Borrowing or otherwise using a resident's personal funds for any purpose other than the resident's benefit.

Subsection rule 65G-2.012(2)(e) establishes that "a violation of this subsection shall constitute a Class III violation. See, rule 65G-2.0041, Florida Administrative Code.

4. How do we deal with a mother/guardian advocate who can talk her daughter into things (like a move) that we know the person doesn't want to do, but doesn't want to offend her mother?

The Ward retains rights except those granted to the guardian advocate to exercise. The court will issue Letters of Guardianship and specifying what type of guardianship has been approved by the Court such as guardian of the person, guardian of the property, or a "plenary" guardian. It is important to remember that a Ward's civil rights may NEVER be taken away from the individual. § 709.2114, Fla. Stat. The following are examples of rights which may not be taken away—

- To marry

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- To vote
- To apply for government benefits
- To have a driver's license
- To travel
- To seek or retain employment
- To sue or defend lawsuits, or obtain legal counsel
- Access to the court
- Legal counsel
- Court access
- Education
- Freedom from Abuse, Neglect and Exploitation
- To be treated humanely and with dignity and respect
- To remain as independent as possible
- Receive necessary rehabilitation and services

The individual or ward has the right to independence. A guardian advocate may be appointed by a written order of the court to represent an individual with a developmental disability under Ch. 393, Fla. Stat.

As a Waiver Support Coordinator, it is important to make sure that you discuss with the individual their preferences and choices. By law, guardians and guardian advocates must take into consideration the individual's preferences; however, managing family dynamics can be complicated. Working with the family to ease any concerns that the guardian advocate might have can be part of your support plan. Consider making your support plan a list of goals with tasks and objectives that the person can complete that would bring some security to the guardian advocate.

5. Can a Power of Attorney cross State lines?

It depends. If the Power of Attorney was properly executed under the other state's laws, then it may be recognized and used in Florida, but its use will be subject to Florida's Power of Attorney Act and other state laws. The agent may act only as authorized by Florida law and the terms of the Power of Attorney. You will need to seek the advice of your individual attorney to determine whether the Power of Attorney may be used in the state of Florida.

6. Can a WSC be a client's health care surrogate?'

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No. In accordance with the Prohibited Activities in the iBudget Handbook, 2-75, WSC must adhere to the following:

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The provider, its employees, or subcontractors must not:

- Be the legal representative, apply to be the legal representative, or be affiliated with an organization or person who is the legal representative of a recipient served by the provider.
- Be the legal representative or representative payee for any benefits received by a recipient served by the provider.
- Provide any waiver service other than support coordination.

7. Can a group home owner have a medical proxy for a resident if no family is available?

No. A group home owner cannot be a medical proxy for a client. The Law is very specific in the priority for serving as the medical proxy. Florida law lists the order of priority for whom may serve as the medical proxy. Sec. 765.401, Fla. Stat. The statute specifically states in subsection (1) that

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

- (a) The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability as defined in s. 393.063, who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;
- (b) The patient's spouse;
- (c) An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

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- (d) A parent of the patient;
 - (e) The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;
 - (f) An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or
 - (g) A close friend of the patient.
 - (h) A clinical social worker licensed pursuant to chapter 491, or who is a graduate of a court-approved guardianship program. Such a proxy must be selected by the provider's bioethics committee and must not be employed by the provider. If the provider does not have a bioethics committee, then such a proxy may be chosen through an arrangement with the bioethics committee of another provider. The proxy will be notified that, upon request, the provider shall make available a second physician, not involved in the patient's care to assist the proxy in evaluating treatment. Decisions to withhold or withdraw life-prolonging procedures will be reviewed by the facility's bioethics committee. Documentation of efforts to locate proxies from prior classes must be recorded in the patient record.
- (2) Any health care decision made under this part must be based on the proxy's informed consent and on the decision the proxy reasonably believes the patient would have made under the circumstances. If there is no indication of what the patient would have chosen, the proxy may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.
- (3) Before exercising the incapacitated patient's rights to select or decline health care, the proxy must comply with the provisions of ss. 765.205 and 765.305, except that a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.
- (4) Nothing in this section shall be construed to preempt the designation of persons who may consent to the medical care or treatment of minors established pursuant to s. 743.0645."

8. Can a group home owner be named a guardian for a client?

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The group home is prohibited from being a named guardian for a client.

Pursuant to Sec. 744.309 (3) and (6), Fla. Stat.,

Subsection (3), *Disqualified Persons*, states in pertinent part that “. . . A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest. The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.”

In subsection (6), *Health Care Provider*, it goes on to state that "A provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court specifically finds that there is no conflict of interest with the ward's best interests.”

9. Does a proxy need approval from the court?

No, the medical proxy does not need approval from the court.

Pursuant to subsection (1) of §765.401, Fla. Stat., “

Under Florida Statute 765.401, a medical proxy can be appointed to make health if an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designed or alternate surrogate is no longer available to make health care decisions, it may be made by individuals, in an order of priority” as stated in the statutory text.

10. Who can be an APD Client Advocate and where would we get the APD form?

Pursuant to § 393.063, Fla. Stat., a “Client advocate means a friend or relative of the client, or of the client's immediate family, who advocates for the best interests of the client in any proceeding under this chapter in which the client or his or her family has the right or duty to participate.”

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- 11. My question is: as a WSC, we have consumers who have no parental involvement and live in group homes. These consumers are in need of guardianships. The group home is not going to come out of pocket and find a person to represent these individuals. What can we do as a WSC to refer these individuals for guardianship? Who can we send these individuals to? This has been a question over the years that have puzzled us.**

The WSC can assist in the application for a Public Guardian through the local Public Guardian office. The office of Public and Professional Guardians (OPPG), is housed within the Department of Elder Affairs. The program is directed by statute to provide guardianship services to persons who do not have adequate income or assets to afford a private guardian and there is no willing family or friend to serve. There are 17 local Office of Public Guardianship throughout Florida. These offices are also responsible for the registration and education of professional guardians. For more information on the Florida Public Guardian Programs, you can contact OPPG at (850)414-2381 or by email at OPPGinfor@elderaffairs.org.

- 12. Is there a free or very low program/s for the Guardian Advocate process?
QA/Clinical**

In accordance with a change in law, public guardians may now serve as guardian advocates for persons with developmental disabilities under § 393.12, Fla. Stat. In order to qualify for these public guardian services, the person must meet all requirements of being served by a public guardian, including:

1. Being of low economic means (indigent),
2. Have no friends or family willing or able to serve, and
3. Being eligible for a guardian or guardian advocate.

Most public guardian programs maintain a waiting list. It is important to make sure that there is no one else available who is willing or able to serve the person as the guardian advocate. The WSC can assist in the application for a Public Guardian through the local Public Guardian office. The office of Public and Professional Guardians (OPPG), is housed within the Department of Elder Affairs. The program is directed by statute to provide guardianship services to person who do not have adequate income or assets to afford a private guardian and there is no willing family or friend to serve. There are 17 local Office of Public Guardianship throughout Florida. These offices are also responsible for the registration and education of professional guardians. For more information on the Florida Public Guardian Programs, you can contact OPPG at (850)414-2381 or by email at OPPGinfor@elderaffairs.org.

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If a person is eligible for a guardian advocate and has financial means or someone willing and able to serve, they should contact an elder law attorney for assistance. Additional assistance for Legal Services may be available through the following:

Florida Legal Services	-	850-385-7900
Senior Legal Helpline	-	888-895-7873
Florida Bar Attorney Ref. Service	-	800-342-8011

13. What are the differences between Guardian Advocate & Limited Guardianship?

A guardian advocate is a person who is appointed to serve a person with developmental disabilities as specifically provided for under § 393.12, Fla. Stat. Guardian Advocates cannot serve someone who is totally incapacitated (i.e., a plenary guardianship). Whereas, a limited guardianship under Florida Statute Chapter 744 is not specific to developmental disabilities and is applicable to all individuals who may need a guardian. A limited guardian may exercise some rights on behalf of the individual but there are certain rights which may not be delegated to the guardian,. See, generally, § 744.361, Fla. Stat. Guardian advocacy is considered to be less restrictive and less costly. In addition, guardian advocacy does not require an adjudication of a person's incapacity.

Pursuant to § 744.3085, *Fla. Stat. – Guardian Advocates –*

“A circuit court may appoint a guardian advocate, without an adjudication of incapacity, for a person with developmental disabilities if the person lacks the capacity to do some, but not all of the tasks necessary to care for his or her person, property, or estate, or if the person has voluntarily petitioned for the appointment of a guardian advocate . . . In accordance with the legislative intent of this chapter, courts are encouraged to consider appointing a guardian advocate, when appropriate, as a less restrictive form of guardianship.”

Pursuant to § 744.102, *Fla. Stat. - Limited Guardian – defines a “limited guardian” to mean* “a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after 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, or after the person has voluntarily petitioned for appointment of a limited guardian.”

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14. If the guardian passes away and there is no backup guardian, but there is a family member that is willing to step up, what is the process to get the family member to become the new guardian?

The court is responsible for the appointment of a new guardian in the case that a successor guardian was not in place for the Ward; however, sometimes the court is not made aware of this situation in a timely manner. Any person may write to the court to alert them that a guardian has passed away.

If a family member is interested in becoming the successor guardian in this case, the family member should contact legal services or an elder law attorney who specializes in guardianship to assist them. The family member may also write to the court.

All guardians are required by law to retain an attorney for the duration of the guardianship. Family guardians are required to complete a background screening, ensuring no disqualifying offenses will prevent them from appointment. Additionally, they will be required to complete an 8-hour training. For more information on legal services, the family member may contact the following:

Florida Legal Services	-	850-385-7900
Senior Legal Helpline	-	888-895-7873
Florida Bar Attorney Ref. Service	-	800-342-8011

15. With limited guardianship, is the person considered capacitated.

According to Florida Statute Chapter 744,, a person under a limited guardianship is considered incapacitated. A limited guardianship refers to the rights delegated to the guardian and not the capacity of the Ward. Whereas, a Guardian Advocate appointed under § 393.12, Fla. Stat., there is no adjudication of incapacity needed, making a guardian advocacy a less-restrictive alternative to guardianship.

Pursuant to § 744.102, *Fla. Stat. - Limited Guardian – defines a “limited guardian” to mean* “a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after 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, or after the person has voluntarily petitioned for appointment of a limited guardian.”

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A key to understanding a "Limited guardianship" is that it is the partial removal of rights and powers from the Ward that are delegated to the Guardian. Put another way, the court has determined that the individual continues to have some ability to perform some duties.

16. How can we have a public guardian appointed for a consumer when the plenary guardian dies? Who do we refer in the court system to request that a public guardian be appointed?

The office of Public and Professional Guardians (OPPG), is housed within the Department of Elder Affairs. The program is directed by statute to provide guardianship services to person who do not have adequate income or assets to afford a private guardian and there is not willing family or friend to serve. There are 17 local Office of Public Guardianship throughout Florida. These offices are also responsible for the registration and education of professional guardians. For more information on the Florida Public Guardian Programs, you can contact OPPG at (850)414-2381 or by email at OPPGinfor@elderaffairs.org.

17. Is the process for Limited Guardianship the same as full guardianship? Are there professional or public guardians in Florida? How often does guardianship need to be reviewed and renewed by the courts?

1. The process for limited guardianship and full guardianship are the same. A petition is filed with the court for guardianship, and after an examining committee is appointed and has the chance to meet with the person, the court makes the determination of which rights, if any, can be exercised without the assistance of a guardian.
2. There are 17 local Office of Public Guardianship through Florida. These offices are also responsible for the registration and education of professional guardians. For more information on the Florida Public Guardian Programs, you can contact OPPG at (850) 414-2381 or by email at OPPGinfor@elderaffairs.org.
3. A guardianship is reviewed, at a minimum, annually by the court. The guardianship can be reviewed during the course of the year if any person or interested party requests. The guardianship remains in place until:
 1. Death of the ward
 2. Restoration of the ward's rights and discharge of the guardian
 3. Death of the guardian

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4. The ward cannot be located
5. The responsibilities of the guardian are not met

The guardian, depending on if they are guardian of the person or property, or plenary, is required to file a report and/or accounting with the court annually.

18. **On the Civil Rights chart, the last 5 items are checked that they “Cannot be delegated to a guardian or guardian advocate” but then those same items also have check in columns that they can be delegated to a guardian or guardian advocate of the person/property. Can you clarify?**

The information on the chart was listed incorrectly. We will issue a new chart.

19. **Can you give examples of what “social life” means?**

Social Life is the time spent with friends and family participating in activities that we enjoy doing for pleasure.

- Involvement in community activities
- Going to Church
- Going out with friends
- Going to a movie
- Shopping
- Going to the park
- Activities with other residents

20. **How can a WSC help a Group Home and consumers to obtain a Public Guardian, when the legal guardian dies and there are no one available take their guardianship, or the current guardian was allowed by the court to withdraw their Guardianship? Who should be responsible for getting a Legal Guardian? Is the Group Home responsible or the Waiver Support Coordinator?**

The office of Public and Professional Guardians (OPPG), is housed within the Department of Elder Affairs. The program is directed by statute to provide

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guardianship services to person who do not have adequate income or assets to afford a private guardian and there is not willing family or friend to serve. There are 17 local Office of Public Guardianship throughout Florida. These offices are also responsible for the registration and education of professional guardians. For more information on the Florida Public Guardian Programs, you can contact OPPG at (850)414-2381 or by email at OPPGinfor@elderaffairs.org.

The Waiver Support Coordinator. Waiver support coordination is the service of advocating for the recipient and identifying, developing, coordinating and accessing supports and services on the recipient's behalf, regardless of the funding source.

- 21. I have a consumer who previously had a guardian. The guardian passed away. The rest of the family refuses to take on guardianship. The consumer is able to make good decisions. She knows medications, abuse types, etc. She is her own payee. How can I help her go about restoring her capacity to care for herself or to help her get a public guardian?**

Capacity is determined by the court. A petition with the court can be filed and a hearing set which will include a committee to determine the restoration of capacity. The court is responsible for the appointment of a new guardian in the case that a successor guardian was not in place; however, sometimes the court is not made aware of this situation in a timely manner. Any person may write to the court to alert them that a guardian has passed away.

The restoration of capacity is a process that should be approached after consulting with your individual attorney. Florida State § 744.464 explains the process of filing a suggestion of capacity (§ 744.464, Fla. Stat.), as well as ther other requirements. The document can be filed by any interested party and must state the individual is now capable of performing all or some of the duties. The suggestion of capacity is filed with the court. Once the court receives the request, a physician is assigned to examine the ward. The physician files a report with the court within 20 days. The physician makes his recommendation and a hearing is set by the court. The ward will need to prove by a preponderance of evidence that he or she is now capable of exercising the rights previously removed by the court.

- 22. I accessed the FDDC website and could not find the Building Abilities workbook.**

The information is located on the FDDC website at www.fddc.org

1. Lighting the Way to Guardianship and Other Decision -Making Alternatives Manual

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2. Lighting the Way to Guardianship and Other Decision-Making Alternatives

Online Module

3. LTW educators Series:

1. Educator Facts Sheets
2. Student Facts Sheets
3. Parent Fact Sheets

4. Building Abilities Series:

1. A Workbook for Persons with Disabilities
2. A Guide for Supports
3. A Legal Manual