



FINAL REPORT

JANUARY 2022

“
Florida doesn't need a good system;
Florida needs a *great* system.
”

Senator Jennifer Bradley

ACKNOWLEDGEMENTS

This report would not have been possible without the hard work, dedication, and time commitment of so many people.

The first acknowledgement needs to go to the Task Force members. The Task Force consisted of a diverse group of people whose perspectives enlightened our discussions and contributed to the depth of this report. The seriousness of their commitment is reflected in every word. My personal thanks to Vice Chair Anthony Palmieri for his support.

The Florida Court Clerks & Comptrollers (FCCC) deserves credit for the creation of the Task Force and for providing critical staff support. This effort would not have been possible without the leadership of President Angelina “Angel” Colonnese, Esq. (Manatee County), past President Tara S. Green, (Clay County), and Chris Hart (CEO). My sincere appreciation to Sara Sanders Bremer and Kimberly Renspie (FCCC staff) for their assistance in the coordination of the Task Force’s work and to Karen Lamb (Pinellas Clerk’s office) for the arduous task of compiling the meeting notes.

Karen Murillo, Esq., Assistant Statewide Prosecutor, Office of Attorney General Ashley Moody, and Tom Hall, FCCC Consultant, had the herculean task of authoring the report. The countless hours of research, drafting, and editing reflect their dedication to this cause. Their goal of ensuring the report accurately portrayed the work of the Task Force has been achieved.

While we anticipate this report will lead to tangible positive outcomes, its mere existence is evidence of the open mindedness and willingness of all involved to work together and that is an important first step toward improving guardianships in the State of Florida.

Ken Burke, CPA
Guardianship Improvement Task Force Chair
Pinellas County Clerk and Comptroller

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I. Executive Summary

A society is judged not by how it takes care of its most gifted individuals, but those who are the most vulnerable.¹

We wish to thank the Florida Court Clerks & Comptrollers for initiating, sponsoring, and staffing this Guardianship Improvement Task Force. We would also like to thank the Task Force members, expert presenters, and members of the public who helped the Task Force identify areas of improvement for Florida's guardianship system.

This Task Force was created with the goals of examining the guardianship system in Florida and making recommendations to the Florida Legislature to improve the system. We found that these goals were best served by assembling a diverse group of members comprising a broad range of perspectives and disciplines to provide a multidisciplinary review of Florida's guardianship process.

Task Force members were identified and selected through various stakeholder agencies and organizations that have a direct interest or involvement with Florida's guardianship system. We requested that each Task Force member contribute and vote, based on his or her own knowledge of the issues and express his or her own perspective, as opposed to purporting to represent the opinion or views of any stakeholder agency or organization. We asked the Task Force members to draw upon their professional and personal life experiences to enrich the work of the Task Force, which facilitated meaningful discussion by the Task Force membership and inspired passionate contributions from the public at each and every meeting.

Out of respect for the schedules of our dedicated Task Force members, and with the objective of providing efficient and effective feedback for the Florida Legislature's use prior to the 2022 Legislative Session, this Task Force was held to a rigorous time schedule and provided a quick timeline for completion. In less than four months, this Task Force identified and discussed dozens of topics of concern involving Florida's guardianship system, which are outlined within the body of this report. Ultimately the Task Force voted and agreed upon ten specific recommendations for consideration by the Florida Legislature and Florida Courts.² These Task Force recommendations are

¹ Generally attributed to Mahtma Ghandi (1931).

² Although the original goal was to make recommendations exclusively to Florida's Legislature, it quickly became apparent that many of the recommended improvements fell within the constitutional purview of the Supreme Court of Florida. Consequently, some of the recommendations are suggestions for the Legislature to make a recommendation to the Supreme Court.

listed below in order of importance, as voted upon, and ranked by the members of this Task Force³:

1. Create a statewide data collection system to gather data on all guardianship cases. (Score: 5)⁴
2. Adopt uniform guardianship forms to be used statewide to assist in the data collection process. (Score: 5)
3. Create a long-term entity (i.e., such as a division within a department and/or a legislative advisory group) that is not limited by any specific time and comprised of individuals with extensive guardianship knowledge and with a broad range of perspectives, tasked with making recommendations regularly on legislative changes to improve the guardianship system. (Score: 5)
4. Advance Directives and Pre-Need Estate Planning Documents: (Score 5)
 - a. Offer more education, especially to the judiciary, regarding the preference which should be given to advance directives and other pre-need estate planning documents by the courts as less restrictive alternatives whenever available.
 - b. Collect data statewide regarding the treatment of advance directives and pre-need estate planning documents by the courts in this state.
5. Professional Guardian Database: (Score 5)
 - a. Require the creation of a publicly accessible, online database responsible for tracking the registrations, qualifications, and guardianship case histories of professional guardians; the database should include the number of wards assigned to each professional guardian and list the counties and circuits in which the guardian operates or has previously operated.⁵
 - b. Require that when a guardian has received any form of discipline or has been removed from a case for cause by any court, the entity responsible for maintaining this professional guardian database provides an immediate

³ Some of these recommendations entail several steps or recommendations, which have been broken down into subcategories, listed as parts “a,” “b,” and/or “c” of the recommendation.

⁴ The scoring system was based on a majority vote of the Task Force members on how to rank each recommendation between 1 and 5, with 1 being least important and 5 being most important.

⁵ To the extent information is confidential under Florida law, that information should be protected.

notification to the Chief Judge in each circuit in which a guardian has previously and/or is currently practicing.⁶

6. Require enhancement and improvement to the initial and continuing education requirements for all parties and personnel involved in the guardianship case process, including, but not limited to, professional guardians, family guardians, clerk personnel, attorneys, judges, examining committee members, and court monitors. *(Score 4)*
7. Health and Residential Care Pipelines to Guardianship *(Score 4)*
 - a. Create a work group or task force (in addition to the continuous task force recommended in Recommendation 3) to review the current practices and use of the guardianship system by health care and residential care facilities (including, but not limited to, hospitals, skilled nursing facilities, and assisted living facilities), as well as to explore alternatives to guardianship for health care providers serving isolated or abandoned vulnerable adults.
 - b. Prohibit health care and residential care facilities from proposing, recommending, or pre-selecting a professional guardian for any patient or client in their care, in order to minimize potential conflict.
 - c. Require all health care and residential care facilities supporting a petition for guardianship for purposes of the ongoing or change in care of a patient or client to demonstrate they have exhausted all available health care surrogate and proxy options (i.e., other than court-appointed guardians).
8. Approve, when appropriate, the use of supported decision-making⁷ as an alternative to guardianship that must be considered by the court prior to appointing a guardian. *(Score 4)*
9. Require each judicial circuit to implement a guardianship monitoring process. *(Score 4)*
10. Update and remove potentially prejudicial, outdated, or pejorative language and terminology from the guardianship statutes (e.g., “ward” and “alleged incapacitated person”). *(Score 1)*

⁶ This is not to suggest that the issuance of a show cause order would trigger any reporting requirement.

⁷ The Task Force did not agree to any specific definition or method for assessing supported decision-making and this recommendation does not reflect any comment by the Task Force on past, pending, or future legislative proposals.

This Task Force intends for the State of Florida’s guardianship laws and processes to be among the most protective and robust in the nation and recognizes that substantial and ongoing work is required to achieve this goal.

As Task Force member, Senator Jennifer Bradley, so eloquently remarked:

Florida doesn’t need a good system; Florida needs a **great** system.⁸

This 2021 Guardianship Improvement Task Force respectfully submits this report in furtherance of our collective goal to make Florida’s guardianship system a truly **great** system for our most vulnerable populations.⁹

⁸ Guardianship Improvement Task Force Public Meeting, July 28, 2021, recording available at: <https://youtu.be/P0A1LKJnaig?t=1055>. (quoting Senator Jennifer Bradley).

⁹ None of these recommendations consider funding. It was beyond the scope and expertise of this Task Force to determine amounts or source of funding for the recommendations. The Task Force is confident that if the Legislature believes the recommendations are worth implementing, it will provide for funding.

II. Introduction of the Task Force

“Something like guardianship is a necessity in a system that recognizes private ownership of property, while dividing the world into those who are, and those who are not, sui juris – that is, fully capable of acting on their own.”¹⁰

While our guardianship system is intended to assist and protect the most vulnerable in society, there is little doubt that this system requires thorough, constant, and consistent improvements to keep up with the increasing demands and evolving needs of that society. We have unfortunately seen the guardianship system come under recent and intense public scrutiny due to abuses of the system by individual bad actors, the non-uniform and unequal application and practices of guardianship laws across the

¹⁰ Chris Guthrie, et. al, “Guardians: A Research Note,” *American Journal of Legal History*, vol. 40, no. 2, (1996), pp. 146, available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/812/>.

Guardianship Improvement Task Force

- **Chair: Ken Burke, Pinellas County Clerk of Court and Comptroller**
- **Vice Chair: Anthony Palmieri, Statewide Investigation Alliance**
- Bob Asztalos, Deputy Director, Florida Dept. of Veteran’s Affairs
- Crystal Kinzel, Collier County Clerk of Court and Comptroller
- Colleen Burton, State Representative, District 40, Florida House of Representatives
- Dennis Moore, Interim Director Statewide Guardian Ad Litem
- Gina Rossi-Scheiman, Executive Director, Florida State Guardianship Association
- Hillary Hogue, Ward Advocate
- JD Peacock II, Okaloosa County Clerk of Court and Comptroller
- Jennifer Bradley, State Senator, District 5, Florida Senate
- Jose R. Rodriguez, Retired Judge, Ninth Judicial Circuit
- *Karen C. Murillo, * Assistant Statewide Prosecutor, Office of the Attorney General*
- Michael Lincoln-McCreight, Person Formerly Under Guardianship
- Michelle T. Morley, Judge, 5th Judicial Circuit
- Mike Donovan, Community Development Attorney, Legal Services of North Florida
- *Richard Prudom*, Secretary, Dept. of Elder Affairs*
- Sancha Brennan, Attorney Rep. for Real Property, Probate, & Trust Law Section
- Sean Cadigan, Magistrate, 13th Judicial Circuit
- Shannon McKenzie Miller, Attorney Rep. for Elder Law Section
- Tamara Cribben, CEO Aging Solutions, Inc., Florida Public Guardian Coalition
- Viviana Bonilla Lopez, Equal Justice Works Fellow, Sponsored by the Florida Bar Foundation, Disability Rights Florida
- Zayne Smith, Associate Director of Advocacy, AARP Florida

**Non-Voting Member*

state, as well as the lack of accessibility and transparency of the system to the public.¹¹

One need look no further than current media reports, both in Florida and nationwide, to see many of the areas of public concern surrounding guardianship.¹²

At the urging of several clerks, the Florida Court Clerks and Comptrollers (FCCC) decided to address these areas of concern in guardianship. On April 30, 2021, the FCCC Board of Directors (Board) under then President Tara Green, Clerk and Comptroller for Clay County, voted to form a task force, comprised of individuals with a wide range of expertise and disciplines, to examine Florida's guardianship system and make recommendations to the Florida Legislature on areas for improvement. Florida's elected Clerks of Court voted to provide FCCC staff and resources to assist in the work of the task force and named Ken Burke, Clerk and Comptroller for Pinellas County, as Chairperson for the 2021 Guardianship Improvement Task Force.

Individuals with a wide range of interests and expertise in guardianship-related issues were recruited to serve on the Task Force. The Task Force held biweekly information gathering meetings over a three-month time span, during which the Task Force received presentations from a wide range of experts in guardianship. The Task Force also took comments from the public during each meeting.

¹¹ See generally Danielle DaRos, "I-Team: How a Florida guardian stole \$400k from his wards," *CBS 12 News* (Sep. 10, 2021), available at: <https://cbs12.com/news/local/i-team-how-a-florida-guardian-stole-400k-from-his-wards>; Adam Walser, "Former guardian charged with pillaging elderly man's estate refuses to sign final accounting – Family seeks \$1.8 million dollars in lawsuit," *ABC Action News, WFTS Tampa Bay* (March 4, 2021), available at: <https://www.abcactionnews.com/news/local-news/i-team-investigates/the-price-of-protection/former-guardian-charged-with-pillaging-elderly-mans-estate-refuses-to-sign-final-accounting>; Dillon Begin, "The court has plans for you'," *Searchlight New Mexico* (Feb. 18, 2021), available at: <https://searchlightnm.org/the-court-has-plans-for-you/>; Doha Madani and Diana Dasrath, "Britney Spears' father files petition to end conservatorship after 13 years at help of pop star's estate," *NBC News* (Sep. 7, 2021), available at: https://www.nbcnews.com/pop-culture/pop-culture-news/britney-spears-father-files-petition-end-conservatorship-n1277108?utm_source=facebook&utm_medium=news_tab&utm_content=algorithm; Danielle Waugh, "CBS 12 News Investigates: Guardianship Abuse," *CBS 12 News* (April 28, 2021), available at: <https://cbs12.com/news/cbs12-news-i-team/cbs-12-news-investigates-guardianship-abuse>.

¹² See Hannah Critchfield, "A Brandon woman, 92, fought her guardianship. Things escalated quickly." *Tampa Bay Times*, (Aug. 26, 2021), available at: <https://www.tampabay.com/life-culture/2021/08/26/a-brandon-woman-92-fought-her-guardianship-things-escalated-quickly/>.

a. Membership

Recognizing that the guardianship system is a complicated legal process which impacts numerous interested persons and parties, all levels of the court system and process, a variety of professions, as well as several government agencies and non-profit organizations, the FCCC proscribed that this Task Force's membership be as diverse and expansive as the impact of the guardianship process.¹³ Several key stakeholder organizations, entities, and professions were identified and invited to serve on the Task Force, resulting in a task force of 22 members representing the perspectives from each of the following organizations and disciplines:

- Elected officials from the Florida Senate and Florida House of Representatives;
- Florida probate judges;
- Florida guardianship attorneys (including representatives selected by the Elder Law and Real Property, Probate and Trust Law sections of The Florida Bar);
- Clerks of Court from a variety of regions across the state;
- Advocates and representatives for wards;
- Legal Aid programs;
- Public Guardian programs;
- The Florida Office of the Attorney General;
- The Office of Public and Professional Guardians for the Florida Department of Elder Affairs;
- The Statewide Investigation Alliance;
- The Florida State Guardianship Association;
- Florida's Guardian Ad Litem program;
- Disability Rights Florida;
- AARP Florida; and
- The Florida Department of Veterans' Affairs.

The broad scope of recommendations adopted by this Task Force reflect the diverse and wide range of perspectives provided by this Task Force membership.

As noted in our initial Task Force meeting, "To truly modernize the guardianship system... giving autonomy and dignity and respect... *that* should be our focus... guardianship works best when it's done collaboratively and not just from one singular perspective."¹⁴

¹³ See Section XVI. (Next Steps) and Appendix F. (List of Stakeholder Agencies and Organizations) for additional stakeholders identified by the Task Force.

¹⁴ Guardianship Improvement Task Force Public Meeting, July 22, 2021, *recording available at: <https://youtu.be/DKP83myRMOM?t=1056>*. (quoting Task Force Member, Anthony Palmieri).

b. Work Process

Between July 22 and November 15, 2021, the Task Force met in six virtual and two in-person meetings (for a total of eight meetings). The initial, introductory meeting of the Task Force held virtually on July 22, 2021, served to familiarize the members with their peers and the overall task force process. This initial meeting also provided the members with an opportunity to contribute their personal goals and objectives for the Task Force.

The subsequent six meetings of the Task Force provided a series of presentations and resources relating to guardianship for consideration by the Task Force.¹⁵ The topics covered and those who presented at these meetings were as follows:

Wednesday, July 28, 2021 (In-Person Meeting in Clearwater, Florida)	
Overview of the Guardianship Process in Florida	Atty. Vito M. Roppo, Twelfth Circuit
Judges' Perspectives on Guardianship	Hon. Jose R. Rodriguez (Ret.) Mag. Kimberly Davis Bocelli
Clerk of Court Panel Perspective on Guardianship	Panel of Clerks of Court and Clerk Staff for Sarasota, Polk, Lee, Pasco, Polk, and Charlotte Counties

Thursday, August 5, 2021 (Virtual Meeting via WebEx)	
Case Studies in Guardianship	
Statewide Investigation Alliance Investigative Data and Analysis	
Case Study # 1	Sr. Auditor and Investigator Nancy Abraham, Polk County Clerk
Case Study # 2	Assoc. Insp. Gen. Jenna Murphy, Palm Beach County Clerk
Case Study # 3	Chief Insp. Gen. Lita McHugh, Polk County Clerk

¹⁵ Within this report there are references to the Task Force hearing from experts. The Task Force did not specifically qualify the presenters who testified before it as experts, however, the Task Force recognized these presenters as subject matter experts in relevant matters involving Florida guardianship.

Thursday, August 19, 2021 (Virtual Meeting via WebEx)	
Successes in Other States: “What Can We Learn?”	Tom Hall, FCCC Consultant
Q & A by National Experts in Guardianship	Asst. Dir. Erica Wood, ABA Comm on Law and Aging (Ret.) Author Sally Hurme, AARP (Ret.)

Thursday, September 2, 2021 (Virtual Meeting via WebEx)	
Education, Regulation, and Discipline of Professional Guardians	Exec. Dir. Chante’ Jones, Office of Public & Professional Guardians
Ninth Circuit Court Monitoring Program	CP Spc. Wynter Solomon-Cuthbert, Ninth Judicial Circuit Court of Florida
Seventeenth Circuit Court Monitors	Broward County Court Monitor & Atty. Paulette V. Armstead
Fifteenth Circuit Court Monitors	Hon. Stephen M. Cohen (Ret.)

Tuesday, September 14, 2021 (Virtual Meeting via WebEx)	
Demonstration: Guardianship Inventory Reports & Accountings for Florida (GIRAFF)	Hon. Joseph Abruzzo, Palm Beach County Clerk of Court & Comptroller
Family Guardians’ Perspective	Julie & Heather
Professional Guardian’s Perspective	Prof. Guardian Irene Rausch
Court-Appointed Attorneys’ Perspective	Atty. Jeffrey Eisel, Sixth Circuit Mary K. Wimsett, Eight Circuit

Thursday, September 23, 2021 (In-Person Meeting in Tallahassee, Florida)	
An Overview of the Bill Drafting Process	Lobbyist Mark Pinto

The presentation materials provided during these meetings have been included as appendices to this report.

In addition to the above-referenced presentations, the Task Force members were also provided additional reference materials and prior guardianship task force reports for review and consideration.¹⁶

The seventh meeting of the Task Force was held in-person in Tallahassee, Florida on September 23, 2021. An eighth and final meeting was held via Zoom on November

¹⁶ See the References Section at the end this report for a complete listing of these resources and reports. These and additional resources are available on the Task Force’s web page, available at: www.GuardianshipImprovementTaskForce.com,

15, 2021, during which a vote was held to approve the final report of the Task Force. The primary purpose and objective of this final meeting was for the Task Force members to outline, discuss, and vote on recommendations of the Task Force to be published in a final report.

An overview of the details and content of this report are provided below.

c. This Report

This final Task Force report contains and reflects the evidence, testimony, and recommendations made to and by members of this Task Force. Neither the recommendations nor the information captured in this report reflect any particular stakeholder agency or organization's views, nor does this report reflect the perspective of any one Task Force member.

This report was drafted and created with the goal of fairly capturing the diverse scope of concerns, recommendations, and ideas presented to or raised during the assembly of the Task Force. In furtherance of this goal, this report contains quotes and key topics raised during public testimony, which are provided in the relevant sections of this report under the sub-heading "*Public Testimony*." The topics and proposals made within the public testimony sub-sections of this report are not necessarily reflective or representative of the opinion of this Task Force or any of its members. This information is provided just as much to capture the views and perspectives of those who disagreed with some of the findings and recommendations made by this Task Force, as it is to raise other, related topics of concern which might warrant further review.

Many of the ten agreed-to, and voted upon, recommendations of this Task Force were broad concepts which can be accomplished in a variety of ways by the Legislature and the Florida Supreme Court. While the Task Force did not vote upon, or agree to, all of the specific steps for accomplishing these recommendations, the authors of this report attempted to capture the key issues and objectives raised in each Task Force recommendation by providing more specificity and detail in the following sections of this report. These more specific recommendations have been grouped by key focus areas identified in Sections V – XIII of this report, appearing in no particular order, other than being organized for purposes of overall clarity.

The members of this Task Force identified several other key focus areas of concern which, due primarily to time and resource constraints of this Task Force, were not formally voted upon or addressed during the final, in-person Task Force meeting. Nonetheless, these key focus areas of concern have been included and are generally outlined in Section XIV (Additional Focus Areas of Concern) of this report. Further, in recognition of the numerous additional topics for consideration raised before this Task Force by members, presenters, and the public, this report provides a list of many of these additional topics in Section XV (Other Topics Recommended for Future Consideration) of the report. Neither the content in Section XIV or in Section XV has

been voted upon by the members of this Task Force and these sections have been included with the hopes of future, anticipated use by the Legislature and Courts.

Almost immediately this Task Force recognized that a primary recommendation would be the creation of and funding by the Florida Legislature of a continuous task force or legislative advisory work group, commissioned to evaluate and assess Florida's guardianship processes and to provide legislative recommendations on a long-term basis.¹⁷ As Section XVI (Next Steps) of this report describes, we hope that this future broad-based advisory group with representatives from all three branches of Florida's government will consider some of the focus areas of concern identified in Section XIV (Additional Focus Areas of Concern Identified by Task Force), as well as investigate further the topics for consideration included in Section XV (Other Topics Recommended for Future Consideration).

During the final virtual meeting of this Task Force, held on November 15, 2021, the Task Force voted by a majority vote to accept the recommendations and report records as provided in its final draft form. However, several members of this Task Force requested the opportunity to provide individual comments to clarify the information covered in this report, to voice objections to certain sections in this report, and/or to express opposition to the wording of specific recommendations made in the report. These individual Task Force member comments have been included in Section XVIII (Member Perspectives).

¹⁷ See Appendix F. (List of Stakeholder Agencies and Organizations) for details on potential membership composition for future guardianship workgroups or task forces.

III. Historical Task Force Reports

The 2021 Guardianship Improvement Task Force is not the first group to evaluate areas of concern and make recommendations for improvement regarding Florida's guardianship system. In fact, there have been many other committees, task forces, and work groups. Some previous Florida-based guardianship evaluation reports considered by this Task Force include:

- **2003 Guardianship Monitoring in Florida Report**: In 1999, the Florida Supreme Court Commission on Fairness was directed by Chief Justice Major B. Harding to “investigate and report on various models for guardianship monitoring.” As a result, the Commission established the Guardianship Monitoring Committee, which published its findings in early 2003 in a report entitled, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards.”¹⁸
- **2004 Guardianship Task Force Report**: Subsequently on May 30, 2003, Florida Governor Jeb Bush signed Senate Bill 2568, creating a Guardianship Task Force within the Florida Department of Elder Affairs for the purpose of examining guardianship and incapacity determinations in Florida. This Guardianship Task Force compiled its findings and recommendations in a 2004 report addressed to Governor Bush, Department of Elder Affairs Secretary, Terry White, and the Florida Legislature.¹⁹
- **2014 Restoration of Capacity Study & Work Group Report**: In 2013, the Florida Developmental Disabilities Council and Guardian Trust commissioned a research study on the restoration of capacity process in Florida, led by the Office of Public Guardian, Inc., which embarked upon a year-long process of collecting guardianship and restoration data in order to determine the need for assistance with restoration among persons with developmental disabilities under guardianship. This work group published its report in February 2014, entitled “Restoration of Capacity Study and Work Group Report.”²⁰

¹⁸ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), *available at*:

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

¹⁹ Governor’s Guardianship Task Force, “2004 Final Report of the Guardianship Task Force,” (Dec. 2004), *available at*: <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/09/2004-Guardianship-Task-Force-Final-Report.pdf>.

²⁰ The Florida Developmental Disabilities Council / Guardian Trust, “Restoration of Capacity Study and Work Group Report,” *Florida Courts*, (Feb. 28, 2014), *available at*: <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>.

- **2018 Judicial Management Council Guardianship Workgroup Report:** On October 24, 2016, Florida Supreme Court Chief Justice Jorge Labarga announced the establishment of a new Guardianship Workgroup under the supervision of the Judicial Management Council, which was tasked 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.” Further, this workgroup was instructed to focus on the following areas of concern related to guardianship: 1) Use of least restrictive alternatives to guardianship; 2) Determinations of incapacity; 3) Restoration of capacity; 4) Costs associated with guardianship administration; 5) Proceedings and responsibilities related to guardianship after adjudication; and 6) Training opportunities available to judges and court staff. This workgroup submitted its findings in a final report in June 2018.²¹

These four reports identify many similar and overlapping areas of concern and suggestions for improvement in the guardianship system. This report provides the following list of focus areas of concern or improvement, which were identified by this 2021 Task Force, and compares its findings and recommendations with those previously described earlier task force reports.

Focus Areas of Concern / Improvement

1. Statewide Guardianship Data Transparency
2. Statewide Uniformity in Forms, Processes, and Practices
3. Increased Oversight, Safeguards and Court Monitoring Processes Across the State
4. Preserving the Rights, Dignity, and Autonomy of Alleged and Adjudged Incapacitated Persons
5. Ensuring the Use of Least Restrictive Alternatives, Such as Advance Directives and Supported Decision-Making
6. Health and Residential Care “Pipeline to Guardianship”
7. Enhanced Education and Qualification Requirements of Professionals and Parties in Guardianship
8. Increased Accessibility and Transparency of Professional Guardians and the Guardianship Process
9. Need for Additional Workgroup(s) Responsible for Assessing Florida’s Guardianship System
10. State Support and Funding for Guardianship-Related Programs and Processes

Comparison of Focus Guardianship Areas of Concern / Improvement: 1999 – 2021

²¹ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

Focus Areas of Concern / Improvement	This Report	2018 Report	2014 Report	2004 Report	2003 Report
Statewide Data Collection & Information Sharing	✓		✓	✓	✓
Uniform Forms, Processes, and Practices	✓	✓	✓	✓	✓
Increased Oversight & Court Monitoring	✓	✓		✓	✓
Rights, Dignity, and Autonomy of the Individual	✓	✓	✓	✓	✓
Least Restrictive Alternatives (Advance Care & Supported Decision-Making)	✓		✓	✓	
Health / Residential Care <i>Guardianship Pipeline</i>	✓				
Education and Qualification for Professionals	✓	✓	✓	✓	✓
Accessibility & Transparency of Guardianship Process Information	✓	✓	✓		
Additional / Future Guardianship Workgroups	✓	✓	✓		
State Support & Funding of Guardianship	✓ ²²	✓		✓	✓

Several significant steps were made towards the improvement of Florida’s guardianship system in response to recommendations published in these prior task force reports. In fact, Florida’s Guardianship Statutes (Chapter 744) have been added to, updated, or amended by the Florida Legislature every single year from 1999-2021, While there is no doubt that progress has been made in guardianship legislation over the past 23 years, this Task Force notes that several areas of concerns and legislative problems have nevertheless persisted. Many of those persistent areas of concern are described in the recommendations and additional areas of concern sections of this report.

²² While the 2021 Guardianship Improvement Task Force did not agree to this specific recommendation, the need for increased funding for the Public Guardianship Program and the need for state-funded or alternatively funded processes like court-appointed counsel, was identified numerous times by Task Force members and during every public comment session of Task Force meetings.

IV. Task Force Recommendations at a Glance

Focus Area # 1: Statewide Guardianship Data Transparency		Options for Implementation		
Recommendation	Purpose	Amend Statute	Amend Rule	Other
1. Create a statewide data collection system for all guardianship cases.	Provide meaningful and objective data for improvements to guardianship system, while increasing the public trust with the transparency of non-confidential information.	✓		
2. Require that every judicial circuit collect and report information in all guardianship cases regarding the existence of advance directives, powers of attorney, health care surrogate designations, and other similar legal documents, whether the document was honored (in part or total), and any reason given by the court for not honoring the document.	Provide statistical information regarding the treatment of advance directives across the state to aid in future improvements to guardianship system and to foster public trust.	✓	✓	
3. Require that every judicial circuit collect and report guardianship case information and changes to the Office of Public and Professional Guardians (OPPG) and the entity responsible for maintaining the publicly accessible professional guardian database described in Focus Area # 8.	Eliminate gaps in the information sharing process pertaining to professional guardians in order to facilitate OPPG in its efforts to monitor and regulate the profession.	✓	✓	
4. Require that OPPG and/or the entity responsible for maintaining the publicly accessible database described in Focus Area # 8 promptly notify the chief judge in any judicial circuit in which a professional guardian is currently	Increase transparency and accountability of professional guardianship regulation process to provide guidance to the courts and address an area of public mistrust.	✓	✓	

<p>serving and/or has previously served as guardian in a case of any verified findings of misconduct, disciplinary records, or removal of the guardian for cause by any other court.</p>				
<p>Focus Area # 2: Statewide Uniformity in Forms, Processes, and Practices</p>		<p>Options for Implementation</p>		
<p>Recommendation</p>	<p>Purpose</p>	<p>Amend Statute</p>	<p>Amend Rule</p>	<p>Other</p>
<p>1. Uniform guardianship forms should be adopted and required statewide.</p>	<p>Facilitate continuity in the process of guardianships across the state, to clearly establish minimum disclosure requirements to the court, and to assist in statewide data collection on guardianships.</p>	<p>✓</p>		
<p>2. A uniform process and form should be created to track whether a guardian is being removed for cause by a court or any other finding of misconduct, if the guardian resigns prior to involuntary removal by the court.</p>	<p>Eliminate jurisdictional information silos regarding professional guardians and promote statewide accountability and transparency of guardians.</p>		<p>✓</p>	
<p>Focus Area # 3: Increased Oversight, Safeguards, and Court Monitoring Processes Across the State</p>		<p>Options for Implementation</p>		
<p>Recommendation</p>	<p>Purpose</p>	<p>Amend Statute</p>	<p>Amend Rule</p>	<p>Other</p>
<p>1. Every judicial circuit within the State of Florida must implement a guardianship monitoring process, which must assist in maintaining and reporting statewide guardianship data.</p>	<p>Increase and standardize guardianship monitoring processes across the state for greater oversight and accountability, as well as to eliminate regional inconsistencies.</p>	<p>✓</p>		<p>Judicial Administrative Commission</p>
<p>2. The Legislature should adopt and proscribe clear and comprehensive minimum standards for guardianship monitoring programs across the state.</p>	<p>Create greater uniformity in processes and facilitate equity in the court systems and protections provided across the state.</p>	<p>✓</p>		
<p>3. The Legislature should consider the creation of a statewide department, entity, or organization to</p>	<p>Create clear standards for implementation, oversight, and accountability in</p>	<p>✓</p>		

supervise and assist individual circuits in the implementation and facilitation of guardianship monitoring processes or programs.	guardianship monitoring processes statewide.			
Focus Area # 4: Preserving the Rights, Dignity, and Autonomy of Alleged and Adjudged Incapacitated Persons		Options for Implementation		
Recommendation	Purpose	Amend Statute	Amend Rule	Other
1. The Legislature should review and consider updating existing language used in Chapter 744 of Florida Statutes (e.g., ward).	Remove and eliminate prejudicial, dated, and pejorative language and terminology from Florida law.	✓		
Focus Area # 5: Ensuring the Use of Least Restrictive Alternatives (Including Advance Directives and Supported Decision-Making)		Options for Implementation		
Recommendation	Purpose	Amend Statute	Amend Rule	Other
1. Require a written finding and explanation by the court in every instance in which an advance directive is not honored (either in total or in part) by the court.	Increase visibility of situations in which advance directives cannot be honored, as well as increasing accountability of the judiciary in honoring advance directives when possible.	✓	✓	
2. Include the use of supported decision-making as an alternative to guardianship that must be considered by the court prior to appointing a guardian when appropriate.	Maximize the potential for use of less restrictive alternatives to guardianship when appropriate and possible.	✓		
Focus Area # 6: Health and Residential Care “Pipeline to Guardianship”		Options for Implementation		
Recommendation	Purpose	Amend Statute	Amend Rule	Other
1. Require all health care and residential care providers, or counsel retained on their behalf, seeking or supporting a petition for guardianship to demonstrate in writing that they have exhausted all available health care surrogate and proxy	Ensure that the least restrictive alternatives have been explored prior to filing a petition for guardianship.	✓	✓	Agency for Health Care Admin.

options (i.e., other than court-appointed guardians), provided in Florida Statute § 765.401.				
2. Prohibit health care and residential care providers, or counsel retained for their benefit, from recommending (directly or indirectly) the appointment of any specific professional guardian for any patient or client in their care.	Eliminate a clear conflict of interest for the guardian in order to ensure all decisions are motivated by wishes and best interests of the individual in guardianship.	✓	✓	Florida Bar Agency for Health Care Admin.
3. Require that any attorney filing or assisting in the completion or filing of a petition for guardianship disclose any existing or previous relationship the attorney has with any health, residential or other care provider or caregiver of the alleged incapacitated person.	Provide transparency and full disclosure to the court and parties in a guardianship proceeding to eliminate potential conflicts of interest and promote public trust in the guardianship system.	✓	✓	Florida Bar
Focus Area # 7: Enhanced Education and Qualification Requirements of Professionals and Parties in Guardianship		Options for Implementation		
Recommendation	Purpose	Amend Statute	Amend Rule	Other
1. Require enhancement to the initial and continuing education requirements for all parties and personnel involved in the guardianship process.	Ensure that all professionals involved in guardianship are adequately educated and aware of their obligations to the individual in guardianship.	✓	✓	
2. Review the existing education and qualification requirements for members of the examining committee.	Clarifying the standards and areas of inquiry which are appropriate for consideration by the committee, eliminating potential conflicts of interest by examining committee members, and providing uniform practices statewide in the evaluation of individual rights subject to removal during the guardianship process.	✓	✓	

<p>3. Require that all judges handling guardianship cases must undergo and certify continuing judicial education regarding advance directives and least restrictive alternatives to guardianship.</p>	<p>Ensure that judges involved in guardianship determinations are experts in this complicated and sensitive area of law, in order to protect the rights of our state’s most vulnerable population.</p>	<p>✓</p>	<p>✓</p>	
<p>Focus Area # 8: Increased Accessibility and Transparency of Professional Guardians and the Guardianship Process</p>		<p>Options for Implementation</p>		
<p>Recommendation</p>	<p>Purpose</p>	<p>Amend Statute</p>	<p>Amend Rule</p>	<p>Other</p>
<p>1. Direct the creation of a publicly accessible, online database regarding the registration, qualifications, and disciplinary / removal history for all professional guardians.</p>	<p>Increase transparency and eliminate jurisdictional information gaps regarding professional guardians to promote the integrity of and foster public trust in Florida’s guardianship system.</p>	<p>✓</p>	<p>✓</p>	
<p>Focus Area # 9: Need for Additional Workgroup(s) Responsible for Assessing Florida’s Guardianship System</p>		<p>Options for Implementation</p>		
<p>Recommendation</p>	<p>Purpose</p>	<p>Amend Statute</p>	<p>Amend Rule</p>	<p>Other</p>
<p>1. Create a long-term entity or workgroup, comprised of individuals with guardianship knowledge and a broad range of perspectives and disciplines, tasked with regularly making recommendations for improvement to the guardianship system.</p>	<p>Continuously review and make improvements to the guardianship system from a multidisciplinary perspective, accounting for the numerous individuals, professions, agencies, and industries affected by guardianship.</p>	<p>✓</p>		
<p>2. Create an additional workgroup or task force to review the current practices and uses of the guardianship system by health and residential care providers and explore appropriate alternatives for those providers serving isolated or abandoned vulnerable adults.</p>	<p>Provide viable alternatives to guardianship for the health care industry with the additional expertise of medical, health, and other care-related professionals.</p>	<p>✓</p>		

TOPICS NOT REACHED / ADDRESSED BY THIS TASK FORCE

Additional Focus Areas of Concern Identified by Task Force		Options for Implementation		
Proposal	Purpose	Amend Statute	Amend Rule	Other
1. Review and improve the restoration of capacity process, by reducing barriers and making the process clear and accessible.	Encourage and facilitate the restoration of capacities and increased independence of individuals in guardianship whenever possible.		✓	
2. Consider the use of less expensive, alternative dispute resolution and problem-solving options for those involved in the guardianship process.	Provide faster relief to the individuals in guardianship without the expense of court fees and attorney's fees assessed from the individual's assets.	✓	✓	
3. Consider implementing a process for the appointment of attorneys for an alleged incapacitated person or ward in all involuntary guardianship proceedings, paid for by the state, regardless of the individual's indigency status, who would serve as a defense attorney to guardianship.	To eliminate the inherent conflict of interest which exists when an attorney's compensation is dependent upon a determination of incapacity and the establishment of a guardianship for the ward, as well as to provide statewide uniformity in the minimum standards and responsibilities of representation for an individual in guardianship.	✓	✓	Judicial Administrative Commission
4. Clarification on the process for waiver of the alleged incapacitated person's, or ward's, presence in any guardianship hearing, which properly preserves the due process protections of the individual.	Safeguard the rights of the individual in guardianship and eliminate the potential for misrepresentations or mistake of fact regarding the individual's ability and willingness to participate in hearings regarding their care and wellbeing.		✓	See UGCOPAA §§ 205, 307, 408 for comprehensive provisions on a respondent's presence and rights at a hearing.

5. Address alternatives to the school-to-guardianship and foster-care-to-guardianship “pipelines” for young adults with developmental disabilities.	Ensure that least restrictive alternatives to guardianship options have been thoroughly explored prior to the implementation of a permanent guardianship for a young adult with disability.	✓	✓	Florida Department of Children and Families
6. Reconsideration of Florida’s adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, either in total or in part.	To eliminate the potential for “granny-snatching” and other abuses caused by forum-shopping or jurisdictional avoidance of persons seeking control over a vulnerable adult and/or their assets.	✓		
7. Creation of a singular point of intake process and regulating entity for guardianship concerns regarding the welfare of the person or property involved in guardianship.	Remove obstacles and confusion from the reporting process to ensure prompt and appropriate review and response to complaints regarding the welfare and protection of individuals in guardianship.	✓		Florida Department of Children and Families

Other Topics Recommended for Future Consideration	Key Points Discussed in This Report	Options for Implementation		
		Amend Statute	Amend Rule	Other
1. Accessibility and Court Services for the Guardianship Process	<ul style="list-style-type: none"> • ADA Accommodations • Language Interpreter Services 	✓	✓	Judicial Administrative Commission
2. Alleged and Adjudged Incapacitated Persons’ Rights and Protections	<ul style="list-style-type: none"> • Elimination of Plenary Guardianships • Standardized Rights Removal and Delegation Forms • Neutral Advocacy • Substitution of Counsel • Freedom to Communicate and Associate • Access to Information Upon Request 	✓	✓	

	<ul style="list-style-type: none"> Continuing Review of Need for Restriction(s) 			
3. Confidentiality and Privacy Protections	<ul style="list-style-type: none"> Transparency vs. Dignity of Individual Consent of Individual. 	✓	✓	
4. Conflicts of Interest	<ul style="list-style-type: none"> Attorneys for Guardian Professional Guardian Examiners 	✓		Judicial Administration Commission
5. Costs of Guardianship	<ul style="list-style-type: none"> Professional Guardian Fees Attorney's Fees Court Costs for Indigent Individuals 	✓	✓	
6. Criminal and Social Service Investigations	<ul style="list-style-type: none"> Central Abuse Hotline Adult Protective Services Law Enforcement Prosecution 	✓		
7. Delinquent and Incomplete Reporting by Guardian	<ul style="list-style-type: none"> Court Notification Accountability and Discipline 	✓	✓	
8. Family Guardianships	<ul style="list-style-type: none"> Education and Training Resources for Guardians 	✓	✓	Seek NGO and other non-profit support.
9. Guardian Advocacy	<ul style="list-style-type: none"> Rights Retained Oversight 	✓		
10. Professional Guardians	<ul style="list-style-type: none"> Compensation Standards Billable Hours Harassment by Parties Transparent Practices 	✓	✓	Administrative Rules.
11. Statewide Health Care Surrogate / Proxy Database	<ul style="list-style-type: none"> Accessibility by Health Care Professionals Statewide Limited Use 	✓		
12. Public Information and Resources	<ul style="list-style-type: none"> Explanation of Rights Overview of Guardianship Process Guides for Individuals in Guardianship 	✓	✓	Seek NGO and other non-profit support.

	<ul style="list-style-type: none"> Guides for Family Members and Persons Assisting Individuals in Guardianship 			
13. Rehabilitation-Focused Guardianship Process	<ul style="list-style-type: none"> Presumption of Restoration Encouraged Independence Individualized Care and Training Plan Multiple Paths to Restoration 	✓	✓	
14. Sale of Property	<ul style="list-style-type: none"> Affidavits / Disclosures Initial Recovery Period 	✓	✓	
15. Trusts and Guardianship	<ul style="list-style-type: none"> Disclosure Requirements Compensation / Reimbursement of Guardian 	✓	✓	

V. Focus Area #1: Statewide Guardianship Data Transparency

Present Situation

Florida's Guardianship Data Collection Practices

Currently the State of Florida has little state-wide formalized guardianship case data collection or sharing processes in place.²³

Much of the needed information exists within each of the 67 separate Florida county clerks of courts' case maintenance systems. However, these case maintenance systems are locally maintained in accordance with each county's established policies and procedures, using different case maintenance systems, and the data is not shared or comprehensibly reported across the state. Additionally, the information collected in each guardianship case may vary from county to county because data collection is often driven by local needs. The technology used by the clerks' offices is locally funded.

Information Available for Professional Guardians

Circuit courts must verify that a professional guardian is registered by the Office of Public and Professional Guardians (OPPG) prior to appointing the guardian on any case,²⁴ and individual clerks of court are charged with receiving and maintaining information regarding the qualifications and caseload for guardians.²⁵ The Department of Elder Affairs and OPPG must in turn provide the clerks of the court and chief judge of each judicial circuit with relevant information about professional guardians.²⁶

As the regulating authority for all professional guardians in the state, OPPG is responsible for monitoring the initial and continued qualifications of professional guardians in the areas of education, background checks, complaints, and disciplinary actions.²⁷ Consequently OPPG maintains information concerning the training, education, and practical examination results for each registered professional guardian. OPPG also contracts with the Florida Department of Law Enforcement to perform Level II background screening (criminal history check) for professional guardians once every

²³ See "Trial Court Statistics Search," *Florida Courts*, (2021), available at: <http://trialstats.flcourts.org/>.

²⁴ Florida Statute § 744.2003 (9).

²⁵ Florida Statute § 744.3135 (1), (3), (4)(a), and (6).

²⁶ See Florida Statute § 744.2002 (9).

²⁷ See Florida Statute § 744.2003.

five years of registration.²⁸ Further, OPPG receives, reviews, and investigates, via the Statewide Investigation Alliance, all legally sufficient administrative complaints filed about the conduct of state-registered, professional guardians, and is responsible for determining and seeking any appropriate disciplinary action when these complaints are verified.²⁹

Recommendations:

1. Create a statewide data collection system for all guardianship cases.

Commentary

Without question the most significant issue this Task Force discussed and agreed upon was a means to improve what data is available in order to document problems within the guardianship system in Florida. Florida is not alone. A recent three-part report about guardianship in the United States concluded that, after making public records requests in all 50 states and the District of Columbia, “[f]ewer than half of the states had fully usable data [about guardianship cases].”³⁰

In Florida even basic information such as: the number of people under guardianship, the number of guardians, how many cases each guardian has, how much money and property are under the control of guardians, and who are the people under guardianship, is not readily available.

As one experienced family guardian aptly described the situation in Florida, “Data collection is sketchy at best.”³¹

This Task Force received compelling presentations and testimony about problems within Florida’s guardianship system. The Task Force believes many of these serious problems are widespread throughout the state. It was impossible, however, to quantify the scope of these experiences as a statewide problem because the data

²⁸ See “Professional Guardian Registration Form,” *Office of Public and Professional Guardians*, (Feb. 2017), available at: <https://elderaffairs.org/wp-content/uploads/office-of-public-and-professional-guardians-professional-guardian-registration-form.pdf>.

²⁹ Florida Statute § 744.2004.

³⁰ Heidi Blake and Katie J.M. Baker, “Beyond Britney: Abuse Exploitation and Death Inside America’s Guardianship Industry,” *BuzzFeed News*, (Sep. 17, 2021), available at: <https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears>.

³¹ Tom Scherberger, “Florida Guardianship System Lacks Crucial Central Database,” *AARP*, (March 1, 2021), available at: <https://states.aarp.org/florida/florida-guardianship-system-lacks-crucial-central-database>.

simply is not available. The testimony provided on Florida’s guardianship problems evidences the need for statewide data collection.

One topic of concern identified during a court monitoring presentation before this Task Force is the potential failure by the courts, clerks of court, and/or court monitors to report situations of abuse, neglect, or exploitation to Florida’s Central Abuse Hotline.³² Without any formalized method for data collection by the courts in each guardianship case, there is no way to determine whether the courts, clerks, and court monitors are complying with their mandatory reporting obligations provided in [s. 415.1034, F.S.](#)

Prior Task Force Support

Three of the four Florida guardianship task forces/work groups previously identified in this report underlined the lack of available statewide data for adequate and objective evaluation and assessment of Florida’s guardianship system.

The 2014 Restoration of Capacity Study and Work Group Report perfectly captured the challenge they faced when attempting to assess the process and rates for the restoration of capacity of individuals in Florida guardianships:

“There is little uniform data collected on guardianships in Florida. The Office of the State Courts Administrator (OSCA) reports at the state level only the number of guardianships filed in a given year and the dispositions of those cases. The state does not keep a record of the total number of persons under guardianship, whether the guardianship is plenary or partial, the nature of the disability of the person under guardianship, or a host of other data crucial to making informed decisions about systems change. Additionally, there is neither central reporting of the number of Suggestions of Capacity filed nor restoration outcomes in general.”³³

Even as early as 2003, guardianship evaluators noted “[e]ach of the components of guardianship monitoring requires *data* relative to the specific services provided.”³⁴

³² During presentations by court monitors, one court monitor told this Task Force that she reports her findings of exploitation and other misconduct to the court and relies upon the judge to determine whether a report should be filed with the Florida Department of Children and Families, Central Abuse Hotline.

³³ The Florida Developmental Disabilities Council / Guardian Trust, “Restoration of Capacity Study and Work Group Report,” *Florida Courts*, (Feb. 28, 2014), pp. 4, available at: <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>.

³⁴ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), pp.33, available at:

So too did this prior task force suggest that the problem may be easily remedied using court case management systems:

“A relational automated case management system provides the framework to record information about guardianship cases, the wards, and the guardians. This information database can be used to meet the operational and management needs of the guardianship monitoring program as well as providing the necessary management, planning and budget information.

The Commission aspires to bring a cohesive, integrated approach to the use of technology in the judicial branch for collecting, processing, and sharing information in a standardized format. Such standardized automated court systems will not only meet the data needs of judges, the public, justice system partners, and others who need to access court information, but also encourage innovative cost-effective projects that can be used throughout the judicial branch.”³⁵

Public Testimony

- The initial petition for guardianship could be used to effectively collect data by the courts. All of the following disclosures should be required in the petition:
 - The relationship between the filer and the ward (e.g., family member, assisted living facility, hospital, member of the community, etc.);
 - The reason for requesting guardianship (e.g., intervention in an exploitation scenario, developmental disability, new medical issue);
 - The type of guardianship being requested (e.g., person only, property only, person and property, plenary, or guardianship advocacy);
 - Whether the ward is indigent; and
 - Whether the filer of the petition is indigent.
- Each of the following topics regarding guardianships received widespread criticism by the public; the Task Force was convinced they were very problematic, but the scope of these experiences could not be quantified due to the lack of a statewide data collection system: (*appearing in no particular order*)
 - The total costs to wards in the guardianship process;
 - The cost of attorney’s fees for litigating contentious guardianship cases;

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.
(emphasis added).

³⁵ *Id.*

- The volume and cost of “frivolous” complaints filed by family members in guardianship cases;
- The total number of cases or wards assigned to a guardian at any one time;
- The practices by each clerk of court with respect to indigent wards and/or indigent petitioners for guardianship;
- The number of guardianship cases left pending for extended periods of time due to a lack of final accounting;
- The compensation practices for guardians by county or circuit;
- The number of guardianship cases in which exploitation or other criminal misconduct is alleged, versus the number of cases resulting in a criminal investigation and/or prosecution;
- The number of cases in which a suggestion of capacity is filed, as well as the number of cases in which capacity is partially or fully restored;
- The history or record of examining committee members involved in assessing capacity or the restoration of capacity; and
- The number of cases in which an AIP or ward’s presence is waived for dispositive hearings, as well as information regarding how judges in each county ensure the person’s due process protections when a waiver is requested.

Implementation

This Task Force unanimously agrees that Florida cannot make meaningful changes in the improvement of the state’s guardianship system without this necessary data. Recommendations on exactly what guardianship information is collected,³⁶ how it is collected, how it is maintained, and what may be publicly accessible, was beyond the ability of this Task Force to conclude because of its limited time and resources. Nevertheless, this Task Force strongly urges the Legislature to establish a system to collect and monitor guardianship case data, as well as report problems and trends to the Legislature, other key leaders in the guardianship system, and the other two branches of government.

At what stage in the guardianship process data is collected, what data is collected, how and with whom that data is shared – particularly among critical agencies and the courts, who is responsible for collecting and organizing this data, and how this data is used or disseminated is left to the sound discretion of the Legislature.

³⁶ See Appendix D. (Statewide Data Collection Metrics for Guardianship) for examples of relevant information in guardianship cases which should be considered for data collection planning purposes.

Privileged, confidential information pertaining to the individuals within guardianships otherwise protected by existing law should remain protected and confidential, unless the Legislature determines some other public interest would prevail in its disclosure.

2. **Require that every judicial circuit collect and report information in all guardianship cases regarding the existence of advance directives, powers of attorney, health care surrogate designations, and other similar legal documents, whether the document was honored (in part or total), and any reason given by the court for not honoring the document.**

Commentary

One key area of concern identified during public testimony, as well as during Task Force presentations and deliberations, was the question of how courts across the state are treating advance directives. There are concerns that the treatment of advance directives varies drastically between the various counties and circuits of this state and that some courts may not be honoring valid advance directives when they are offered as a less restrictive alternative to guardianship.

While individual case results were discussed and based on the personal experiences of both the professionals and members of the public in attendance at Task Force meetings, the scope of these experiences cannot be quantified due to the lack of statewide data reporting on this point. A sheer majority of public comments reflected personal accounts of judges ignoring or unlawfully overruling an advance directive, meanwhile some members of this Task Force relayed witnessing judges make every effort to honor and incorporate valid advance directives in their case decisions.

Additionally, as is discussed in Section X (Health and Residential Care “Pipeline to Guardianship”) of this report, concerns were raised before this Task Force about the use of guardianships by the health and residential care industries to deal with solo, alienated patients who lack capacity to consent to care or placement. It is unclear whether any of these patients had advance directives which were considered by the court prior to placing the person in guardianship. This is an essential piece of information, which must be collected in order to objectively assess and improve the Florida’s guardianship process.

Public Testimony

The public comment echoed the call for better oversight of the treatment of advance directives, especially when they are being overruled by the courts in favor of guardianships.

Implementation

In continuation from Recommendation # 1 for a statewide data collection process and system, this Task Force recommends that the frequency of both the existence and treatment of advance directives by the guardianship courts in this state should be mandatorily tracked and reported by every judicial circuit. Additionally, to properly evaluate and monitor statistics regarding the different treatment of advance directives across the state, each judge should be required to clearly state the reason(s) an existing advance directive is not being honored by the court, and this information should be reported through a statewide data collection process.

- 3. Require that every judicial circuit collect and report guardianship case information and changes to the Office of Public and Professional Guardians (OPPG) and the entity responsible for maintaining the publicly accessible professional guardian database described in Focus Area # 8.**

Commentary

There is no reporting obligation by the courts to notify OPPG when a professional guardian is appointed to a case, nor are the clerks of court required to report the number of cases that a professional guardian has within each county or judicial circuit at a time. And due to the security and confidentiality restrictions placed on guardianship cases with Florida's Comprehensive Case Information System (CCIS), coupled with the regional differences in data reporting and entry by each clerk of court office, there is no singular method or process for identifying the number of cases or wards a professional guardian may be responsible for at any given point in time. However, this information is currently tracked and monitored by each of the 67 separate county clerks of court, but as noted there is no central data base for this information. Clerks are doing what they are currently required to do under the law, but the data they collect goes largely unused because it is not shared.

Additionally, there are no reporting obligations for the courts or the clerks of court to file a complaint with or otherwise notify OPPG of delinquent or tardy filings by professional guardians, or other failures by professional guardians to comply with statutory reporting obligations to the court. Consequently, the regulatory agency responsible for ensuring the professional and statutory qualifications and capabilities of all professional guardians in Florida (i.e., OPPG) is effectively prevented from investigating many professional guardians who:

- “Fail [] to perform any statutory or legal obligation placed upon a professional guardian.”³⁷
- “...intentionally or negligently fail [] to file a report or record required by state or federal law...”³⁸
- And other violations of provisions in Chapter 744, including the timely filing of filing of guardianship reports, plans, inventories, and accountings.³⁹

The Task Force heard testimony from General Magistrate Kimberly Davis Bocelli that the Lee County Clerk of Court maintains an informal chart, which is updated to reflect the filing and reporting compliance of professional guardians registered with the Clerk in Lee County.⁴⁰ General Magistrate Bocelli described to the Task Force how she relies upon this information to confirm a professional guardian’s ability to meet and maintain the expectations of the court.⁴¹ However, the Task Force also learned that this practice is unique to Lee County and the information is only for internal use by the Lee County Court.⁴²

There is likewise no existing requirement that the clerks of court or the court notify OPPG when a guardian has been removed from a case for cause. While there are any number of legitimate and non-offending reasons for why a guardian may voluntarily resign from or be removed by the court from a guardianship case, the removal of a professional guardian from a case for cause is another matter entirely. OPPG should be informed any time a professional guardian has been removed for cause from a case, so that OPPG may review and, when appropriate, investigate the guardian’s conduct for potential administrative action or discipline.

Further, both the Legislature and the courts should review existing policies regarding guardians who attempt to voluntarily resign in an apparent effort to avoid adverse findings or disciplinary action by the court.

This Task Force was provided examples of guardians who voluntarily resigned prior to the court conducting any evidentiary hearings that might result in contempt actions or removal of the guardian for cause from the case. In these examples, the courts accepted the voluntary resignations of the problematic guardians, likely because it negated the need for a full evidentiary hearing and provided the court with

³⁷ Florida Statute § 744.20041 (i).

³⁸ Florida Statute § 744.20041 (j).

³⁹ Florida Statute § 744.20041 (s).

⁴⁰ See Guardianship Improvement Task Force Public Meeting, July 28, 2021, *recording available at*: <https://www.youtube.com/watch?v=P0A1LKJnaig&t=19089s>.

⁴¹ *Id.*

⁴² *Id.*

an opportunity to appoint a more suitable guardian in his or her place. However, by accepting the voluntary resignation of the guardian and not making any specific findings regarding the misconduct of the guardian, the courts often unintentionally permitted the same guardian to commit misconduct on other cases, especially for cases in other counties and circuits where the guardian also practices.

This Task Force encourages the Legislature to review existing practices and law pertaining to the regulation of guardians to ensure that substantive and recurring misconduct or malfeasance is promptly identified and addressed by all interested courts and agencies.

Public Testimony

- The clerk of courts' case management systems should track each professional guardian's compliance with meeting filing deadlines for accountings and other reporting requirements.
- Tardy filings, failures by a guardian to respond, and other recurring problems by professional guardians should be accurately recorded and available for judges in every judicial circuit for consideration in appointing the guardian to a new case.
- Recurring problems with professional guardians who fail to meet filing deadlines or other reporting obligations before the court should be reported or made available for review by OPPG for disciplinary considerations.
- Each judge should be able to access relevant information about professional guardians, including the number of wards a guardian is serving at any given point in time.

Implementation

The most logical remedy to address this gap in information appears to be a statutory amendment which requires every clerk of court, or every guardianship court, to promptly report information regarding each professional guardian's involvement and interaction with the guardianship court. This information should include, but may not be limited to, the number of cases on which a guardian is or has previously been appointed to serve, the case numbers associated with this guardian's current and past professional history, both the counties and circuits in which a guardian is actively or has previously served, as well as the compliance history of the professional guardian with statutory and professional obligations, such as reporting.

Additionally, the clerks of court or guardianship courts should be required to immediately notify OPPG if a guardian is removed from a case for cause.

Further, the legally sufficient basis for which OPPG may open an investigation into a professional guardian,⁴³ as well as the grounds for disciplinary actions or penalties for a professional guardian, should be statutorily expanded to include the issuance of an Order of Contempt by any guardianship court or the removal of a guardian for cause from a case.⁴⁴

- 4. Require that OPPG and/or the entity responsible for maintaining the publicly accessible database described in Focus Area # 8 promptly notify the chief judge in any judicial circuit in which a professional guardian is currently serving and/or has previously served as a guardian in a case of any verified findings of misconduct, disciplinary records, or removal of the guardian for cause by any other court.**

Commentary

Obviously collecting data serves no purpose unless it is used effectively. It is clear from the testimony and presentations provided to the Task Force that information regarding professional guardians is not available to those who need it most, namely the judges handling guardianship cases.

As the Orange County Comptroller noted in its March 2021 report auditing the administration of the guardianship program noted, “when guardians are suspended, there are no procedures in place to identify and reassign their cases.”⁴⁵ The Orange County Comptroller found in its audit of the guardianship program that an unregistered professional guardian was still assigned as the guardian of record in five guardianship cases; this is after the Court and the Clerk of Court were notified in writing by OPPG regarding the guardian’s suspension.⁴⁶ Unfortunately this example is not reflective of an isolated problem of any single county or judicial circuit, but rather a problem of statewide concern and significance.

Requiring the notification of the chief judge of each circuit would allow information pertaining to the qualifications of a professional guardian to be disseminated timely to the guardianship court judges who are dealing with these guardians directly. Moreover, this notification, in conjunction with the overall professional guardian reporting requirements of each clerk of court (or guardianship court) to OPPG discussed previously in Recommendation #3 of this section, would allow for greater

⁴³ Florida Statute § 744.2004.

⁴⁴ Florida Statute § 744.20041.

⁴⁵ “Audit of the Orange County Clerk of Court’s Administration of the Guardianship Program,” *Orange County Comptroller’s Office*, (March 2021), Report No. 489, pp. 18, available at: https://www.occompt.com/download/Audit%20Reports/rpt489_2.pdf.

⁴⁶ *Id.*

accountability and monitoring by multiple agencies and organizations to eliminate problems like the example provided in Orange County.

Public Testimony

- Professional guardians should have caps or limits on the number of wards they may have at one time.
- There are concerns that judges have no access to complaints or investigations being conducted on professional guardians, which would be red flags and prevent the guardian from being appointed to new cases if the judges were made aware.
- Professional guardians should be appointed on a rotation basis to eliminate potential for conflict of interest.
- Professional guardians could be held to a flat hourly rate when randomly appointed to a case from a wheel, but then the parties could opt to hire a specific professional guardian who charges more or less than the flat rate, if the parties agree to the professional guardian and the guardian's hourly rate.

Implementation

The process for interagency sharing of information regarding the qualifications of a professional guardian should be statutorily clarified and should include the requirement that the chief judge in each judicial circuit receives such notifications. To the extent that this recommendation might require the Supreme Court of Florida to amend rules of procedure or judicial administration, the Legislature should urge the Supreme Court of Florida to do so for the reasons set out above.

VI. Focus Area #2: Statewide Uniformity in Forms, Processes, and Practices

Present Situation

Guardianship Forms

Similar to the data collection practices on guardianship information across the state, there are few, if any, truly uniform forms used statewide in guardianship cases. Instead, these forms tend to vary from circuit to circuit and even county to county and, in some cases, even by individual judge or attorney preference. Likewise, this lack of uniformity in forms contributes to the data collection challenges the state faces with guardianship case information.

While some Florida Statutes provide a list of information which must be contained within certain guardianship pleadings and applications,⁴⁷ in practice these documents will vary from jurisdiction to jurisdiction.⁴⁸

Florida's Probate Rules provide model forms, such as the "model accounting format," however this is only a *suggested* form and is not required for use statewide.⁴⁹

Guardianship Case Processes

Florida's localized court system, driven by local funding of technology, contributes to the overall lack of statewide data collection. There are multiple clerk case management systems utilized throughout the state and data collection is currently driven primarily by the local needs and demands of the local judiciary.

A committee of the Florida Courts Technology Commission is currently working on plans to develop more standardized docketing codes statewide. This standardization will improve the state's data collection and analysis capabilities for all court case types and should hopefully assist with some of the guardianship data collection principles discussed in this section. One simple example of how these practices can vary so drastically by county to county in Florida is by Uniform Case Number "court type."

⁴⁷ See generally Florida Statute § 744.3125.

⁴⁸ See "Application for Appointment as Guardian," *Thirteenth Judicial Circuit*, (May 2021), available at: <https://www.fljud13.org/Portals/0/Forms/pdfs/ejc/ApplicationforAppointmentsasGuardian.pdf>. See also "Application for Appointment as Guardian / Guardian Advocate," *Seventeenth Judicial Circuit*, (May 2018), available at: http://www.17th.flcourts.org/wp-content/uploads/2017/08/application_for_appointment_as_guardian.pdf.

⁴⁹ See Fla. Rule Prob. 5.696. See also Fla. Rule Prob. Appendix A.

The Florida Supreme Court adopted a “Uniform Case Numbering System” for the Florida Courts System in 1998, which provides a format for all case numbers for circuit and county courts:⁵⁰

<u>County Designator</u>	<u>Year Designator</u>	<u>Court Type</u>	<u>Sequential Number</u>	<u>Party/Defendant Identifier</u>	<u>Branch Location</u>
01	2000	CF	000001	A/N* (4)	A/N* (2)

**Alpha Numeric*

The Florida Supreme Court provided that the “court type” codes or designators for guardianship cases handled by the circuit courts would be one of the following:⁵¹

“CP + Probate/Guardianship” or “GA = Guardianship”

The actual application of this choice in case designation means that the Polk County Clerk of Court’s office will designate a plenary guardianship case in the style of “CP,” while the neighboring Osceola County Clerk of Court provides the same plenary guardianship case with a “GA” case designation when transferred. This very simple example of differences in jurisdictional practices caused by an unclear rule highlights a key reason why the State of Florida is unable to compile accurate statewide data on the scope of guardianship cases around the state. If there is no one method for identifying a guardianship case in Florida’s Comprehensive Case Information System (CCIS), then there is no reliable method for state agencies and policy makers to gather data for analysis on guardianships across the state.

This example produces even greater disparity when attempting to identify concurrent case proceedings within guardianship, such as the determination of incapacity or an injunction for protection against exploitation. A review of docketing practices across the state reveals that *most* capacity determinations are bifurcated from the petition for guardianship, resulting in a second case number for the same parties. In some counties this will appear in CCIS as two “GA” case numbers (e.g., Indian River County), for other counties this will appear as two “CP” case numbers (e.g., Hillsborough County), while in still other counties you may see a “GA” or “CP” case number matched with an “MH” (mental health) case number (e.g., Palm Beach County).

⁵⁰ *In re Uniform Case Numbering System*, Fla. Admin. Order (July 6, 1998), available at: https://www.flcourts.org/content/download/219190/file/AO_Uniform_Case_Numbering_07-06-98.pdf.

⁵¹ *In re Uniform Case Numbering System*, Fla. Admin. Order (Dec. 3, 1998), available at: https://www.flcourts.org/content/download/219191/file/AO_Uniform_Case_Numbering_12-03-98_amended.pdf.

Guardianship Case Practices

In addition to these coding differences between individual county clerks of court, there are also procedural differences which vary by county. These procedural differences result in some county clerks of court waiving the application fee for an indigent petitioner in a guardianship case, while others do not. These procedural differences also impact how each court appoints court monitors in a problematic guardianship case.

Recommendations:

1. Uniform guardianship forms should be adopted and required statewide.

Commentary

Many areas of legal practice benefit from standard forms. As an example, standardized forms are often utilized in family law cases to ensure continuity in practices and information sharing.⁵² Additionally, traffic citations are uniform across the entire state.⁵³

While individual circuit courts in Florida may have standardized forms available through the clerk of courts website,⁵⁴ these forms are not the same statewide.

Standard forms allow the collection of the same information from each judicial circuit. As noted in Section V of this report, there is a serious need for standardized data collection to improve the evaluation of Florida's guardianship process. The use of *some* standardized forms would appear to be inextricably intertwined and fundamental to a consistent statewide data collection process.

⁵² See Family Law Forms "Florida State Courts System's Self-Help Center," *Florida Courts*, (Aug. 4, 2021), available at: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Family-Law-Forms?parentId=669505&sort=form/number%20asc,%20form/date%20desc&view=embedded_custom&searchtype=form&limit=50&query=&offset=0.

⁵³ The Legislature has seen the benefit of standard forms and recently charged the Department of Law Enforcement with creating a Uniform Arrest Affidavit. See Florida Statute § 943.6871.

⁵⁴ See "Guardian Advocacy Forms," Thirteenth Judicial Circuit, (Feb. 10, 2021), available at: <https://www.fljud13.org/Portals/0/Forms/pdfs/GA%20Forms%20packet.pdf>, and the Seventeenth Circuit, <http://www.17th.flcourts.org/probate-and-guardianship-smart-forms-home-page/>.

Prior Task Force Support

The 2018 Guardianship Workgroup report specifically recommended the creation of standardized statewide forms for petitions, orders, letters, and annual reports in guardianship cases.⁵⁵ In support of this recommendation, the report notes that the use of such forms would promote uniformity among the courts, as well as potentially help to reduce attorneys' fees by simplifying some of the reporting processes in guardianship cases.

Additionally, both the 2003⁵⁶ and 2004⁵⁷ guardianship reports supported the use of uniform reporting and data collection processes as a method of streamlining processes for the clerks of court, as well as to facilitate information-sharing across the state.

Public Testimony

- Much criticism was received regarding the lack of clarity in processes for raising concerns or complaints regarding fraud and other misconduct in guardianship. This process should be streamlined across the state to ensure that all appropriate local and state agencies are appropriately and timely notified when there is a problem.
- Criticism was provided by guardianship attorneys over the variety in application forms and practices for guardianship from county to county.
- Uniform letters for guardianship should be considered for circumstances when more than one guardian is appointed in a case; especially if there are separate guardians for the person and the property. The uniform letters should include language which would place a third party on notice that the authority of the guardian is limited only to certain rights and delegations.
- Indigency of the ward and petitioner is treated differently from county to county and each court uses a different indigency status form; this should be a standardized form and process to avoid inconsistent results around the state.

⁵⁵ Judicial Management Council Guardianship Workgroup, "Final Report," Supreme Court of Florida Judicial Management Council, (June 2018), *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

⁵⁶ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "Guardianship monitoring in Florida: Fulfilling the Court's duty to protect wards," (2003), *available at*: <https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

⁵⁷ Governor's Guardianship Task Force, "2004 Final Report of the Guardianship Task Force," (December 2004), *available at*: <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/09/2004-Guardianship-Task-Force-Final-Report.pdf>.

- Standardized forms for examining committee members, as well as standardized tools to assist in their assessments, would help to ensure clarity on the processes and standards being used during each assessment. This should include a form that specifically enumerates the individual rights and authorities which the court may remove from an individual, along with a description of each right/authority for the examining committee member.
- Guardianship court practices differ when it comes to initial inventories of a ward's assets; all courts should request/require a credit report for the ward be provided to the court to ensure transparency and accuracy in the inventories.
- The petition for guardianship should be a standardized form, which captures all of the following information:
 - The relationship between the filer and the ward (e.g., family member, assisted living facility, hospital, member of the community, etc.);
 - The reason for requesting guardianship (e.g., intervention in an exploitation scenario, developmental disability, new medical issue);
 - The type of guardianship being requested (e.g., person only, property only, person and property, plenary, or guardianship advocacy);
 - Whether the ward is indigent; and
 - Whether the filer of the petition is indigent.
- The use and creation of mandatory standardized forms should be carefully considered and weighed against the additional expense and demand this may place on the clerks and courts.
- Instead of using standardized forms in a single format, the Legislature could simply identify required information which must always be identified and recorded in each guardianship case.
- The use of standardized forms in guardianship accountings would help to prevent inadvertent omissions by a guardian.

Implementation

It is clear that the Legislature has the capability to provide standardized forms via statute; the Petition for Injunction for Protection Against Exploitation of a Vulnerable Adult provides one such example.⁵⁸ However, the Legislature may also consider requesting that the Supreme Court of Florida create guardianship pleading forms and rules concerning their mandatory use statewide.

Whatever the approach, this Task Force strongly recommends and supports the adoption of uniform guardianship forms and pleadings to facilitate the goal of statewide guardianship data collection.

⁵⁸ See Florida Statute § 825.1035 (3)(a).

2. A uniform process and form should be created to track whether a guardian is being removed for cause by a court or any other finding of misconduct if the guardian resigns prior to involuntary removal by the court.

Commentary

Section XII of this report discusses the need for additional accessibility and transparency of information provided between the Office of Public and Professional Guardians, the judiciary, the clerks of court, and to the public regarding professional guardians. This is especially true when it comes to the misconduct and/or disciplinary history of a specific professional guardian.

As noted in Section V of this report, there is no existing requirement or process for notification of OPPG, by the clerks of court, the judiciary, or any other parties, when a guardian has been removed from a case for cause. Additionally, the Task Force heard examples of professional guardians who voluntarily resigned from a case before the Circuit Court was able to remove the guardian for cause in an apparent effort to avoid detection or discipline.

This Task Force recommended in Section V that OPPG should always be informed when a guardian is removed *for cause* from a case, so that OPPG may review and investigate the guardian for potential penalties. In order to accomplish this notification to OPPG and in order to ensure that all other interested parties are notified when a professional guardian faces discipline or admonition from a court for misconduct in a guardianship case, this Task Force additionally recommends the creation of a form and/or uniform order which will accurately convey a professional guardian's misconduct or negligence in a particular case.

Public Testimony

- Recurring problems with professional guardians who fail to meet filing deadlines or other reporting obligations before the court should be reported or made available for review by OPPG for disciplinary considerations.
- Each judge should be able to access relevant information about professional guardians, including the number of wards a guardian is serving at any given point in time.

Implementation

In accordance with the earlier recommendations provided in Section V regarding information sharing on professional guardians, this Task Force proposes a statutory requirement for notification, which provides either a standard form or describes what must be reported by the court via court order. The Legislature may also choose to request that the Supreme Court of Florida assist with creation of this order or form.

VII. Focus Area #3: Increased Oversight, Safeguards, and Court Monitoring Processes Across the State

Present Situation

A “court monitor” is a person who is appointed by a guardianship court under [s. 744.107, F.S.](#), to provide the court with information concerning a ward.⁵⁹ A court monitor need not be an attorney or have any specific qualifications or training to be appointed by the court, other than the requirement that the person may not be a family member or interested person to the relevant guardianship case.⁶⁰

Each judge is given the discretion to appoint a court monitor in a guardianship case to investigate and assist the court with protecting the interests of the ward.⁶¹ This court monitor may then “investigate, seek information, examine documents, or interview the ward and shall report to the court his or her findings.”⁶² The appointment of a court monitor may be done at any time,⁶³ but requires notification to the guardian, the ward, and other interested parties designated by the court, unless the appointment of a court monitor is done on an emergency basis.⁶⁴

A court monitor may be compensated through a reasonable fee, as determined by the court, paid from the property and assets of the ward.⁶⁵ If the court monitor is a full-time state, county, or municipal employee or officer, the court monitor cannot be paid on a fee-basis for his or her investigation and report.⁶⁶ Additionally, if the ward is indigent, the court *may* appoint the Office of Criminal Conflict and Civil Regional Counsel as monitor of the case.⁶⁷

The vast majority of Florida’s circuit courts do not appear to have an established practice or policy with respect to the appointment of court monitors in guardianship cases. The few judicial circuits with established court monitoring processes differ drastically in the process for appointment of court monitors or initiating an investigation,

⁵⁹ Florida Statute § 744.1012 (6).

⁶⁰ See Florida Statute § 744.1012 (6). See *also* Florida Statute § 744.107.

⁶¹ See Florida Statute § 744.107.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Florida Statute § 744.1075.

⁶⁵ Florida Statute § 744.107 (4).

⁶⁶ *Id.*

⁶⁷ Florida Statute § 744.107 (5).

the qualifications or professional backgrounds of the court monitors, and the methods of compensation for court monitors.

On Thursday, September 2, 2021, this Task Force received virtual presentations and testimony from three court monitors practicing in the three separate judicial circuits in this state regarding the processes and practices of court monitors in each of those circuits (e.g., 9th, 15th, and 17th judicial circuits). Each of the following court monitoring program descriptions is derived from the recorded testimony provided before the Task Force on September 2, 2021, unless otherwise noted.

Ninth Judicial Circuit Court Monitor (Orange and Osceola Counties)

First Wynter Solomon-Cuthbert described her role as the Court Program Specialist II for Guardianship in the Ninth Judicial Circuit Court.

Ms. Solomon-Cuthbert is a full-time government employee in Court Administration. Ms. Solomon-Cuthbert typically investigates on a case-by-case basis in her role as a court monitor once she is appointed by a guardianship court judge in the Ninth Circuit to a particular case. However, Ms. Solomon-Cuthbert also reviews and assists in other problematic guardianship cases on behalf of the court without formal appointment, such as with locating missing wards and/or guardians.

Ms. Solomon-Cuthbert's case appointments may originate through a complaint filed with the clerk of court, from an attorney in the case, or from members of the public with concerns about a particular case.

In addition to investigating complaints, Ms. Solomon-Cuthbert assists with obtaining reimbursements from guardians owed to a ward or ward's estate.

Fifteenth Judicial Circuit Court Monitor (Palm Beach County)

The Honorable Stephen Cohen, a retired Palm Beach County Court Judge and practicing litigation attorney, provided a presentation on his role in the Fifteenth Judicial Circuit serving on many cases as a court monitor.

Judge Cohen is one of many experienced attorneys who have been appointed as needed on specific, problematic guardianship cases. The Fifteenth Judicial Circuit, as with some other jurisdictions in the state, appoints local, experienced, private attorneys to serve as court monitors in guardianship. Normally this appointment occurs after a Level II Auditing Report by the Clerk of Court has flagged problems with a guardian's management or a ward's assets. The court monitor is then appointed to investigate the matter further and report his or her findings to the court.

While court monitors in the Fifteenth Judicial Circuit can be paid a reasonable fee and be reimbursed for expenses from the ward's assets, Judge Cohen has previously declined such fee compensation because he stated he does not want to take fees from

the ward's assets or estate. Judge Cohen explained that he does not "believe in the theory of winning the battle and losing the economic war."⁶⁸

After filing a court monitor report with the court, the court may remove a guardian and/or may authorize a court monitor to take additional actions to obtain reimbursement for the ward or ward's estate.

When the Fifteenth Judicial Circuit Court has authorized Judge Cohen to file civil actions against the guardian or the guardian's attorney in past cases, he has utilized separate civil actions to seek sanctions and attorney's fees, as well as investigative expense reimbursement from the perpetrator(s) or defendant(s) in these actions. Judge Cohen's first priority is to reimburse the ward's estate and thereafter any compensation or reimbursement for the court monitor's fees or expenses is paid by the bad actor(s).

However, Judge Cohen also notes that this compensation by the wrongdoer has not been litigated fully, as most civil actions of this kind resolve by negotiated settlement between the parties. Judge Cohen also notes that Florida Statutes do not specifically provide for this remedy in court monitoring cases.

Seventeenth Judicial Circuit Court Monitor (Broward County)

The Task Force additionally received testimony from Paulette Armstead, a court monitor in Broward County.

The Seventeenth Judicial Circuit court monitor appointment and selection process is outlined by administrative order, which creates a court monitor registry of "qualified and approved individuals" who are appointed by the guardianship judge(s) on a strict rotation basis.⁶⁹ The Seventeenth Circuit defines these "special court monitors" as court monitors who investigate non-indigent guardianship cases.⁷⁰ These "special court monitors" must be familiar with Chapter 744 of Florida Statutes and must have certain legal, investigative, medical, social work, accounting, or professional guardianship experience to qualify for this position.⁷¹

⁶⁸ See Guardianship Improvement Task Force Public Meeting, September 2, 2021, recording available at: <https://youtu.be/1LvMZyCdobc?t=3713>,

⁶⁹ "Broward County Administrative Order 2019-26-PRC," *Seventeenth Judicial Circuit of Florida*, (March 2019), available at: <http://www.17th.flcourts.org/wp-content/uploads/2019/03/2019-26-PRC.pdf>.

⁷⁰ "Special Court Monitors," *Seventeenth Judicial Circuit of Florida*, available at: <http://www.17th.flcourts.org/about-court-administration/special-court-monitors/>.

⁷¹ "Court Monitor Application," *Seventeenth Judicial Circuit of Florida* (Jan. 18, 2019), available at: http://www.17th.flcourts.org/wp-content/uploads/2019/01/Court-Monitor-Application_20190118.pdf.

Broward County court monitors are independent investigators who have no *ex parte* communications with the judge in the guardianship case. Court monitors may interview a ward without the presence of the ward's attorney. Court monitor investigations are limited to the scope of matters specifically articulated within the court order appointing the court monitor.

Court monitoring fees are paid from the assets of the ward, provided that the ward has sufficient assets remaining to cover the expense. If a ward's assets are depleted and the court monitoring fee cannot be paid by the ward, the fees may instead be paid from the Justice Administrative Commission, unless the court monitor waives his or her fees and performs such work on a pro bono basis. Court monitors in Broward are compensated at a set rate of \$55 per hour of court monitoring work.

The appointment of a court monitor typically occurs when one of the three following groups of individuals requests such an appointment or otherwise reports concerns to the guardianship judge: (1) the court on its own motion and/or through the clerk of courts through audits; (2) court-appointed attorneys for the ward; and (3) concerned family members (usually initiated by a letter from the family member addressed to the judge presiding over the guardianship matter).

Recommendations:

- 1. Every judicial circuit within the State of Florida must implement a guardianship monitoring process, which must assist in maintaining and reporting statewide guardianship data.**

Commentary

A consistent theme in comments provided by both the presenters and members of the public appearing before this Task Force is the need for additional oversight and accountability within the guardianship process.

Florida's courts are overwhelmed by the volume and complexity of guardianship cases across the state, which are only likely to increase in the future with the so-called "silver tsunami." Both judicial and clerk resources are stretched to the max to ensure a fair and accurate accounting process occurs within each and every guardianship case. And despite the extensive reporting and accounting requirements outlined in [Chapter 744, F.S.](#), the state continues to see instances of guardianship exploitation go undetected for years at a time.

This report addressed in previous sections some of the problems associated with leaving guardianship practices and processes to vary so drastically from county-to-county or circuit-to-circuit. The court monitoring process is another major example of this concern. While several circuits within this state have demonstrated proficient and capable court monitoring policies and practices, there appears to be a lack of utilization of the court monitoring process by many other judicial circuits in this state.

Prior Task Force Support

The 2003 Supreme Court Commission on Fairness issued a report from its Committee on Guardianship Monitoring (Committee).⁷² The Committee explained:

“The mission of guardianship monitoring is to collect, provide, and evaluate information about the well-being and property of all persons adjudicated of having a legal incapacity so that the court can fulfill its legal obligation to protect and preserve the interests of the ward, and thereby promote confidence in the judicial process.”⁷³

The Committee’s conclusions and observations also reflect the view of this Task Force.

The Committee further described:

“Guardianship is a distinct and unique type of case. Unlike other cases, guardianships may remain open for years or even decades, particularly in cases involving individuals with developmental disabilities or mental disorders. Guardianship is also different because although it begins with an adversarial hearing, once incapacity has been determined, there are usually no “adversaries” to bring concerns to the court’s attention. Thus, the court must be proactive to discover and respond to disputes and issues.

The role of a guardian is highly complex, involving legal, medical, social, financial, and psychological dimensions. Many guardians are family members of the wards and have no experience with guardianship. These family members may be employed and have children for whom they must care, while simultaneously serving as guardian for their aging parents or other incapacitated family members. Most guardians and attorneys do an admirable job protecting the interests of the wards, but some need additional guidance and oversight. A guardianship monitor can assist guardians and attorneys in correcting minor problems and by making recommendations for that correction to the court. Such guidance by the guardianship monitor can often alleviate the need for a court hearing, thereby conserving judicial resources for those few instances in which guardians are misusing their authority.

Guardianship requires on-going court involvement and supervision. In 1986, the National Conference of the Judiciary on Guardianship

⁷² Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), available at: <https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

⁷³ *Id.* at pp. 2.

Proceedings for the Elderly said that ‘given the loss of liberties involved, the vulnerability of elderly wards, and the need to ensure the least restrictive alternative, it is essential that the court receive and review information about the status and well-being of the ward, and actions the guardian has taken.’ Guardianship monitoring is a mechanism Florida courts can use to review a guardian’s activities, assess the well-being of the ward, and ensure that the ward’s assets are being protected.

It is also clear that funding of additional judgeships to reduce the number of guardianship cases that an individual judge must oversee is neither cost effective nor possible given the current condition of Florida’s economy. However, by employing business-like practices, using support personnel, and implementing technology to manage information received by the court, it will be possible to accomplish much of the guardianship oversight requirements codified by the Legislature in the Florida Statutes.”

This Task Force believes what the Committee said in 2003 is still true today and the Legislature should require a guardianship monitoring program in every circuit court in Florida.

Public Testimony

- The statutes providing for court monitoring compensation should be amended to allow for fees and reimbursement to be assessed against the wrongdoer in a guardianship case, not just against the ward’s assets or estate.
- Court monitors need to be completely independent, and their compensation should not be tied to the ward’s assets.
- “§744.107, Florida Statutes, should restrict those able to be appointed as Court Monitors to: (a) former Judges in the State of Florida; and (b) Certified/Qualified Court Monitors. ‘Certified/Qualified Court Monitors’ would be defined as those who apply and are annually screened by the Judges of the Guardianship Division. Additionally, Court Monitors may not regularly practice before the Court that appoints him/her as a Court Monitor. This will also allow the Court Monitor to be compensated without violating §744.107(4), Florida Statutes, which prohibits full-time government employees from collecting a fee as a Court Monitor.”
- “§744.446(4), Florida Statutes, [sic] should be revised to provide a ‘reasonable fee’ to the Court Monitor to be paid first by any party found by the Court to be liable for wrongdoing to the Ward and, if unable to recover from the same, then from the assets of the Ward’s estate.”
- “§744.446(4) should be expanded to allow for liability against Counsel for the Guardian (as well as the Guardian) for wrongdoing upon proof that said attorney knew or should have known that they were assisting the Guardian to violate the rights of the Ward.”

Implementation

It is the decision and recommendation of this Task Force that court monitoring processes should be established and augmented, both by statute and court rule, to ensure that fair and effective court monitoring processes are utilized in every county and circuit across the State of Florida.

2. The Legislature should adopt and proscribe clear and comprehensive, minimum standards for guardianship monitoring programs across the state.

Commentary

This Task Force encountered some debate and lack of unanimity in describing the exact process by which court monitoring processes should be established in Florida. As some Task Force members point out, several judicial circuits have already addressed this concern in a manner that best reflects the needs of each circuit. However, the members of this Task Force were able to agree that based upon the minimal or non-existent court monitoring processes in other circuits of this state, minimum standards for court monitoring must be clearly established and required statewide.

While the Task Force acknowledges that there is no “one right way” to achieve Florida’s goal for comprehensive court monitoring, there are certainly basic principles and considerations that should be accounted for statewide, which *can* and will fairly apply to every region of the state.

Court monitoring programs and processes should be established in every circuit, through which *any person* with knowledge about a problem involving a guardianship case may report their concerns. While the appointment of a court monitor may only occur through appointment by the guardianship judge in a case, the method for raising a concern about a guardianship case should be apparent and accessible to *everyone*.

Additionally, court monitoring programs should be managed in a way which balances the ward’s protection with the transparency and integrity of the guardianship case process.

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) provides standards for “enhanced monitoring of guardians... to ensure that such appointees are complying their fiduciary duties and that individuals subject to guardianship... are protected against exploitation.”⁷⁴ Procedures

⁷⁴ National Conference of Commissioners on Uniform State Laws, “Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act,” *Uniform Law Commission*, (April 3, 2020), pp. 3, *available at*: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>.

suggested by the UGCOPAA, along with other examples of successful guardianship monitoring practices (both inside and outside of the state) should be reviewed by the Legislature for implementing minimum standards and requirements for court monitoring programs.

Public Testimony

- Court monitors, like every other person in the State of Florida, have a mandatory reporting obligation to report reasonable suspicions of abuse, neglect, or exploitation occurring against vulnerable adults. This should not be considered optional, nor is it an obligation passed on to the court, but rather court monitors *must* report and work with DCF and APS on exploitation cases.
- There is not enough accountability for guardians or attorneys who file fraudulent documents before the court in guardianship cases.
- The guardianship judges often “take the guardian’s word as gospel” and do not investigate or inquire further into the propriety of a guardian’s actions.
- Court monitors should have some level of investigative experience, education, or certification; for example: National White Collar Crime Institute certification for exploitation investigations.
- It is important to ensure that court monitors are not having *ex parte* communications with the judge in a guardianship case; the parties should be made aware of a court monitor’s findings at the same time as the judge.
- There needs to be a cost-effective way for a party to raise a concern involving a guardianship case without the parties and their attorneys continuously spending the ward’s money on legal fees litigating these issues.

Implementation

The existing statutes concerning court monitors should be expanded to include more detail regarding the qualifications needed to serve as a court monitor, methods for how a court monitor may be compensated, and minimum investigative standards or practices, which must be in place for any court monitoring investigation. Additionally, it should be clear that the court monitoring process does not ordinarily permit *ex parte* communications between the court monitor and the judge.

3. The Legislature should consider the creation of a statewide department, entity, or organization to supervise and assist individual circuits in the implementation and facilitation of guardianship monitoring processes or programs.

Commentary

Currently there is no singular state agency or regulatory authority responsible for the oversight of Florida's guardianship system. This lack of singular agency or point of intake results in complaints and concerns regarding guardianship being reported to a variety of state and local agencies, which may lack the authority and/or the expertise in guardianship needed to intervene or assist.

Further, the lack of statewide supervision and assistance is perhaps one explanation as to why Florida's court monitoring practices are so inconsistent and varied across the state.

The creation of a statewide entity tasked with supervising and assisting in the implementation of court monitoring processes would ensure minimum standards in guardianship are maintained in every region of the state. This statewide entity would additionally assist in identifying trends and problems involving guardianships as they are identified across the state.

A statewide entity for court monitoring programs might assist in earlier detection of problematic professionals involved in guardianship, as well as with identifying industry considerations often overlooked or ignored (see Section X of this report for one such example of an industry problem). Further, a statewide entity for court monitoring could also aid in notifying and collaborating with relevant agencies and stakeholders of problems that overlap with disciplines outside of guardianship (see Appendix F for examples of other industries, disciplines, and stakeholders).

Public Testimony

- What one agency or entity is responsible for intervening in guardianship abuse situations for the State of Florida? There isn't one, but there *needs* to be.
- OPPG investigates abuses by guardians, but who is investigating guardianship misconduct by the attorneys and other professionals involved in the case?

Implementation

The Legislature should consider creating a statewide court monitoring agency or supervising organization or entity via statutory amendment to [Chapter 744, F.S.](#)

VIII. Focus Area #4: Preserving the Rights, Dignity, and Autonomy of Alleged and Adjudged Incapacitated Persons

Present Situation

Terminology for Individuals in Guardianship

Guardianship actions have existed in the American judicial system since the 1600s. The colony of Massachusetts had statutory guardianship laws in 1641. In guardianship proceedings, since their very beginning, courts (exercising the *parens patriae* power of the state) have appointed a guardian to protect the “ward.”⁷⁵

For judges and lawyers, the word “ward” is a term of legal art, but as pointed out by a 2017 Iowa Guardianship and Conservatorship Task Force:

“The term ‘ward’ is viewed as demeaning and even offensive by members of the disability community and providers of services to persons with disabilities. The terms ‘person subject to guardianship’ and ‘person subject to conservatorship’ are known as person first language because they refer to the person first and the disability second. Such person first language has become the preferred way of referring to people with disabilities.”⁷⁶

Alleged Incapacitated Person:

Whenever a petition for determination of incapacity is filed in conjunction with a petition for guardianship, the individual whose various capacities are being challenged and will be the subject of review in the case is automatically labeled the “alleged incapacitated person” or AIP.

“Attorney for the *alleged incapacitated person*” means an attorney who represents the *alleged incapacitated person*.⁷⁷

⁷⁵ See L. Friedman, J. Grossman, *Guardians: A Research Note*, 40 *American Journal of Legal History*, (1996), pp. 146, available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/812>.

⁷⁶ Iowa Supreme Court Guardianship and Conservatorship Reform Task Force, “Reforming Iowa’s Guardianship and Conservatorship System,” *Iowa Judicial Branch*, (Aug. 2017), pp. 13, available at: https://www.iowacourts.gov/static/media/cms/Final_Task_Force_Report_5A992F4D4AF86.pdf

⁷⁷ Florida Statute § 744.102 (1).

Incapacitated Person

After an evaluation by an examining committee, the court will consider and adjudge the ward's ability or inability to perform certain functions or capacities on behalf of him- or herself. Once adjudged, this inability or incapacity renders the individual an "incapacitated person" in the eyes of the law.

"Incapacitated person" means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.⁷⁸

Ward

Once the court has determined the individual lacks capacities for which a guardian should be appointed to provide, the person becomes a "ward" under the care and supervision of a guardian. "Ward" means a person for whom a guardianship has been appointed.⁷⁹

Recommendations:

- 1. The Legislature should review and consider revising the existing language used in Chapter 744 of Florida Statutes (e.g., "ward" and "alleged incapacitated person") to remove potentially prejudicial, outdated, or pejorative terminology.**

Commentary

The Uniform Law Commission suggests that the terms "ward" and "incapacitated person" are demeaning and offensive.⁸⁰ This terminology may also inaccurately characterize an individual in guardianship because, as we have come to understand with guardianships, there is no 'one size fits all' approach.

For example: An individual who may be placed in a limited guardianship of the ward's person may have all total mental capacity but may lack the physical capability to "meet essential requirements for health or safety" (i.e., to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or

⁷⁸ Florida Statute § 744.102 (12).

⁷⁹ Florida Statute § 744.102 (22).

⁸⁰ National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," *Uniform Law Commission*, (April 3, 2020), pp. 1, *available at*: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>.

other care).⁸¹ Despite the fact that this individual is fully mentally capacitated, they may nevertheless be labeled as an “incapacitated person” under Florida law.⁸²

The use of terminology, which places the person first, is also referred to as “person-centered language.”

“People are so much more than their substance use disorder, mental illness, or disability. Using person-centered language is about respecting the dignity, worth, unique qualities and strength of every individual. A person’s identity and self-image are closely linked to the words used to describe them.”⁸³

Care-based industries have been encouraged to utilize this person-centered language approach because the use of stigmatizing and deficit-based language can create barriers for an individual’s recovery.⁸⁴ A medical professional’s choice of words can impact the mood, self-perception, and cognitive processing of his or her patient. Narrowed and negative labels used as part of an industry culture (e.g., addict) are often stigmatizing and can result in both discriminatory and ineffective care.⁸⁵

The use of person-centered language may be a first step towards including individuals subject to guardianship in the decision-making process, as well as to encourage person-centered planning practices.⁸⁶ Person-centered terminology proposed and utilized within the UGCOPAA include, “the more precise terms [of] ‘adult subject to guardianship,’ ‘minor subject to guardianship,’ and ‘individual subject to conservatorship.’”⁸⁷

⁸¹ See Florida Statute § 744.102 (12)(b).

⁸² See *id.*

⁸³ Kathryn Hyams, et al., “Clinical Tip: Person-Centered Language,” *Minnesota Center for Chemical and Mental Health*, (May 11, 2018), pp.1, available at: <https://practicetransformation.umn.edu/wp-content/uploads/2019/01/9.-MNCAMH-Clinical-Tip-Person-Centered-Language-May-11-2018.pdf>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ National Conference of Commissioners on Uniform State Laws, “Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act,” *Uniform Law Commission*, (April 3, 2020), pp. 2, available at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>.

⁸⁷ *Id.*

Examples of terms discussed and proposed by Task Force members to replace the term “ward” include the following:⁸⁸

- Person under guardianship;
- Protected person under guardianship;
- Protected person;
- Person served by guardianship;
- Client; and
- Person subject to guardianship.

The Task Force would note that given existing statutory interpretations by Florida’s courts, changing any term without being entirely clear in the statutory language itself could lead to unintended consequences. As explained by the Florida Supreme Court:

““We . . . adhere to the ‘supremacy-of-text principle’: ‘The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means[,] citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012).”⁸⁹ We thus strive to determine the text’s objective meaning through “the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued[,] citing Scalia and Garner, *Reading Law* at 33.”⁹⁰

While this should not deter the Legislature from updating outdated or offensive terminology, any replacement language must be clearly identified to not trigger a change in any interpretation of a person’s rights.

Implementation

The Task Force recommends that the Legislature consider updating the terminology used to refer to individuals in guardianship, which places the person first (i.e., utilizes person-centered language).

⁸⁸ The Task Force did not reach a consensus regarding any specific replacement for the word “ward.”

⁸⁹ Advisory Opinion To the Governor Re: Implementation of Amendment 4, The Voting Restoration Amendment, 288 So.3d 1070, 1078 (Fla. 2020).

⁹⁰ Page v. Deutsche Bank Trust Co. Americas, 308 So.3d 953, 958 (Fla. 2020)

IX. Focus Area #5: Ensuring the Use of Least Restrictive Alternatives (Including Advance Directives and Supported Decision-Making)

Present Situation

Least Restrictive Alternatives

In recognition that guardianships are the most restrictive forms of supervision and protection, which deprive a “person of all her or his civil and legal rights and that such deprivation may be unnecessary,” the Florida Legislature specified its intent that the courts “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 assistance... [should] be explored before a plenary guardian is appointed.”⁹¹

Additionally, the Legislature requires that “[t]he order appointing a guardian must be consistent with the incapacitated person’s welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person’s ability to do so.”⁹²

Examples of less restrictive alternatives to guardianship can include:⁹³

- Health Care Advance Directives;
- Durable Powers of Attorney;
- Appointment of a Guardian Ad Litem;
- Bill Paying or Money Management Services;
- Joint Bank Accounts or Convenience Bank Accounts;⁹⁴
- Trusts; and
- Supported Decision-Making.

Advance Directives for Health Care

Advance directives for health care are the witnessed oral or written instructions by a principal concerning any aspect of the principal’s health care or information; advance

⁹¹ Florida Statute § 744.1012 (1) & (2).

⁹² Florida Statute § 744.2005 (3).

⁹³ See American Bar Association Commission on Law and Aging – American Psychological Association, “Judicial Determination of Capacity of Older Adults in Guardianship Proceedings,” (May 2006), pp. 62, *available at*: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_bk_judges_capacity_longer_version.pdf.

⁹⁴ See Florida Statute § 655.80.

directives include, but are not limited to: health care surrogate designations, living wills, or an anatomical gift of all or part of the principal's remains after death.⁹⁵ These advance directives normally designate a surrogate to act on the principal's behalf, even when (especially when) the principal later experiences diminishment or loss of his or her mental capacity.⁹⁶

A guardianship court must consider any previously executed, valid advance directive of the person in guardianship when delegating any authority concerning the person's health care decisions to a guardian.⁹⁷ The court may modify or revoke the previously provided authority of a surrogate to make health care decisions for the ward under certain circumstances,⁹⁸ but only after providing notice to the surrogate and any other appropriate parties and then providing specific written findings of fact supporting the revocation or modification of the surrogate's authority.⁹⁹

Durable Power of Attorney

"Power of attorney' means 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."¹⁰⁰

"Durable" means the power of attorney is "not terminated by the principal's incapacity."¹⁰¹

There are numerous authorities which may be delegated through a validly executed power of attorney document. The most pertinent example of a durable power of attorney document would include the authority to manage finances and make decisions with respect to real and personal property on behalf of the principal.

⁹⁵ Florida Statute § 765.101 (1).

⁹⁶ See Florida Statute § 765.102 (2).

⁹⁷ See Florida Statute § 744.3115.

⁹⁸ See Florida Statute § 765.105 (1).

⁹⁹ Florida Statute § 744.3115.

¹⁰⁰ Florida Statute § 709.2102 (9).

¹⁰¹ Florida Statute § 709.2102 (4).

Supported Decision-Making

Supported Decision Making (SDM) “is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices.”¹⁰² However, SDM is not limited to individuals with disabilities, as it can be utilized to promote independence and greater autonomy for other individuals as well (e.g., minors nearing the age of majority and older adults with mild capacity concerns). This support can include consulting with friends, family members, community organizations, or other trusted contacts prior to making an important decision, providing the individual with a safe space to talk out the possible outcomes and considerations necessary in reaching a thoughtful, final decision.¹⁰³

SDM occurs organically for most people with or without disabilities, but the process can also be formalized through a written agreement (“supported decision-making agreement”) specifying the names and roles of specific supporters, as well as the scope of each supporter’s authority or responsibility towards the individual. Individuals with disabilities may encounter situations with doctors, nurses, bankers, teachers, or attorneys, in which the individual’s capacity to provide informed consent is challenged; SDM agreements serve as documentation that an individual is able to make his or her own choices. Supported decision-making agreements can serve as a roadmap that explains how other alternatives to guardianship, like powers of attorney, will be incorporated or used by the person with a disability.¹⁰⁴

SDM differs from guardianship, as it places the individual with disability in control over how much support they are willing to receive and provides the individual with the option to withdraw a supporter’s authority at any time.¹⁰⁵ Unlike a durable power of attorney,

¹⁰²American Civil Liberties Union, “Supported Decision-Making: Frequently Asked Questions,” *ACLU.org*, (March 18, 2016), pp.1, *available at*: https://www.aclu.org/sites/default/files/field_document/faq_about_supported_decision_making.pdf..

¹⁰³ “Guardianship and Supported Decision-Making: Supported Decision-Making,” *American Bar Association, Commission on Law and Aging*, (Aug. 16, 2021), *available at*: https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/.

¹⁰⁴ See American Civil Liberties Union, “Supported Decision-Making: Frequently Asked Questions,” *ACLU.org*, (March 18, 2016), *available at*: https://www.aclu.org/sites/default/files/field_document/faq_about_supported_decision_making.pdf.

¹⁰⁵ See Zachary Allen and Dari Pogach, “More States Pass Supported Decision-Making Agreement Laws,” *Bifocal*, American Bar Association, Commission on Law and Aging, vol. 41, no. 1, (Oct. 1, 2019), *available at*: https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/volume-41-issue-1/where-states-stand-on-supported-decision-making/.

SDM agreements do not appoint a substitute decision-maker, but rather are intended to act as a written authorization designating a person to assist the individual with a disability in either reaching or asserting his or her informed decision.¹⁰⁶

Recommendations:

1. **Require a written finding and explanation by the court in every instance in which an advance directive is not honored (either in total or in part) by the court.**

Commentary

The Uniform Law Commission recommends in the UGCOPAA that courts should only appoint a guardian after making a finding that “the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communication decisions, even with appropriate supportive services, technological assistance, or supported decision making... The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.”¹⁰⁷

In a national review of guardianship practices across the U.S., the National Council on Disability found that while “[m]ost state statutes require consideration of less-restrictive alternatives... courts and others in the guardianship system often do little to enforce this requirement.”¹⁰⁸ Perhaps this is why the Uniform Law Commission also recommends that the guardianship court should automatically appoint a visitor who will assess the ward and provide “a recommendation regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternative for meeting the

¹⁰⁶ American Civil Liberties Union, “Supported Decision-Making: Frequently Asked Questions,” *ACLU.org*, (March 18, 2016), pp. 1, *available at*: https://www.aclu.org/sites/default/files/field_document/faq_about_supported_decision_making.pdf.

¹⁰⁷ National Conference of Commissioners on Uniform State Laws, “Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act,” *Uniform Law Commission*, (April 3, 2020), Section 301, pp. 69-70, *available at*: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>.

¹⁰⁸ “Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,” *National Council on Disability*, (March 22, 2018), pp.23, *available at*: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

respondent's needs is available..."¹⁰⁹ The Task Force proposed that the guardianship court provide a written finding and explanation whenever an advance directive or other pre-need estate planning document is not honored because:

- Doing so would provide greater oversight and accountability for the courts to ensure that least restrictive alternatives to guardianship are being carefully considered and given preference to imposition of a plenary guardianship; and
- This written finding and explanation can then be used as part of the statewide data collection and analysis of Florida's guardianship system, as discussed in Section V of this report.

The requirement of a written finding is consistent with existing statutes and rules in guardianship. Florida's Probate Rules already require that the court's order in guardianship "shall specify whether there is an alternative to guardianship that will sufficiently address the problems of the ward..."¹¹⁰ This rule suggests that the courts should already be addressing available alternatives to guardianship in their orders whenever they are practical. Adding the requirement to address advance directives or planning documents, even when they are being revoked or cannot be honored by the court, will provide greater transparency to this process.

Further, this required written finding complements and supports the Florida Legislature's intent to promote the use of least restrictive alternatives to guardianship whenever possible¹¹¹ by demonstrating on the record all the reasons why a less restrictive is *not* possible in each case.

A collection of written findings by the courts describing the reasons for revoking or otherwise modifying advance estate planning tools of individuals subject to guardianship would aid the Legislature in crafting appropriate legislative remedies and alternatives to guardianship. Likewise, these written findings would assist the estate planning legal community in identifying problems with existing estate planning methods to craft better pre-need planning documents for individuals who may later be the subject of guardianship proceedings.

¹⁰⁹ National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," *Uniform Law Commission*, (April 3, 2020), Section 304, pp. 79, *available at* <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>.

¹¹⁰ Fla. Rule Prob. 5.685 (e).

¹¹¹ See Florida Statute § 744.1012 (1) & (2).

Prior Task Force Support

In the 2003 *Guardianship Monitoring in Florida* report, the Supreme Court's Committee on Guardianship Monitoring outlined the importance of the courts imposing the least restrictive supervision or assistance for an individual.

“Guardianship is only warranted when no less restrictive alternative – such as durable power of attorney, trust, health care surrogate or proxy, or other form of pre-need directive – is found by the court to be appropriate and available.

Legislative intent establishes that the least restrictive form of guardianship is desirable.”¹¹²

Further noting the importance of recognizing less restrictive alternatives to guardianship, the 2018 Guardianship Workgroup's recommended that Florida's courts should amend rules to:

“Require the petition 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 guardianship are insufficient...”¹¹³

Public Testimony

As noted in Section V of this report, a great deal of public comments demanded better oversight regarding the treatment of pre-need estate plans and advance directives by the guardianship courts. This oversight is especially critical in circumstances when the courts are revoking or modifying the advance planning decisions of a person in favor of formal guardianships.

Implementation

The creation of a written explanation by the court may be accomplished through statutory amendment to [s. 744.2005, F.S.](#), as well as by amendment to the Florida Rules of Probate.

¹¹² Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court's duty to protect wards,” *Florida Courts*, (2003), pp. 5, *available at*

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

¹¹³ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 1, *available at*

https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

2. Include the use of supported decision-making as an alternative to guardianship that must be considered by the court prior to appointing a guardian when appropriate.

Commentary

Chapter 744 already requires that the courts consider less restrictive alternatives before appointing a guardian, but the law provides no specific guidance on which alternatives judges must consider.¹¹⁴ While various forms of supported decision-making have been utilized in Florida before now, there is no statutory provision that supported decision-making should be considered as a potential less restrictive alternative to guardianship.

While determining the exact statutory definition and process for honoring the supported decision-making process remains outstanding, this Task Force was able to reach a consensus regarding the positive impact supported decision-making can have in empowering individuals with varying capacities by avoiding the guardianship process altogether. This Task Force specifically found that it supports the general concept and use of supported decision-making as an alternative to guardianship that should be considered by the court prior to appointing a guardian when appropriate.

“Supported decision-making is [relatively new](#), but its [proponents say](#) it can work for a wide array of people with disabilities. Decades of prior research [found](#) that when people with disabilities make their own decisions they’re more likely to be employed, healthier, happier, and more involved in their communities.”¹¹⁵

Thirteen states have recently adopted some form of SDM model.¹¹⁶

“There is no one-size-fits-all supported decision-making agreements law. States take different approaches to addressing the risk of exploitation or manipulation of decision-makers at the hands of supporters. For example, Texas, Wisconsin, Nevada, and North Dakota place no restrictions on who may act as a supporter. Some states, like Delaware, Alaska, the District of Columbia, and Rhode Island, restrict who may serve as a supporter: employers/employees, anyone against whom the decision-maker has a

¹¹⁴ See Florida Statute § 744.334.

¹¹⁵ Heidi Blake and Katie J.M. Baker, “‘My Human Rights Are Being Violated’: Fighting a Family Conservatorship,” *BuzzFeed News*, (Sep. 20, 2021), *available at*: <https://www.buzzfeednews.com/article/katiejmbaker/family-guardianship-conservatorship-disabilities>.

¹¹⁶ *Id.*

restraining order, or a person directly providing paid support services to the decision-maker.”¹¹⁷

Florida should consider codifying some form of supported decision-making, as well as including supported decision-making among the options considered by the courts as less restrictive alternatives to guardianship.¹¹⁸

Prior Task Force Support

The 2018 Judicial Management Council Guardianship Workgroup Report suggests the consideration of supported decision-making as a potential alternative to guardianship.

“[S]tatute 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 [sic] exist...”¹¹⁹

“Through this process, persons with disabilities choose trusted others ‘to support them in making their own decisions and exercising their legal capacity.’”¹²⁰

Public Testimony

One of the primary advocates of supported decision-making was a member of this Task Force, Michael Lincoln-McCreight. Mr. Lincoln-McCreight was once a ward within the guardianship process, however he was able to be removed from the

¹¹⁷ See Zachary Allen and Dari Pogach, “More States Pass Supported Decision-Making Agreement Laws,” *Bifocal*, American Bar Association, Commission on Law and Aging, vol. 41, no. 1, (Oct. 1, 2019), *available at*: https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/volume-41-issue-1/where-states-stand-on-supported-decision-making/.

¹¹⁸ While the Task Force noted that the intent of supportive decision-making is that it is an alternative to guardianship that allows a person with a disability to make their own decisions with the support of the people they trust, the Task Force did not agree to a proposed statutory definition or method for assessing supported decision-making in Florida and this recommendation does not reflect any comment by the Task Force on past, pending, or future legislative proposals.

¹¹⁹ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp.16, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

¹²⁰ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018) pp. 73, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

guardianship system and have his rights fully restored, in part due to the use and availability of supported decision-making.

Mr. Lincoln-McCreight describes the supported decision-making concept and how it can incorporate other alternatives to guardianship like health care surrogate designations or Social Security Representative payees:

“In the guardianship system, there are a lot of cracks... supported decision-making is an alternative to just throwing someone in a full guardianship...

[Supported decision-making] basically would include a lot of the medical aspects. You can have a health care surrogate... You can have a representative payee... You can have all kinds of supports along with... whatever supports that you [already] have in place.”¹²¹

Mr. Lincoln-McCreight summarizes the profound impact of supported decision-making on his life by describing how it “involves the person that was in the guardianship to let them make the ultimate decision.”¹²²

Implementation

Whether by court rule or statute, the general concept of supported decision-making should be a less restrictive alternative to guardianship considered by every guardianship court, whenever available and appropriate.

¹²¹ Guardianship Improvement Task Force In-Person Public Meeting, September 23, 2021, *recording available at* <https://www.youtube.com/watch?v=squMgVeP30&t=20418s>.

¹²² *Id.*

X. Focus Area #6: Health and Residential Care “Pipeline to Guardianship”

Present Situation

“A central tenet of modern medicine is that patients must provide fully informed consent to receive or refuse medical care offered by their [health care providers]. If a patient is unable to make and communicate a choice or clearly indicate an understanding of the information presented, then he or she is considered to lack the capacity to make medical decisions and the medical team must seek consent from the patient’s surrogate decision-maker. Every U.S. state recognizes a patient’s healthcare proxy (HCP) and a court-appointed guardian as a legally recognized surrogate. Most of the states also have statutes or regulations establishing a hierarchy of legally recognized surrogate decision-makers in the absence of a HCP or a court-appointed guardian...”¹²³

In Florida, “[i]f an incapacitated or developmentally disabled patient has not executed 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...

- (a) The judicially appointed guardian of the patient...
- (b) The patient’s spouse;
- (c) An adult child of the patient...
- (d) A parent of the patient;
- (e) The adult sibling of the patient...
- (f) An adult relative of the patient who has exhibited special care and concern... or
- (g) A close friend of the patient.”¹²⁴

However, in certain circumstances when no surrogate or proxy is identified and/or available, “the hospital must petition a court to appoint a guardian as a legally recognized surrogate decision-maker.”¹²⁵

“For many individuals, guardianship is initiated when an individual is in the hospital, appears to lack capacity, has no apparent or available legal representative, and needs

¹²³ Ricotta, Daniel, et. al, “The Burden of Guardianship: A Matched Cohort Study,” *Journal of Hospital Medicine*, vo. 13, no. 9, (Sep. 2018), pp. 595, available at: <https://cdn.mdedge.com/files/s3fs-public/Document/August-2018/jhm013090595.pdf>. (internal citations omitted).

¹²⁴ Florida Statute § 765.401 (1).

¹²⁵ Ricotta, Daniel, et. al, “The Burden of Guardianship: A Matched Cohort Study,” *Journal of Hospital Medicine*, vo. 13, no. 9, (Sep. 2018), pp. 595, available at: <https://cdn.mdedge.com/files/s3fs-public/Document/August-2018/jhm013090595.pdf>.

to be moved to another level of care. Nationally, hospital stays are short – on average, only 4.6 days – so discharge planning has to start promptly.”¹²⁶

In a novel research study conducted between 2014 and 2015 at the Beth Israel Deaconess Medical Center in Boston, Massachusetts, researchers found that “[t]he median length of stay for patients requiring guardianship was 28 (range, 23-36) days, and the median total charges were \$171,083 (\$106,897-\$245,281) [per patient] ...”¹²⁷

Another Boston hospital estimated that in 2018, “the median length of stay for a [Boston Medical Center] patient needing a guardianship, was about 100 days, compared to a hospital-wide average length of stay of just 5 days. In extreme cases, some patients without guardians have stayed at [the hospital] for more than a year after they were ready for discharge.”¹²⁸

And as in-house general counsel for the Boston Medical Center notes, “our struggles with guardianship are by no means unique.”¹²⁹

Recommendations:

1. **Require all health and residential care providers, or counsel retained on their behalf, seeking or supporting a petition for guardianship to demonstrate in writing that they have exhausted all available health care surrogate and proxy options (i.e., other than court-appointed guardians), provided in Florida Statute § 765.401.**

Commentary

Patients may be admitted to a hospital for all types of emergencies, illnesses, procedures, etc. Frequently a patient’s psychological condition will be impacted by an illness or injury to the patient’s physical condition or due to the medication or care

¹²⁶ Alison Hirschel and Lori Smetanka, “The Use and Misuse of Guardianship by Hospitals and Nursing Homes,” *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), pp. 4, available at: <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>.

¹²⁷ Ricotta, Daniel, et. al, “The Burden of Guardianship: A Matched Cohort Study,” *Journal of Hospital Medicine*, vo. 13, no. 9, (Sep. 2018), pp. 597, available at: <https://cdn.mdedge.com/files/s3fs-public/Document/August-2018/jhm013090595.pdf>.

¹²⁸ Wendoly Ortiz Langlois and Dianne Yacovone, “Improving the Guardianship Process: Better for Patients and Better for Hospitals,” *HEALTHCITY*, (May 13, 2019), available at: <https://healthcity.bmc.org/policy-and-industry/guardianship-process-change-better-patients-and-hospitals>.

¹²⁹ *Id.*

they receive to treat any such ailment.¹³⁰ “Up to a third of patients 70 years old and older experience delirium in the hospital – which typically lasts from a couple of days to a few weeks – and the rate is much higher for those in intensive care or undergoing surgery. Because nursing homes require the person or a representative to consent to admission and care... hospital staff sometimes pivot to the guardianship system to resolve the dilemma.”¹³¹

If a patient’s capacity is being assessed by hospital staff before he or she has had sufficient time to recover, such diminished capacity may be the basis used for a judge to issue an emergency temporary guardianship order in their case. “After guardianship is established, factors including... whether the patient has access to advocates and supporters will all affect the patient’s chances of terminating the guardianship or returning to the community.”¹³² And once a patient’s records reflect that he or she has been previously deemed incapacitated, doctors and hospital staff are reluctant to challenge this assessment, even after the patient has substantially improved.¹³³

“[A] few extra days in a hospital may be sufficient for some patients to avoid nursing home placement... Accelerating the judicial proceedings also gives the patient less time to recover capacity and for other less restrictive legal and practical alternatives to emerge...”¹³⁴

While the guardianship process may be an appropriate and effective tool for health care providers to use in certain extreme circumstances, this must be carefully balanced and considered with the significant impact that these decisions have on vulnerable adults who are the subject of these cases, even for emergency, temporary guardianships.

The Fourth National Guardianship Summit in May 2021¹³⁵ urged the adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act

¹³⁰ See Alison Hirschel and Lori Smetanka, “The Use and Misuse of Guardianship by Hospitals and Nursing Homes,” *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), pp. 4-5, available at: <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>.

¹³¹ *Id.*

¹³² *Id.* at pp. 9.

¹³³ *See id.*

¹³⁴ *Id.* at pp. 15.

¹³⁵ The Guardianship Summit, a cooperative event put on by the National Guardianship Network, with the support of the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the Syracuse University College of Law, brought together 125 advocates, family guardians, judges, lawyers, scholars, and other stakeholders.

(Uniform Act) in part because, among other things, it would: “require petitioners to state whether less restrictive alternatives have been tried and justify any failure to do so.”¹³⁶ The emphasis on less restrictive alternatives seeks to address these pipeline issues, both the school to guardianship pipeline for juveniles transitioning to adulthood, but also health care and residential facility pipelines to guardianship.

The Task Force received testimony about how the health care and residential care industries have created a pipeline into the guardianship process in Florida; many, if not all, of the commenters on this topic felt that guardianship was not truly needed in most of these cases. Rather than guardianships being used as an option of last resort, it is becoming the first choice by some within the health and residential care industries. Given the considerations that hospitals are facing in some of these alienated patient scenarios [reducing patient’s length of stay, financial incentives, freeing beds for patients with acute more needs, fear of negative consequences from discharging a person of questionable or limited capacity],¹³⁷ it is clear why hospitals are seeking guardianships for their patients.

Long-term residential and health care facilities, like nursing homes and assisted living facilities, also seek guardianships for patients or clients in their care for many of the same reasons, but most frequently to ensure the facility bills are being timely paid.¹³⁸

“Although it is common practice for nursing homes to pursue guardianship to resolve resident debt, some courts have objected to the use of the guardianship process for this purpose.”¹³⁹ In New York, legislation has been proposed several times which would prohibit guardianship actions from being initiated solely for bill collection purposes; however, this legislation has not yet been enacted.¹⁴⁰

National Guardianship Network, “Recommendations Adopted by Summit Delegates,” *Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 2021), American Bar Association, Commission on Law and Aging, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2021-grd-smmt-recmndtns.pdf.

¹³⁶ *Id.*

¹³⁷ See Alison Hirschel and Lori Smetanka, “The Use and Misuse of Guardianship by Hospitals and Nursing Homes,” *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), available at: <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>.

¹³⁸ *Id.* at pp. 17-20.

¹³⁹ *Id.* at pp. 19.

¹⁴⁰ *Id.* at pp. 19-20.

“[S]ome nursing homes may [also] threaten or initiate guardianship petitions when a resident or family member is considered challenging. In those cases, the nursing home may seek a more agreeable party with whom to interact or use guardianship as a punitive or retaliatory measure.”¹⁴¹

Hospitals and other care providers appear eager to resolve, or avoid altogether, the issue of the isolated or “unbefriended,” incapacitated patients requiring guardianships.¹⁴² As noted by counsel for the Boston Medical Center, “if a patient has a healthcare proxy in place when they become incapacitated, the entire guardianship process can be avoided.”¹⁴³ However, these solutions often require a proactive approach by these same care providers, such as promoting the use of the advance care directive and surrogacy process with patients¹⁴⁴ or by actively searching for a qualifying health care proxy among those related to the patient.¹⁴⁵

Public Testimony

- Concerns were raised regarding the practice of “patient-dumping” by some facilities and hospitals, and how guardianships can facilitate this practice.
- Florida needs to address the conflicts of interest occurring when a guardian and nursing home or hospital are represented by the same attorney or law firm.
- Concerns were raised regarding nursing and assisted living facilities isolating patient wards in their care by depriving them of communication devices and preventing them from having access to friends and family.
- Someone who has a relationship with a hospital, assisted living facility, etc. should have to disclose that relationship to the court when petitioning for guardianship in a case.

¹⁴¹ *Id.* at pp. 18.

¹⁴² “At a time where medical systems are searching for opportunities to reduce the length of stay, prevent unnecessary hospitalization, and improve the quality of care, reevaluating the guardianship process is ripe with opportunity.” Ricotta, Daniel, et. al, “The Burden of Guardianship: A Matched Cohort Study,” *Journal of Hospital Medicine*, vo. 13, no. 9, (Sep. 2018), pp. 601, available at: <https://cdn.mdedge.com/files/s3fs-public/Document/August-2018/jhm013090595.pdf>.

¹⁴³ Wendoly Ortiz Langlois and Dianne Yacovone, “Improving the Guardianship Process: Better for Patients and Better for Hospitals,” *HEALTHCITY*, (May 13, 2019), available at: <https://healthcity.bmc.org/policy-and-industry/guardianship-process-change-better-patients-and-hospitals>.

¹⁴⁴ See *id.*

¹⁴⁵ See generally Florida Statute § 765.401 (1).

Implementation

Florida’s guardianship statutes should be amended to require that health and residential care providers (or their representatives) must demonstrate that they have tried and exhausted all other options prior to seeking guardianship for one of their patients/residents, including the list of qualified health care proxies provided in [s. 765.401 \(1\), F.S.](#)

- 2. Prohibit health and residential care providers, or counsel retained for their benefit, from recommending (directly or indirectly) the appointment of any specific professional guardian for any patient or client in their care.**

Commentary

“[S]erious concerns arise when the hospital controls or influence not only who files the petition [for guardianship] but also who is appointed as guardian ad litem and guardian.”¹⁴⁶ When the hospital’s counsel and proposed professional guardian receive any part “of their income from the hospital, their obligation to serve the best interests of the individual and their duties to the court must... come into conflict with their desire to honor the hospital’s desire to discharge [the individual] swiftly.”¹⁴⁷

One investigation into a law firm which represented a leading health system in Virginia uncovered that the firm “took hundreds of hospital patients to court and frequently asked the court to appoint one of the firm’s lawyers as the patients’ guardians. In addition, the hospital attorney often recommended to the court that the individual who should be appointed as guardian ad litem and that individual, who was supposed to be an impartial court investigator, was also paid by the hospital at a rate higher than she would have received from the Commonwealth pursuant to state law. The guardian-ad-litem often returned the favor by recommending the court appoint the same attorney or firm as guardian.”¹⁴⁸

A Michigan court judge removed a professional guardian (and attorney) from cases after finding serious conflicts of interest attributed to “an undisclosed agreement with the hospital in which she was paid to petition for guardianship of certain patients. In at least two of the cases, the hospital paid [the guardian] for time spent with the

¹⁴⁶ Alison Hirschel and Lori Smetanka, “The Use and Misuse of Guardianship by Hospitals and Nursing Homes,” *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), pp. 11, available at: <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>.

¹⁴⁷ *Id.* at pp. 12.

¹⁴⁸ *Id.* (citing a three-part article series published in the Richmond Times-Dispatch).

patients after she was appointed guardian...¹⁴⁹ And in South Carolina, an attorney received a public reprimand after an alleged conflict of interest was uncovered where she served as both guardian and general counsel for the hospital.¹⁵⁰ However, one need look no further than *local* media coverage in recent years to find examples of guardianship conflicts of interest along these same lines.

As noted in the previous recommendation of this section, these issues are not isolated to hospitals alone, but also include long-term residential care and skilled care industries. Residents whose bills at a facility go unpaid for extended periods of time, either due to the patient's now diminishing capacity or the ineptitude of the patient's designated representative, frequently cause facilities to seek the assistance of a professional guardian who will see the nursing home bills are promptly paid.¹⁵¹

The conflict of interest is inherent whenever a specific professional guardian is appointed at the behest of any facility in the health or residential care industry.

Public Testimony

Public comment on this topic was overwhelmingly in support of preventing or prohibiting the health or residential care facility from selecting the professional guardian for a patient in their care.

Implementation

The Legislature should amend Florida's guardianship statutes to explicitly prohibit health or residential care facilities (or representatives on their behalf) from recommending or suggesting the appointment of a specific professional guardian.

¹⁴⁹ Weiss, Debra C., "Cases raise questions about guardianship and lawyer-hospital relationships," *ABA Journal*, American Bar Association, (Oct. 10, 2017), available at: https://www.abajournal.com/news/article/questions_are_raised_about_guardian_oversight_and_lawyer_hospital_relations.

¹⁵⁰ *Id.*

¹⁵¹ See Alison Hirschel and Lori Smetanka, "The Use and Misuse of Guardianship by Hospitals and Nursing Homes," *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), pp. 11, available at: <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>.

3. **Require that any attorney filing or assisting in the completion or filing of a petition for guardianship disclose any existing or previous relationship the attorney has or had with any health, residential or other care provider or caregiver of the alleged incapacitated person.**

Commentary

As noted in the preceding recommendations of this section, the guardianship process may, at times, be the only option available to hospitals, nursing homes, etc. when they are left with an isolated, vulnerable adult who lacks capacity. However, the courts and the parties should be aware of who the actual petitioner is in a guardianship action.

As a fundamental principle of fairness and candor to the tribunal, as well as to ensure the efficacy of Recommendation # 2 made in this section (i.e., prohibiting the health and residential care providers or their counsel from recommending a specific guardian), attorneys should be statutorily required to disclose such pre-existing relationship to the court. It is only when the court is operating with *eyes wide open* that we can ensure the integrity of the guardianship process.

Implementation

Florida's guardianship statutes should be amended to require that any attorney filing for, or assisting with the petition for, guardianship must disclose any pre-existing relationship between the attorney and the individual's health or residential care provider (or any parent company or subsidiary thereof).

XI. Focus Area #7: Enhanced Education and Qualification Requirements of Professionals and Parties in Guardianship

Present Situation

Family Guardians: Family guardians of adults must receive a minimum of 8 hours of training, which covers the following:

- (a) The legal duties and responsibilities of the guardian;
- (b) The rights of the ward;
- (c) The availability of local resources to aid the ward; and
- (d) The preparation of habilitation plans and annual guardianship reports, including financial accounting for the ward's property.¹⁵²

However, the court may, in its discretion, waive some or all of these education requirements on a case-by-case basis.¹⁵³

Parent Guardians of Minor Children: Parent guardians appointed by the court over the property of his/her minor child are required to receive a minimum of 4 hours of training, which covers the following:

- (a) The legal duties and responsibilities of the guardian of the property;
- (b) The preparation of the initial inventory and annual guardianship accountings for the ward's property; and
- (c) Use of guardianship assets.¹⁵⁴

Professional Guardians: Professional guardians are required to undergo 40 hours of initial training and a minimum of 16 hours of continuing education every two calendar years.¹⁵⁵ There are no specific subject areas statutorily required for either the 40- or 16-hour education requirements, only that the instruction and education be completed through a course approved or offered by the Office of Public and Professional Guardians (OPPG).¹⁵⁶

The initial professional guardian education requirements established by OPPG may be bypassed, either in part by a guardian who passes an approved national guardianship examination, or in total by a professional guardian who has practiced for 5 or more

¹⁵² Florida Statute § 744.3145 (2).

¹⁵³ See Florida Statute § 744.3145 (6).

¹⁵⁴ Florida Statute § 744.3145 (3).

¹⁵⁵ Florida Statute § 744.2003 (3).

¹⁵⁶ See *id.*

years and provides a letter from a circuit judge attesting to the guardian's competency as professional guardian.¹⁵⁷

A public guardian is considered a professional guardian for purposes of regulation, education, and registration.¹⁵⁸

Attorney for the Alleged Incapacitated Person – An attorney seeking to be appointed by a court for incapacity and guardianship proceedings must have completed a minimum of 8 hours of education. A court may [however] waive the initial training requirement for an attorney who has served as a court-appointed attorney in incapacity proceedings or as an attorney of record for guardians for not less than 3 years.¹⁵⁹

Examining Committee Members – Examining committees consist of three members, one of whom must be a psychiatrist or other physician; the remaining members may include any of the following individuals:

- Psychologist or Psychiatrist;
- Gerontologist or Person with Advanced Degree in Gerontology;
- Physician;
- Advanced Practice Registered Nurse or Registered Nurse;
- Licensed Social Worker; or
- Any Other Person Who by Knowledge, Skill, Experience, Training, or Education Who the Court Discerns May Provide the Court with a Relevant Expert Opinion.¹⁶⁰

Every examining committee member must complete a minimum of 4 hours of initial training, followed by a 2-hour continuing education requirement every two years.¹⁶¹

Recommendations

1. **Require enhancement to the initial and continuing education requirements for all parties and personnel involved in the guardianship case process, including, but not limited to: professional guardians, family guardians, clerk personnel, attorneys, and court monitors.**

Commentary

In November 2018, the United States Senate Special Committee on Aging published its report on “Strengthening State Efforts to Overhaul the Guardianship Process and

¹⁵⁷ Florida Statute § 744.2003 (6)(d) and (8).

¹⁵⁸ Florida Statute § 744.102 (17).

¹⁵⁹ Florida Statute § 744.331 (2)(d).

¹⁶⁰ Florida Statute § 744.331 (3)(a).

¹⁶¹ Florida Statute § 744.331(3)(d).

Protect Older Americans.” In this report the Committee recommended several key areas for improving the well-being of individuals in guardianship; one of these key areas for improvement emphasized the need for additional education and training for all those involved in the guardianship process.

“All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.”¹⁶²

During the Third National Guardianship Summit in 2011, delegates of the National Guardianship Network (NGN) reached a consensus on education standards, which guardians should be held to in every state.

Standard # 2.1 – The guardian shall seek ongoing education concerning:

- Person-centered planning
- Surrogate decision-making
- Responsibilities and duties of guardians
- Legal processes of guardianship
- State certification of guardians.¹⁶³

The NGN went on to recommend to all state courts and legislatures:

Recommendation # 2.1 – The court or responsible entity should ensure that guardians, [clerk] and court staff, evaluators and others involved in the guardianship process receive sufficient ongoing, multifaceted education to achieve the highest quality of guardianship possible.¹⁶⁴

This Task Force agrees with these standards and recommendations.

Presently there are minimum guardianship education standards in place Florida for family guardians, parent guardians of minors, professional guardians, court-appointed attorneys, and examining committee members, however there are no minimum guardianship education requirements for:

- the judiciary,

¹⁶² U.S. Senate Special Committee on Aging, “Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans,” (Nov. 2018), *available at*

<https://www.aging.senate.gov/imo/media/doc/Guardianship%20Report.pdf>.

¹⁶³ National Guardianship Network, “Third National Guardianship Summit Standards and Recommendations,” *Utah Law Review*, no.3, (2012), pp. 1193, *available at* https://www.eldersandcourts.org/_data/assets/pdf_file/0021/8832/third-national-guardianship-summit-standards-and-recommendations.pdf.

¹⁶⁴ *Id.* at pp. 1200.

- attorneys for the guardian and other attorneys not appointed by the court,
- clerk or court personnel involved in guardianship cases, or
- court monitors.

Additionally, the existing education standards for family guardians, professional guardians, court-appointed attorneys, and examining committee members were criticized as insufficient in key guardianship concepts during both presentations and testimony provided to this Task Force.

The Task Force heard testimony from the Office of Public and Professional Guardians (OPPG) and the Florida State Guardianship Association (FSGA) that additional training has been made available and that there are plans to expand the existing curriculum offered to both professional and family guardians. The Task Force applauds the important work of OPPG and the FSGA in implementing and updating education and training opportunities for guardians in Florida, however the Task Force notes that the current statutory minimum education requirements and continuing education requirements for professional and family guardians do not appear sufficiently detailed to ensure these individuals are fully educated on essential topics such as medical and residential care considerations, the restoration of capacity process, and less restrictive alternatives to guardianship.¹⁶⁵

Prior Task Force Support

Since 1999, each of the four task forces or work groups mentioned in Section III of this report noted concerns and recommended changes to ensure that the judges, court staff, clerks, attorneys, examining committee members, and/or guardians involved in the guardianship process receive sufficient initial and ongoing training due to the complexities surrounding guardianship. While some those training requirements have since improved, this Task Force notes that the qualifications and comprehension of guardianship laws by those professionals involved in guardianship cases remains a prominent area of concern, especially with respect to the judiciary, court-appointed counsel, and examining committee members.

Florida’s Guardianship Task Force recommended in its 2004 report to Governor Bush, the Department of Elder Affairs, and the Florida Legislature, that Florida law should be updated as to minimum guardianship education requirements for court

¹⁶⁵ The 2014 “Restoration of Capacity Study and Work Group Report,” noted that the training of professional guardians was inconsistent across the state as to the legal process for restoring an individual’s capacity, as well as the availability of less restrictive alternatives to guardianship. See The Florida Developmental Disabilities Council / Guardian Trust, “Restoration of Capacity Study and Work Group Report,” *Florida Courts*, (Feb. 28, 2014), pp. 33, *available at* <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>.

appointed attorneys, examining committee members, and the judiciary.¹⁶⁶ Since that report was published, Florida has statutorily added minimum education requirements for court-appointed counsel (which may be waived under certain circumstances), as well as minimum education requirements for examining committee members. As for education for the judiciary,

“... the Task Force recommend[ed] the Florida Supreme Court develop and provide a minimum of eight (8) hours of initial education and four (4) hours of continuing education every two (2) years in the area of guardianship to all judges and hearing officers presiding over guardianship cases.”¹⁶⁷

However, minimum education for initial and continuing education requirements for “any judge presiding over guardianship cases” have not been codified under Florida law or adopted by rule so far.

In the 2018 report, the Task Force recommended the creation of a guardianship bench guide, book, or resource, to assist the judges in their understanding and to “foster greater uniformity in the procedures and practices implemented by the judiciary statewide:

- Person-centered planning and self-determination;
- Matrix of various decisionmaking [sic] needs with corresponding legal options;
- Currently available alternatives to guardianship including supported decisionmaking [sic] 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

¹⁶⁶ Governor’s Guardianship Task Force, “2004 Final Report of the Guardianship Task Force,” (Dec. 2004), pp. 12, *available at*: <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/09/2004-Guardianship-Task-Force-Final-Report.pdf>.

¹⁶⁷ *Id.* at pp. 13.

- Termination of guardianships.”

There do not appear to be any comprehensive guardianship bench books or guides yet available for Florida’s guardianship judges at the time of publication of this report.

Public Comment

The Task Force received numerous comments and suggestions from the public regarding better education and training for all professionals and parties involved in the guardianship process.

Judiciary

- Better education and training are needed for judges handling guardianships, especially with respect to less restrictive alternatives to guardianship.
- Judges request clarification on guardian advocacy statute, as to whether non-delegable rights are always retained by the individual, especially since there is no adjudication of incapacity contemplated by the guardian advocacy process.
- Judges should be educated on frequently occurring conflicts of interests in guardianship cases to assess guardianship cases and prevent conflicts of interest.

Attorneys

- Attorneys need specialized education and training to understand the complexities of guardianship, especially attorneys who represent the alleged incapacitated person (AIP) or ward.
- Attorneys for the AIP or ward should receive training on avoiding conflicts of interest and should be prohibited from recommending a specific non-family member, professional guardian be appointed in a case.
- Attorneys for the AIP or ward should understand their obligations to advocate consistently with the wishes of the ward, as opposed to a best interest standard.

Family Guardians

- Some minimum level of training should always be required for a family guardian, which cannot be waived by the court without some proof of competency by the guardian.
- A family guardian should always be required to undergo training and demonstrate understanding of his or her obligations as a fiduciary and the standards for appropriate financial management of a person’s assets.

Professional Guardians

- Initial and continuing education requirements for guardians should include ethics, some medical and health care knowledge, financial management, and fiduciary trainings.
- Training should be provided as to accurate recording and reporting of billable hours by a guardian, with special emphasis on preventing guardians from billing the same time for multiple wards.
- Education and training should specify how a guardian may bill for time if the person is serving in the capacity of both the guardian and the attorney for the guardian.
- Guardians should be trained on how to appropriately reassess an individual in guardianship for restoration of individual capacities.
- Training and education should be provided as to the rights presumptively maintained by a person in guardianship¹⁶⁸ and the ethical requirements that a guardian observe these rights whenever possible, especially the autonomy for an individual to communicate and/or associate with family and friends.

Implementation

The Task Force recommends the creation of minimum standards of education and training for the judiciary, clerk and court personnel involved in guardianships, all attorneys appearing in guardianship proceedings, and court monitors to ensure consistent application of the law and practices across the state.

The Task Force also recommends that the existing education and training for family guardians, professional guardians, court-appointed attorneys, and examining committee members be enhanced and updated to address topics of concern raised in this report.

2. Review the existing education and qualification requirements for members of the examining committee.

Commentary

The Task Force did not receive any direct presentation or testimony regarding the existing education and training provided to examining committee members but recommends that the sufficiency of these trainings be reviewed in accordance with the concerns raised in this report and addressed in the public comments below.

¹⁶⁸ See Florida Statute § 744.361 (13).

Public Comment

- One suggestion made by a professional guardian to the Task Force was to increase the number of hours for the initial training of examining committee members from 4 to 8 hours.
- The examining committee member training should emphasize the actual application of each right or capacity that an examining committee member may be evaluating or suggesting for removal from the person being evaluated.
 - The training should also stress the weight and deference that the court gives to the suggestions and evaluations by the examining committee.
- Professional guardians should not be permitted to serve on examining committees, as this creates a potential conflict of interest, even if they cannot serve as the professional guardian in the same case.

Implementation

The Task Force recommends that the statute providing the education and qualifications for the examining committee be reviewed for appropriate changes and updates.¹⁶⁹

3. Require that all judges handling guardianship cases must undergo and certify continuing education regarding advance directives and least restrictive alternatives to guardianship.

Commentary

Guardianship law is complex. As with any other area of law it is constantly changing and evolving. Recently that has been especially true.¹⁷⁰ Florida is not alone on this issue. In a November 2018 report, the United States Special Committee on Aging specifically recommended the “[r]equired comprehensive training [of] judicial officials”¹⁷¹ involved in guardianship cases.

¹⁶⁹ See Florida Statute § 744.331 (3).

¹⁷⁰ Jeffrey Goethe – Real Property, Probate and Trust Law, “2020: A Challenging Year for Keeping Up With Changes to Probate and Guardianship Rules and Statutes,” *Florida Bar Journal*, vol. 85, no. 2, (March/April 2021), pp. 26, *available at* <https://www.floridabar.org/the-florida-bar-journal/2020-a-challenging-year-for-keeping-up-with-changes-to-probate-and-guardianship-rules-and-statutes/>.

¹⁷¹ U.S. Senate Special Committee on Aging, “Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans,” (Nov. 2018), pp. 7, *available at* <https://www.aging.senate.gov/imo/media/doc/Guardianship%20Report.pdf>. (emphasis added).

There was conflicting information provided to the Task Force on the issue of judicial education and competence in guardianship law. Some felt it was a major problem and others indicated that while it may have been a problem in the past there has been a lot of improvement in this area.

Public Testimony

The Task Force received numerous public comments and testimony by individuals asserting that advance directives are routinely being ignored or unlawfully removed by judges. The Task Force also received anecdotal testimony and comment that the consideration of less restrictive alternatives to guardianship is being inconsistently applied by judges across the state. The Task Force would note that it received no direct evidence or data to demonstrate the extent of this problem around the state, as such information is not presently tracked or available in this state.

Implementation

The Task Force recommends an education and training requirement be established for all judges handling guardianship cases regarding both advance directives and less restrictive alternatives to guardianship. Since the education and training of judges is primarily the responsibility of the Supreme Court, the Task Force would suggest that the Legislature recommend comprehensive training for judges handling guardianship cases, which would include advance care directives and less restrictive alternatives to guardianship.

XII. Focus Area #8: Increased Accessibility and Transparency of Professional Guardians and the Guardianship Process

Present Situation

The Office of Public and Professional Guardians (OPPG) maintains a list, available online through the [Department of Elder Affairs website](#), of all current, registered professional guardians in Florida.¹⁷² This list provides the following details (listed in order of appearance, from left to right in the online spreadsheet):

- County (i.e., the counties which a guardian self-reports s/he serves);
- Last Name [of the guardian];
- First Name [of the guardian];
- Bond Issued To (re: blanket fiduciary bond for clerk of court in county where guardian's primary business is located);
- Corp Name (i.e., the guardian's incorporated business name); and
- Registration Expired [for recently expired registrants].¹⁷³

A court may only appoint a professional guardian who is registered by OPPG.¹⁷⁴

Recommendations:

1. **Direct the creation of a publicly accessible, online database regarding the registration, qualifications, and disciplinary / removal history for all professional guardians.**

Commentary

OPPG is tasked with ensuring that all registered, professional guardians are qualified and have met all minimum requirements to obtain and maintain their professional guardian registration.

- Each professional guardian must receive a minimum of 40 hours of initial training and instruction and a minimum of 16 hours in continuing education every 2 calendar years.¹⁷⁵

¹⁷² See Office of Public and Professional Guardians, "Registered Professional Guardians," (Nov. 11, 2021), *available at* <https://fmw.state.fl.us:8890/apps/doeaaepex/f?p=2115:1>.

¹⁷³ *Id.*

¹⁷⁴ See Florida Statute § 744.2003 (9).

¹⁷⁵ See Florida Statute § 744.2003 (3).

- Professional guardians must also demonstrate competency to act as a professional guardian by passing a state guardian examination.¹⁷⁶
- Professional guardians and their employees must undergo credit history checks prior to registration with OPPG and then at least once every 2 calendar years thereafter.¹⁷⁷
- Professional guardians and their employees must also undergo a Level II criminal background check prior to registration and then at least once every 5 calendar years thereafter.¹⁷⁸

Additionally, OPPG is responsible for investigating legally sufficient complaints regarding the alleged professional misconduct of professional guardians¹⁷⁹ and take appropriate disciplinary actions for substantiated misconduct, which may include the suspension or revocation of a professional guardian’s registration.¹⁸⁰

However, as noted by the U.S. Senate earlier this year, the problem does not appear to be with the regulation of individual guardians specifically, but rather fundamental flaws and problems which exist within the guardianship process itself.¹⁸¹

“While guardians and conservators often serve selflessly and in the best interest of the person under guardianship, a lack of resources for court oversight and insufficient due process in guardianship proceedings can create significant opportunities for neglect, exploitation, and abuse.”¹⁸²

And exactly how widespread and extensive such abuses by guardians may be remains a mystery due to the limited data available.¹⁸³ Just as there is an overall

¹⁷⁶ See Florida Statute § 744.2003 (6).

¹⁷⁷ See Florida Statute § 744.2003 (4). See also Florida Statute § 744.3135 (5).

¹⁷⁸ See Florida Statute § 744.2003 (5). See also Florida Statute § 744.3135 (4).

¹⁷⁹ See Florida Statute § 744.2004 (1).

¹⁸⁰ See *id* at (2).

¹⁸¹ See generally Warren, E. and Casey Jr., R., An open letter to Secretary Becerra and Attorney General Garland [open letter], (July 1, 2021), *The New York Times*, available at: <https://int.nyt.com/data/documenttools/warren-spears-letter/54dfe78a81eb7135/full.pdf>.

¹⁸² *Id.* at pp. 2. (citing “Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,” *National Council on Disability*, (March 22, 2018), pp. 22, available at: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf).

¹⁸³ See “Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,” *National Council on Disability*, (March 22, 2018), pp.70, available at: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf).

lack of data about guardianships in general, the information is also lacking about the guardians themselves.¹⁸⁴

Relevant questions regarding the demographics of Florida’s professional guardians are left unanswered, such as:

- How many professional guardians in Florida are also public guardians?
- How many professional guardians in Florida maintain dual (state or federal) licenses, such as attorneys barred to practice in Florida?
- How many professional guardians also serve as representative payees in non-guardianship cases?
- How many professional guardians in Florida take on pro bono cases?
- How many professional guardians are compensated by hospitals, assisted living facilities, or other health or residential care providers to serve as a guardian in specific cases?

The National Center for State Courts suggests that these are just a few of the many important data elements we should be recording on guardians and in guardianship cases.¹⁸⁵

Questions regarding the number of cases each guardian is appointed to at any one time, the number of total cases on which a guardian has served, and whether the guardian has ever been removed from a case for cause or malfeasance, likewise remain unanswered in Florida. The practical implication of this lack of data means that a Florida judge who is considering the appointment of a professional guardian to a case will have minimal information about a guardian’s demonstrated capabilities to serve in the case, aside from the minimum qualifications and standards that are statutorily tracked and published by OPPG – unless the court has established its own procedures for tracking additional information about the guardians.¹⁸⁶

The collection and availability of data regarding guardians is integral to the evaluation of Florida’s entire guardianship system; this is true for both professional and family guardians.

¹⁸⁴ See *id.*

¹⁸⁵ See Robinson, Diane, et al., “Guardianship / Conservatorship Monitoring, Recommended Data Elements,” *National Center for State Courts*, (October 2020), pp. 10, available at: https://www.eldersandcourts.org/data/assets/pdf_file/0029/54758/GuardianshipConse rvatorship-Monitoring-Recommended-Data-Elements.pdf.

¹⁸⁶ See generally *In Re: Professional Guardian Registry & Appointment of Professional Guardian*, Fla. 15th Cir. Admin. Order No. 6.310-1/2020 (Jan. 24, 2020), available at: <https://www.15thcircuit.com/sites/default/files/administrative-orders/6.310.pdf>.

Professional guardianship has received considerable scrutiny in recent years – but how many of the abuses and problems occurring in guardianship are actually attributable to *professional* guardians (as opposed to attorneys, family members or others close to the ward serving in the role of guardian)? Some studies suggest that the majority of guardianship exploitation scenarios are perpetrated by family members; namely the children, siblings, and other close relatives (appearing in order of frequency) of the ward.¹⁸⁷ Unfortunately, in these situations, a professional guardian will often be appointed in the case *after* the exploitation by the family member has been discovered.¹⁸⁸

Prior Task Force Support

“[M]ore active oversight is necessary in guardianship cases. While it is beyond dispute that court-appointed guardians should be supervised by the court, it should also be remembered that the vast majority of guardians are family members who are performing difficult, unpaid, and thankless work, solely from a sense of familial devotion and duty. The Committee also found that an overwhelming majority of professional guardians are dedicated and capable service providers.”¹⁸⁹

Guardianship monitoring programs should assist in both the “Initial and On-Going Screening and Reviewing of Guardians.”¹⁹⁰

Public Testimony

Public testimony focused primarily on the tracking of information as it pertains to professional guardians, however practitioners in the guardianship industry also noted the need for better information regarding family guardians.

- There should be caps on the number of wards a guardian may have at the same time and there should be an easily accessible way to determine how many cases a guardian has at any given point.
- Judges currently have no access to complaint and disciplinary information for professional guardians and cannot access information about a guardian’s track record on other cases, which would serve as red flags for judges and

¹⁸⁷ See “Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,” *National Council on Disability*, (March 22, 2018), pp.72, available at: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

¹⁸⁸ See *id.*

¹⁸⁹ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), pp.6, available at: <https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

¹⁹⁰ *Id.*

assist them with appointing competent, capable, and available guardians to cases.

- There is no remedy for the courts when a case has concluded due to the death of the ward, but the case cannot be closed because the guardian has failed to satisfy his/her final accounting and reporting obligations. The guardianship court's jurisdiction effectively ends with the death of the ward.
- As a state, we need additional information and guidance as to how attorneys dually serving as a professional guardian in a case can bill and account for their time.
- Sanctions or removal for cause from a case by the court should be recorded and accessible to everyone, especially the judges in other circuits, and OPPG.
- There needs to be an online matrix of professional guardians which shows where guardians are physically located, how many wards they have, what they charge, etc.
- Disciplinary information from OPPG should be publicly accessible online, not only through public records requests, and the disciplinary information provided online should include the written complaints against the guardian.
- Because guardians are so infrequently disciplined, the complaints filed against them should be made publicly accessible (online), so that the public is aware of problematic guardians, even if they are not "disciplined."
- Tardy or delinquent reporting by guardians should be tracked statewide, as both a method of encouraging compliance with statutory requirements and a method for notifying the courts that a guardian may be overburdened and presently unable to take on a new appointment.
- Guardians should never allow late fees to be assessed, absent circumstances beyond their control; this information should be tracked and flagged as it bears upon their capabilities as a fiduciary.
- Guardian fees should be publicly disclosed and available.

Implementation

The Legislature should review and update the existing statutes and recommend updates to relevant court and administrative rules to facilitate the greater inter-agency sharing of information concerning professional guardians and to require the creation of such a professional guardian database.

XIII. Focus Area # 9: Need for Additional Workgroup(s) Responsible for Assessing Florida’s Guardianship System

Present Situation

As noted in Section III of this report, the study of problems associated with guardianship has been an ongoing concern for many years in Florida. Numerous task forces and prior workgroups have examined many of the guardianship issues addressed in this report.

As pointed out elsewhere in this report, the U.S. Senate Committee on Aging has issued past reports on the complex problems surrounding guardianship cases¹⁹¹ and there is now proposed federal legislation to create national resources and standards with respect to guardianships in the U.S.¹⁹²

Currently, the State of Florida has no state-sponsored or sanctioned, continuous multidisciplinary team or workgroup that is focused on improving Florida’s guardianship laws and process.

Recommendations:

1. **Create a long-term entity or workgroup comprised of individuals with guardianship knowledge and a broad range of perspectives and disciplines, tasked with regularly making recommendations for improvement to the guardianship system.**¹⁹³

¹⁹¹ U.S. Senate Special Commission on Aging Joint Press, “Senate Aging Committee Examines Ways to Strengthen Guardianship Programs,” *United States Senate Special Commission on Aging*, (Nov. 28, 2018), available at: <https://www.aging.senate.gov/press-releases/senate-aging-committee-examines-ways-to-strengthen-guardianship-programs>.

¹⁹² See U.S. Senate Special Commission on Aging Majority Press, “Casey, Collins Introduce Bipartisan Bill to Protect Americans from Guardianship Abuse,” *United States Senate Special Commission on Aging*, (Sep. 28, 2021), available at: <https://www.aging.senate.gov/press-releases/casey-collins-introduce-bipartisan-bill-to-protect-americans-from-guardianship-abuse>.

¹⁹³ An example of one such continuous guardianship workgroup is the *permanent* Guardianship Commission in Nevada, which evaluates state guardianship laws and makes regular recommendations to the Nevada Supreme Court for the improvement of the state’s guardianship system and practices. See “Overview of the Permanent Guardianship Commission,” *Administrative Office of the Courts*, Supreme Court of Nevada, available at: https://nvcourts.gov/AOC/Committees_and_Commissions/Guardianship/Overview/.

Commentary

With the goal that Florida can and should become a leading state example for guardianship protections and processes, this Task Force encourages Florida's elected officials and courts to find and deliver new solutions.

A review of the important impact that prior guardianship task forces in this state (listed in Section III) have made to Florida's guardianship system through their recommendations for improvement is demonstrated by simply reviewing the changes made to Florida's guardianship statutes and rules from 1999 to today. These prior task forces and workgroups have proven that there are no quick fixes to guardianship problems and each proposed solution requires careful analysis and consideration as to the broad scope and impact it may have on all involved.

However, a review of the reports and findings made by these prior guardianship workgroups, (in addition to the many other workgroups not specifically cited in this report), also demonstrates the continuously evolving nature of Florida's guardianship needs and challenges. Many of the issues raised in this report overlap with themes and topics addressed in 2003, 2004, 2014, and 2018, while many other issues raised by this report appear to be novel and unaddressed by any of the prior groups.

A comparison between the improvements made to Florida's guardianship statutes after the 2003, 2004, 2014, and 2018 reports was published, with those related recommendations now made by this report exemplify the ongoing and evolving needs in guardianship improvements. For example, some of the same education and training improvements that were suggested by, and adopted after, the release of the 2004 Guardianship Task Force Report are now, once again, suggested for enhancement and more detailed improvements by this Task Force.

The Task Force believes that these meaningful changes and the evolution of Florida's guardianship processes cannot be achieved through a lengthy report or an individual, temporary workgroup. This process requires a consistent, more permanent process for review and analysis. Due to our evolving identification and understanding of challenges in guardianships, this Task Force recommends that the Legislature create and fund an ongoing, continuous guardianship workgroup. This legislatively enacted workgroup would have an opportunity to consistently review guardianship issues and regularly make recommendations for improvement to existing law.

However, as this Task Force identified from the start, guardianships are complex and the issues pertaining to guardianships can impact a wide variety of disciplines and industries and will involve multiple diverse and overlapping areas of law. Due to these complexities and the wide-reaching impact of Florida's guardianship laws and practices, this Task Force emphasizes that any future guardianship task force or workgroup must be comprised of equally diverse membership and a broad range of perspectives.

From the beginning this Task Force aimed to include as many diverse and related perspectives in the composition of its membership. Initially this Task Force sought out experts and stakeholders representing the following agencies and disciplines:

- Aging Justice Advocates;
- Clerks of Court;
- Court Administration;
- Disability Rights Advocates;
- Elder Affairs;
- Guardian Ad Litem Program;
- Legislature;
- Probate and Elder Law Attorneys;
- Professional Guardians;
- Public Guardians;
- Veteran's Affairs; and
- Current and former Wards and their Advocates and Representatives.

The perspectives offered by the members of this Task Force were varied and diverse, and the Task Force attributes any success achieved through this report to that same diversity. The Task Force even expanded its membership from the initial meetings to ensure that additional stakeholders were part of the conversation.

The Task Force also sought information and input from other related stakeholders and professions, considering presentations and perspectives from:

- Clerks' Inspectors General Offices;
- Statewide Investigation Alliance;
- Court-Appointed Attorneys for the AIP / Ward;
- Court Monitors;
- Family Guardians, Public Guardians, Professional Guardians; and
- National Guardianship Law and Policy Experts.

However, despite the best efforts of this Task Force to include all necessary stakeholders and disciplines, there were numerous related fields and disciplines which were later identified as necessary for a comprehensive guardianship analysis. These other stakeholders include, but are not limited to:

- Agency for Health Care Administration;
- Criminal Investigators / Law Enforcement;
- Criminal Prosecutors / State Attorneys;
- Department of Children and Families (Adult Protective Services);

- Department of Health;
- Financial Industry Regulators and Representatives;
- Florida Bar Representatives;
- Health & Residential Care Industries;
- Hospital Administrators;
- Mental Health Experts and Providers;
- NGO's Involving Guardianship Rights and Resources;
- Non-Profit Trust Operators (e.g., Pooled Trusts, Special Needs Trusts);
- Legal Aid Providers;
- Office of Criminal Conflict and Civil Regional Counsel; and
- Public Defenders.

While this Task Force recognizes that the exact membership of any future task force or work group, the agency or organization supporting or sponsoring such efforts, and how such group will be funded should be left up to the sound wisdom and discretion of the Legislature, it also recognizes and agrees that a properly funded, continuous, and diverse workgroup on guardianship is essential in Florida.

2. Create an additional workgroup or task force to review the current practices and uses of the guardianship system by health and residential care providers and explore the appropriate alternatives for those providers serving isolated or abandoned vulnerable adults.

Commentary

As addressed in Section X of this report, Florida's guardianship processes have tremendous impact on and application to Florida's health and residential care industries. Addressing this significant and complex area of concern will require careful discussion and input from experts in the health and residential care industries, in addition to guardianship practitioners, and elder justice and disability rights advocates.

Public Testimony

- Per one member of this Task Force, advance directives and other pre-need planning documents are routinely voided in Florida guardianship cases; the goal should be to keep these pre-need plans intact and in place unless and until proven to be invalid by clear and convincing evidence.
- There are no effective enforcement mechanisms to ensure that advance directives and pre-need plans, like POA's, are honored by the courts.

Implementation

This Task Force recommends the Legislature also consider the creation of an additional temporary workgroup or task force responsible for analyzing this intersection of health and guardianship disciplines and policies, as well as addressing the health and residential care “pipeline to guardianship” concern discussed in Section X.

XIV. Additional Focus Areas of Concern Identified by Task Force

In addition to the formal recommendations made in this report, the Task Force discussed a number of other *proposed* topics for recommendation. Each of the proposals provided in this section received strong support from the Task Force; however, due to time constraints, this Task Force was unable to reach and address these proposals at the final in-person meeting held on September 23, 2021. These priority topics of concern have been included as *proposals*, as opposed to recommendations agreed upon by a majority of this Task Force membership.

Although each of the proposals in this section received strong report, there was no final vote taken on any of these items. Nevertheless, the Task Force believes these proposals should be brought to the Legislature’s attention, particularly in light of this Task Force’s recommendation that the Legislature create a permanent task force or other entity to look at continued changes to the guardianship system in Florida.¹⁹⁴ These proposals should be among some of the first matters considered and addressed by the newly created, permanent guardianship workgroup.

Proposals:

1. **Review and improve the restoration of capacity process by reducing barriers and making the process clear and accessible.**

Commentary

A frequent complaint heard in the public testimony by this Task Force and several prior task forces pertained to the tremendous barriers and challenges individuals face when attempting to end a guardianship. This problem is well-documented in the media, with examples of the desperation of, and difficulties faced by, individuals under guardianship who *want out*. One recent example provided an article regarding a Florida man with mental health disabilities who spent seven years combatting his Florida guardianship before he was successful.¹⁹⁵

As one author describes in the takeaways of her investigations into guardianship issues across the nation: “People in guardianships can permanently lose [their

¹⁹⁴ See Recommendation 1 in Section XIII of this report.

¹⁹⁵ See Heidi Blake and Katie J.M. Baker, “They Both Fought to Break Free from Guardianship. Only One Escaped,” *BuzzFeed News*, (Sep. 19, 2021), *available at* <https://www.buzzfeednews.com/article/heidiblake/guardianship-conservatorship-marriage-couples>,

rights] ... they can lose their right to hire a lawyer to fight for them, which means that once a guardianship is in place, it is often impossible to escape.”¹⁹⁶

“Individuals seeking restoration face many barriers... The filing of a formal petition requesting restoration is burdensome or impossible for many individuals subject to guardianship...”¹⁹⁷ Less formal methods of communication requesting termination or modification should be accepted, as well.¹⁹⁸

The process for contesting a guardianship or restoring any right for an individual in guardianship should not be a mystery nor should it be so difficult that it prevents individuals in guardianships from addressing their concerns with the guardianship court. While this report does not provide a specific recommendation for how to improve the restoration of rights process in Florida, it is apparent such improvements are critically needed for those individuals presently under guardianship.

2. Consider the use of less expensive, alternative dispute resolution and problem-solving options for those involved in the guardianship process.

Commentary

Although Florida law allows for mediation in most types of contested civil cases,¹⁹⁹ mediation is infrequently used in guardianship cases.

Recent legislation enacted this year now provides for an “elder-focused dispute resolution process,” which would provide “an elder, his or her family members, and legally recognized decisionmakers to have access to a non-adversarial process to resolve disputes relating to the elder which focuses on the elder’s wants, needs, and best interests.”²⁰⁰ However, it is too soon to tell how practical and accessible this process will be for the individuals in guardianship. Further, it is unclear why this

¹⁹⁶ Katie J.M. Baker, “Here Are 8 Major Takeaways From BuzzFeed News’ Investigation Into Guardianship,” *BuzzFeed News*, (Sep. 28, 2021), *Yahoo! News*, available at: <https://news.yahoo.com/8-major-takeaways-buzzfeed-news-165639153.html?guccounter=1>.

¹⁹⁷ Erica Wood, et. al, “Restoration of Rights in Adult Guardianship: Research and Recommendations,” *American Bar Association, Commission on Law and Aging*, (July 2017), pp. 42, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf.

¹⁹⁸ *See id.*

¹⁹⁹ *See* Florida Statute § 44.1011.

²⁰⁰ Florida Statute § 44.407.

alternative dispute resolution process has only been provided for use by “elder[s]”²⁰¹ and is not available to any adult, regardless of age, in guardianship.

Public testimony and concerns posed by family guardians before this Task Force raised the serious concern that the guardianship system makes addressing concerns regarding a loved one in guardianship too costly for the ward.

As one family guardian asked of this Task Force, “Are there *any* cost-effective solutions that are available when [conflict occurs in guardianship]... and the guardian doesn’t want to fight with a stubborn ward in court to... whatever an amount of money is coming out of our bank accounts?”²⁰² As this family guardian described from her own experience, it is cost-prohibitive to litigate small, simple disputes within guardianship cases. Filing costs, attorney’s fees, and other miscellaneous expenses all add up just to be able to address simple issues. For example, her elderly father with dementia retained his rights pertaining to the person but is now refusing to take medications as prescribed; does the family guardian have to litigate this issue every time it resurfaces?

Individuals in guardianship and interested parties in guardianship cases, especially family guardians, need alternative dispute resolution tools where the costs do not outweigh the desired goals or remedies sought.

- 3. Consider implementing a process for the appointment of attorneys for an alleged incapacitated person or ward in all involuntary guardianship proceedings paid for by the state, regardless of the individual’s indigency status, who would serve as a defense attorney to guardianship.**

Commentary

The most critical time a person who may be placed in guardianship needs an attorney is before a guardian is appointed. Basic fundamental rights are taken away from a person once they are placed under guardianship.

Additionally, “[i]ndividuals [already in guardianship] require the assistance of counsel to challenge the continuing need for the order, and to seek modification and

²⁰¹ “Elder” means a person 60 years of age or older who is alleged to be suffering from the infirmities of aging as manifested by a physical, mental, or an emotional dysfunction to the extent that the elder’s ability to provide adequately for the protection or care of his or her own person or property is impaired. Florida Statute § 44.407 (2)(c).

²⁰² Guardianship Improvement Task Force Public Meeting, September 14, 2021, recording available at: https://youtu.be/Hup41N_XKXQ?t=4355.(quoting “Julie”).

restoration. Many such individuals appear to lack counsel and thus may remain in an unnecessary or overbroad guardianship.”²⁰³

Several members of this Task Force, along with numerous members of the public, expressed concerns with the concept that an individual who is involuntarily brought before a guardianship court may nevertheless be forced to pay for his or her own court-appointed representation. This is a topic of concern which the Legislature may wish to review for principles of fairness and equity.

4. Clarification on the process for waiver of the alleged incapacitated person’s, or ward’s, presence in any guardianship hearing, which properly preserves the due process protections of the individual.

Commentary

Another recurring and common theme raised by numerous public commenters was that the incapacitated person is often excluded from court hearings regarding the guardianship.

“The alleged incapacitated person must be present at the adjudicator hearing [re: incapacity], *unless waived* by the alleged incapacitated person or the person’s attorney or unless good cause can be shown for her or his absence.”²⁰⁴

Based upon comments made by the public, several presenters and Task Force members, the norm in Florida now seems to be that a vulnerable adult’s presence will be waived for convenience of the courts and parties in most cases. Waiver of an individual’s presence in guardianship should be heavily scrutinized by guardianship courts, as every individual has a right to be present at a hearing affecting their life and liberties.

This right may also mean that the courts will need to make more efforts to accommodate individuals in guardianship to ensure that their due process protections are strongly protected.

5. Address alternatives to the school-to-guardianship and foster-care-to-guardianship “pipelines” for young adults with developmental disabilities.

²⁰³ Erica Wood, et. al, “Restoration of Rights in Adult Guardianship: Research and Recommendations,” *American Bar Association, Commission on Law and Aging*, (July 2017), pp. 46, available at:

https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf.

²⁰⁴ Florida Statute § 744.331 (5)(b).(emphasis added).

Commentary

As with the health and residential care industry pipelines discussed in Section X, the school-to-guardianship pipeline is a serious topic of concern.

The National Council on Disability conducted research examining the guardianships of individuals with intellectual and developmental disabilities and found evidence that substantiates the school-to-guardianship pipeline complaints.²⁰⁵ School officials may be biasing and encouraging parents to pursue guardianships over their adult children with disabilities due to lack of clear understanding of what guardianship entails.²⁰⁶

In fact, research suggests that well-meaning faculty and school officials frequently “[lack] knowledge regarding the guardianship process and about alternatives to guardianship.”²⁰⁷ This lack of education poses a significant ripple effect for individuals with disabilities and their families. When “guardianship is a family’s first choice rather than the last resort after other alternatives have been tried (or at least seriously considered and rejected), the negative impact may not be limited to the young person with a disability who finds his or her rights curtailed more than necessary.”²⁰⁸

The Legislature should consider methods to help address this pipeline problem, in addition to the recommendations regarding the use of least restrictive alternatives to guardianship provided in Section IX of this report.

6. Reconsideration of Florida’s adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, either in total or in part.

Commentary

Florida is one of only four states in the U.S. that has not adopted some portion of this uniform act; Florida is joined by Texas, Kansas, and Michigan in this regard.²⁰⁹

²⁰⁵ “New federal research examines guardianships of people with intellectual, developmental disabilities, finds school-to-guardianship pipeline,” *National Council on Disability*, (June 10, 2019), available at: <https://ncd.gov/newsroom/2019/new-federal-research-examines-guardianships>.

²⁰⁶ *Id.*

²⁰⁷ “Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,” *National Council on Disability*, (March 22, 2018), pp.92, available at: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf).

²⁰⁸ *Id.* at pp. 93.

²⁰⁹ “Adult Guardianship and Protective Proceedings Jurisdiction Act,” *Uniform Law Commission*, Map of states that have enacted UAGPPJA, available at:

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) provides a comprehensive system for resolving multi-state jurisdictional conflicts involving guardianship, as well as provides a simplified process for transferring a guardianship from one U.S. state to another.²¹⁰

This Task Force heard testimony about how Florida's failure to adopt any portion of the UAGPPJA has been cited by other states' guardianship courts as justification for refusing to honor a Florida guardianship court order. Proponents of the UAGPPJA assert that interjurisdictional disputes with other states' guardianship courts can be resolved faster and more efficiently if Florida adopts the UAGPPJA, which would ultimately preserve the assets of individuals in guardianship that might otherwise be expended in unnecessary litigation.

Several members of this Task Force have suggested that the Legislature should consider the adoption of all or some portion of the UAGPPJA for these reasons and more.

7. Creation of a singular point of intake process and regulatory entity for guardianship concerns regarding the welfare of the person or property involved in guardianship.

Commentary

"The *National Probate Court Standards* recommend that courts 'establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators.'"²¹¹ The UGCOPAA recommends the creation of "an accessible mechanism for bringing concerns about improper conduct by guardians or conservators to the attention of the court," in its Section 127, which outlines a proposed grievance process.²¹²

<https://www.uniformlaws.org/committees/community-home?CommunityKey=0f25ccb8-43ce-4df5-a856-e6585698197a>.

²¹⁰ See *id.*

²¹¹ Erica Wood, et. al, "Restoration of Rights in Adult Guardianship: Research and Recommendations," *American Bar Association, Commission on Law and Aging*, (July 2017), pp. 44, available at:

https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf. (quoting Richard Van Duizend, "National Probate Court Standards," *National Center for State Courts*, (2013), #3.3.18).

²¹² National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," *Uniform Law Commission*, (April 3, 2020), Section 127, pp. 39-41, available at:

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7218ba8f-df8a-2cc1-3a29-053345ffd12c&forceDialog=0>.

So, what are the reporting processes and channels for concerns about guardianships in Florida?

As noted in Section XII of this report, OPPG is responsible for receiving and investigating complaints regarding the alleged misconduct of professional guardians.²¹³ However, OPPG can only investigate legally sufficient claims which demonstrate a professional guardian may be in violation of his or her professional obligations. Consequently, OPPG has no jurisdiction to investigate claims of misconduct or abuse by family guardians, attorneys, other court personnel, or additional indirect forms of conflicts of interest (see Section X of this report for examples).

Additionally, Florida law provides that “[a]t any time, *any interested person*, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan, is exceeding his or her authority under guardianship, is acting in a manner contrary to [Florida guardianship statutes], or is not acting in the best interest of the ward.”²¹⁴ This complaint process is available to all interested parties of the guardianship case, but is not available or clearly accessible to non-attorneys and/or members of the public wishing to notify the court of a concern involving guardianship.

Finally, “[a] person who believes that a guardian is abusing, neglecting, or exploiting a ward shall report the incident to the central abuse hotline of the Department of Children and Families.”²¹⁵ However, as this Task Force heard anecdotally during presentations by court monitors and other personnel, the Department of Children and Families central abuse hotline does not normally accept, or screen in for further investigation, allegations of exploitation and other abuses of power by guardians.

When these options are inapplicable, unavailable, or otherwise fail to address a concern involving guardianship, how do concerned individuals in the community report problems in guardianship so that they are investigated and reviewed by the appropriate individual(s) or agency/agencies?

The Legislature should consider the creation of a singular, statewide point of intake which would appropriately route and report concerns involving guardianship to all necessary agencies and courts, as well as follow up on and report the results accordingly.

²¹³ See Florida Statute § 744.2004.

²¹⁴ Florida Statute § 744.3715 (1).(emphasis added).

²¹⁵ Florida Statute § 744.359 (3).

XV. Other Topics Recommended for Future Consideration

In an effort to accurately report the numerous points of concern raised before this Task Force by its members, presenters, and members of the public, those points of concern and associated recommendations for improvement to Florida’s guardianship system have been organized by topic and subcategories in this section. These topics and subcategories are provided in no particular order and have been organized to provide for the greatest flow and clarity of content.

The content addressed in this section was not voted upon by the Task Force and do not represent any specific recommendations or findings made by the Task Force. These topics are, however, areas of public concern which should be considered in future improvements to Florida’s guardianship system.

1. Accessibility and Court Services for the Guardianship Process

“Of the values embraced in the vision statement of the Florida court system, the first is ‘access,’ meaning ‘convenient, understandable, timely, and affordable to everyone.’ Access to the courts is an explicit right of the people, guaranteed to all litigants and not reserved to those represented by an attorney.”²¹⁶

a. ADA Accommodations

Problem / Concern

How can we ensure Florida’s guardianship courts are accommodating the needs of all individuals in guardianship?

Commentary

As mentioned briefly in Section XIV of this report, the waiver of an alleged incapacitated person’s presence or ward’s presence in a guardianship hearing is a topic of great public concern. One reason for this waiver has been attributed to the logistics involved in transporting or otherwise physically securing the presence of an AIP or ward with physical disabilities and/or health limitations or restrictions at the hearing.

“It is commonly known that the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. It is also commonly known that Title II of the ADA requires that State and local governments, *including courts*, provide people with disabilities an equal opportunity to access and benefit from all of their

²¹⁶ Supreme Court of Florida, Commission on Trial Court Performance and Accountability, *Ensuring Access to Justice: Serving Florida’s Self-Represented Litigants*, Office of the State Courts Administrator, (April 2008), pp. 4, available at: <https://www.flcourts.org/content/download/218243/file/SelfHelpFinalReport0408.pdf>.

programs, services, and activities.”²¹⁷ Florida courts must ensure that all individuals, regardless of physical or medical disability or impairment, have meaningful access to the courts.

Public Testimony

- ADA accommodations are needed for AIP’s and wards, and this should have clear funding options provided by for the state; this should not be something for which the AIP or ward is ultimately financially responsible.

b. Language Interpreter Services

Problem / Concern

Is there a specific process and resource in place to ensure individuals in guardianship can communicate during all essential aspects of the guardianship process?

Commentary

A concern has been raised about not only the use of court approved official interpreters in the substantive hearings involving guardianship case decisions, but also the extrajudicial processes, such as during review of the AIP or ward by examining committee members or during preparatory meetings between an AIP or ward and his/her court-appointed counsel.

One Task Force member mentioned a guardianship proceeding involving an elderly individual whose native language was not English, whose daughter assisted by translating for at least one of the examining committee members during his examination of the AIP.

“Perhaps what is *not* as commonly known [about the requirements of the ADA] is what the ADA requires of courts in terms of providing accessible services to individuals who have cognitive disabilities which affect an individual’s ability to comprehend or express themselves in written or spoken language.”²¹⁸

Individuals who are the subject of a guardianship proceeding must be provided effective means of communication throughout the entire guardianship process as fundamental due process protection. This protection should include an “impartial, valid, and reliable assessment by a compensated and qualified person who has

²¹⁷ Elizabeth Moran, “Something to Talk About: Supported Decision Making and Access to Justice for All,” *Bifocal*, American Bar Association, Commission on Law and Aging, vol. 42, no. 6, (July – August 2021), pp. 132, *available at*: https://www.americanbar.org/content/dam/aba/administrative/law_aging/bif-vol-42-issue6.pdf. (emphasis added).

²¹⁸ *Id.*

knowledge and training about decision-making in the area(s) related to the proceedings, *inclusive of the adult’s preferred reasonable accommodations and method of communication.*”²¹⁹

Keeping in theme with the proposals and concerns raised in Section XIV of this report, this due process protection of providing effective tools for both the understanding of the individual in guardianship, as well as ensuring the courts and other professionals involved in the process have an accurate translation of statements made by the individual in guardianship, is a service which should be guaranteed and provided at no cost to the AIP or ward.

Public Testimony

- In Broward County, court monitors interview the ward without the ward’s counsel or guardian being present, and *they are permitted to utilize the interpreter services of the court in order to communicate with the ward.*
- In the criminal court process, interpreter services are provided by the court for court-ordered evaluations involving a defendant’s competency, and court-appointed counsel may request the provision of such additional interpreter or translator services through the Judicial Administrative Commission.²²⁰

2. Alleged and Adjudged Incapacitated Persons’ Rights and Protections

“...[J]udges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result – a wood staff – is similar, the process of creation is distinct to each staff. Just as a good woodcarver knows that within each tree branch there is a unique staff that can be ‘released’ by the acts of the carver, so too a good judge understands that within each guardianship petition, there is an outcome that will serve the needs of the incapacitated person, if only the judge and litigants can find it.”²²¹

²¹⁹ *Id.*

²²⁰ See “Quick Checklist for Interpreter and Translator Billing,” *Justice Administrative Commission*, (May 4, 2021), *available at*: <https://www.justiceadmin.org/FAQ/Training%20Modules/Quick%20Checklist%20for%20Translator%20and%20Intrepreter%20Billing.EP.CS.4-22-21.pdf>.

²²¹ Lawrence A. Frolik, “Promoting Judicial Acceptance and Use of Limited Guardianship,” *Stetson Law Review*, vol. 31 (Spring 2002), pp. 735, 737, *available at*: <https://www.stetson.edu/law/lawreview/media/promoting-judicial-acceptance-and-use-of-limited-guardianship.pdf>.

a. Elimination of Plenary Guardianships

Problem / Concern

Should 'plenary' guardianships be eliminated from Florida Statutes?

Commentary

It has been argued that it is too easy for an examining committee to recommend, or for a court to order, a *plenary* guardianship be established for a person in significant cognitive decline. Both the examining committee members and the judges should be evaluating each individual right and capacity to determine whether it may be retained by the individual in guardianship, as a less restrictive alternative or form of guardianship.

“By encouraging use of limited guardianships and protective orders instead of full guardianship, states can reduce the likelihood of unnecessarily stripping adults of their civil rights. Yet, although such less restrictive alternatives have long been available to most courts, in practice, their use remains limited and sporadic.”²²²

The Fourth National Guardianship Summit recommended:

“Recommendation 3.2: States should eliminate plenary guardianship, allowing people to retain the maximum of rights, and if guardianship is imposed, require tailored guardianship orders in all cases.”²²³

While the use of “plenary guardianship” is generally understood, perhaps the elimination of this concept under Florida law would facilitate greater scrutiny and analysis by the courts of each separate right of the individual to encourage greater autonomy of the person.

Public Testimony

- Petitions for guardianship should require that the petitioner have personal knowledge of the AIP’s physical and mental condition, that they specify which rights or capacities the person is no longer capable of maintaining, and that the petitioner must attest to this personal knowledge and belief.

²²² Nina Kohn & David English, “Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship,” *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), pp. 1, available at: <http://law.syr.edu/uploads/docs/academics/Kohn-English.pdf>.

²²³ National Guardianship Network, “Recommendations Adopted by Summit Delegates,” *Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 2021), pp. 5, available at: http://law.syr.edu/uploads/docs/academics/Fourth_National_Guardianship_Summit_-_Adopted_Recommendations_%28May_2021%29.pdf.

b. Standardized Rights Removal and Delegation Forms

Problem / Concern

Should Florida adopt a uniform, standardized form outlining the rights which may be removed and the rights which may be delegated in guardianship?

Commentary

In continuation from the preceding problem or concern regarding plenary guardianships, as well as in order to facilitate greater data collection and analysis of guardianship processes in Florida, the state should consider standardized forms outlining rights to be removed for use by both examining committee members in their reporting, as well as by the courts for guardianship orders. These forms would help to clarify the scope of the findings by examining committee members, as well as to guide guardians and others relying up on the order regarding the extent of the delegated authorities pertaining to the person in guardianship. This form would also help to clarify some of the rights never delegated and/or those retained by the ward.

Public Testimony

- Standardized forms should be provided to examining committee members which outline and require an individualized finding as to each individual right the member is recommending be removed and/or delegated.

c. Neutral Advocacy

Problem / Concern

Is there a *neutral* advocate looking out for individuals in guardianship?

Commentary

A consistent theme and concern raised by members of this Task Force and during public comment is the need to ensure a truly objective and *neutral* advocate for the AIP or ward – someone who has no financial incentive or tie to the outcome of any guardianship decision or case.

Court-appointed attorneys for the AIP/ward come close to this requirement in some cases, however, the court-appointed attorney is normally discharged once a guardianship has been ordered by the court. Additionally, the financial compensation of the court-appointed attorneys fees is only guaranteed *if the AIP/ward is placed under guardianship*, which creates a conflict of interest. Further, there are many arguments for why the AIP/ward should not be financially responsible for paying for a neutral advocate to guarantee their due process rights are preserved and protected.

Another example which comes close to neutral advocacy is through some examples of the court monitoring process, however this process only occurs when the court believes a court monitor needs to be appointed to a case (normally when some problem or concern has already occurred) and the court monitor's fees are still typically compensated by the AIP/ward's assets.

There needs to be a neutral party whose exclusive job is to advocate on behalf of the AIP/ward's express wishes (i.e., not best interests or substituted judgment standard), who is always available as a resource to the AIP/ward while a guardianship is in place. This person could also assist a ward with the suggestion, and restoration, of capacity process.

Prior Task Force Support

The 2003 Guardianship Monitoring in Florida report suggest that this neutral advocacy may be achieved through a court monitoring program and is essential because “[unlike other court cases,] once incapacity has been determined, there are usually no ‘adversaries’ to bring concerns to the court’s attention.”²²⁴

Public Testimony

- The ward should have an advocate with no financial interest in the outcome of the case; the guardianship process currently incentivizes litigation, and the continuation of guardianship is driven by profitability in many circumstances.
- Court-appointed counsel should never be able to recommend a specific professional guardian in a case, unless the AIP/ward has specifically requested this. (Unfortunately, this practice does occur in this state.)
- Wards are too frequently left voiceless in the guardianship process.
- The courts should establish an attorney or guardian advocate who has access to the AIP/ward from the very beginning of the case, who has no conflict of interest (i.e., compensation comes from the state or federal government) and whose job is to fight the removal of rights and to keep advance directives and estate planning of the individual in place.
- In some circuits of this state, the attorney petitioning for guardianship will pre-identify or suggest the appointment of a specific court-appointed attorney in their proposed order; this also presents an opportunity for a conflict of interest to occur.

²²⁴ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), pp. 13, *available at*

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

d. Substitution of Counsel

Problem / Concern

How do we create a uniform process and guarantee an individual in guardianship's due process right to substitute counsel of his or her own choosing?

Commentary

Florida courts frequently prohibit a person subject to guardianship from hiring counsel of his or her own choosing to contest guardianship. This is especially problematic when the individual has not yet been deemed incapacitated but has had their capacity to contract removed by the court through an emergency temporary guardianship order. Florida's processes need to be clarified to address this issue and ensure the individual in guardianship is provided adequate due process protections.

"Individuals subject to guardianship require the assistance of counsel to challenge the continuing need for the order, and to seek modification and restoration... [However, guardianship raises a common problem and classic quandary when dealing with legal representation, namely:] Persons subject to guardianship have been determined by a court, depending on the scope of the order, to be unable to make their own decisions and engage in legal transactions, so how can they contract with and direct a lawyer to represent them? How and under what circumstances should a lawyer engage in such representation?"²²⁵

Florida law allows an AIP to select counsel of his or her own choosing, provided that the person's capacity to contract and hire counsel has not already been removed by an emergency guardian.²²⁶ Unfortunately this right to counsel of his or her own choice is typically removed during the adjudication of incapacity and the hiring and selection of counsel is normally delegated to the guardian.²²⁷

²²⁵ Erica Wood, et. al, "Restoration of Rights in Adult Guardianship: Research and Recommendations," *American Bar Association, Commission on Law and Aging*, (July 2017), pp. 46-47, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf.

²²⁶ "The court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court." Florida Statute § 744.331 (2)(b).

²²⁷ "When reasonably necessary, [the guardian has the power without court approval to] employ persons, including attorneys... to advise or assist the guardian in the performance of his or her duties." Florida Statute § 744.444 (13).

Prior Task Force Support

The 2004 Guardianship Task Force recommended Florida courts conduct “[a] hearing on the issue of capacity to retain counsel...” to address situations when an AIP would like to substitute his or her own counsel.²²⁸ This recommendation was echoed by the 2018 Judicial Management Council Guardianship Workgroup, which recommended that the court “[r]equire a hearing for substitution of court-appointed counsel [in determination of incapacity proceedings].”²²⁹

Public Testimony

- A representative of Disability Rights Florida, Florida’s Agency for Persons with Disabilities, testified that Disability Rights Florida has been prevented from speaking with wards under guardianship, even when the ward reached out and initiated the request for assistance.

e. Freedom to Communicate and Associate

Problem / Concern

How do we protect the rights and freedoms to communicate and associate for individuals in guardianship?

Commentary

Individuals in guardianship are supposed to retain their rights to maintain contact with family and friends unless the guardian believes such contact would be harmful to the individual; however, there are no procedural safeguards to decide when a guardian should or should not restrict a ward’s ability to associate and communicate with whomever they choose. Additionally, there is minimal accountability for guardians who usurp or abuse their powers by restricting access to the ward, due to the subjective standard and wide latitude given to the guardian’s decisions by the guardianship court.

Earlier this year, the Florida Legislature recognized that isolation of vulnerable adults often occurs in tandem with other forms of abuse, neglect, or financial exploitation of an individual when it amended [s. 825.102, F.S.](#), thereby criminalizing the conduct of “[i]ntentionally, and without lawful authority, isolating

²²⁸ Governor’s Guardianship Task Force, “2004 Final Report of the Guardianship Task Force,” (Dec. 2004), pp. 9, *available at*: <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/09/2004-Guardianship-Task-Force-Final-Report.pdf>.

²²⁹ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 2, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

or restricting access of an elderly person or a disabled adult to family members...”²³⁰

While existing Florida law generally suggests an individual in guardianship should retain the freedom to associate with friends and family, there are no procedural safeguards to protect this right, nor any real consequences for guardians, attorneys, or residential care facilities who improperly restrict the person’s abilities to communicate or associate. Limiting a person’s access to friends and family should have more procedural safeguards under Florida law, which *may* include reserving such decisions exclusively to the court.

Prior Task Force Support

The 2018 Guardianship Workgroup recommended that Florida Statutes be amended to “[r]equire 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.”²³¹

Public Testimony

- The Task Force received numerous examples from individuals during public comment, of how a guardian inappropriately restricted or prohibited access to the ward by friends and family.
- Several examples of restrictive contact-related testimony provided to the Task Force resulted in the ward passing away without ever having contact with their loved ones again after the guardianship process was initiated.
- “Stop allowing guardians to seize and isolate the ward!”

f. Access to Information Upon Request

Problem / Concern

What rights and processes are in place for individuals in guardianship to request access or information regarding their case, rights, property, care, etc.?

Commentary

Individuals in guardianship have no *protected* right to request information regarding their case, their medical care, or the disposition of their real and

²³⁰ See Florida Statute § 825.102 (1)(d).

²³¹ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 5, *available at* https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

personal property, once a guardianship is established. As discussed elsewhere in this report, AIP's and wards under guardianship have no meaningful process to request assistance of the courts nor to notify the court or other government agencies when problems involving the guardianship arise.

Florida trust laws require that a trustee must "provide a complete copy of the trust instrument and to account to qualified beneficiaries," as well as "respond to the request of a qualified beneficiary of an irrevocable trust for relevant information..."²³² As fiduciaries²³³ owing a duty of care to the ward, shouldn't guardians also be accountable to questions and requests for information by the ward?

g. Continuing Review of Need for Restriction(s)

Problems / Concerns

What processes are in place to guarantee that a person under guardianship is regularly evaluated for restoration(s) of capacity?

Commentary

An individual in guardianship should be regularly and continuously reviewed by the court for the possibility of having some, or all, of their rights restored.

In Florida's criminal justice system, defendants who have been deemed mentally incompetent to stand trial and who are thereby placed in treatment facilities must be reevaluated within 6 months from the date of admission to the treatment facility.²³⁴ The court must hold a hearing upon receipt of the new competency report, at which point counsel for the defendant and prosecutors from the State are present and able to provide arguments regarding the defendant's competency.²³⁵ If the defendant is still deemed incompetent and retained by the facility after this 6 month reevaluation, the court will follow this reevaluation procedure and hearing process annually.²³⁶

Currently, Florida's guardianship law provides for a form of annual review by the court, which is based upon the filing of an annual guardianship plan by the guardian for the ward.²³⁷ This annual guardianship plan *should* include

²³² Florida Statute § 736.0105 (2)(s) & (2)(t).

²³³ "The guardian of an incapacitated person is a *fiduciary*..." Florida Statute § 744.361 (1). (emphasis added).

²³⁴ See Fla. Rule Crim. Pro. 3.212 (c).

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See Florida Statute § 744.3675 (b).

information concerning the medical and mental health conditions of the ward, including the current level of the ward's capacity.²³⁸ However, as the testimony provided to this Task Force has demonstrated, there have been many problems with ensuring the timeliness in filing and overall completeness of these plans.

Additionally, the report regarding the ward's capacity, which is included in the annual plan may be performed by a doctor or practitioner *of the guardian's choosing*, including practitioners of the facility where a ward presently resides.²³⁹ Given the concerns raised in Section X of this report regarding the inherent conflicts of interest in guardianships with the health and residential care industries, there may be concerns regarding the neutrality and objectivity of the physician performing an assessment regarding the continued need for guardianship. One study cited by this Task Force identified a situation in which a nursing home physician asserted a ward was not well enough to even attend her own guardianship capacity hearing ostensibly because the nursing home was attempting to retain the ward as a resident in its care.²⁴⁰

In Florida's criminal process, examining experts are appointed, compensated, and called by the court as a "court witness."²⁴¹ And due to the use of state-funded treatment facilities and programs, the examining experts have no direct or indirect financial interest in the defendant's continued inpatient commitment.²⁴²

²³⁸ *Id.*

²³⁹ See Florida Statute § 744.3675 (b)(2).

²⁴⁰ "They called the police who determined Ms. Roush was very sharp and left the facility with the mistaken impression she would be released. Next, Ms. Roush met with a lawyer to revoke her advance directive, thus stripping Mr. Gallagher of any authority, but the facility still refused to let her go home. Ms. Roush's attorney then filed a habeas corpus petition but it was dismissed after she was unable to testify because her own nursing home physician asserted she was not well enough to attend the hearing. The facility then assisted Mr. Gallagher in filing for guardianship and the nursing home once again prevented Ms. Roush from attending her hearing... The guardian-ad-litem noted Ms. Roush was 'a woman whose liberty interests are being compromised based on the opinion of one nursing home doctor.'"

Alison Hirschel and Lori Smetanka, "The Use and Misuse of Guardianship by Hospitals and Nursing Homes," The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability, (May 10-14, 2021), pp. 4, *available at*: <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>.

²⁴¹ See Fla. Rule Crim. Pro. 3.212 (a).

Public Testimony

- Florida guardianships should have mandatory, periodic review of the continued need for guardianship, as well as availability of less restrictive alternatives to guardianship, by a neutral, disinterested party.
- Shouldn't the goal be to consistently monitor an individual in guardianship for improvement so that the person is no longer a "ward of the state?"

h. Emergency Do Not Resuscitate Orders

Problems / Concerns

How do we address exigent and urgent needs for DNR's in all regions of the state?

Commentary

The Florida Public Guardian Coalition raised concerns regarding the unintended consequences and unreasonable delays caused by a recent amendment to Florida's statute governing the process by which a person under guardianship may obtain a valid order not to resuscitate (commonly referred to as a DNR).²⁴³

The Florida Public Guardian Coalition provided an extensive list of "real-life examples to provide the Task Force with a statewide perspective of how the DNR law is working now, over a year after implementation, and perspective where [the Coalition has identified] areas that the law could be improved."²⁴⁴ The Coalition's "Public Guardian DNR Legislation Unintended Consequences Examples" report has been included as Appendix M in this report.

Public Testimony

- At least one member of this Task Force suggests that there need to be expedited processes available for obtaining court approvals for DNR's in exigent circumstances to prevent the unnecessary and prolonged suffering, harm, and indignity of the ward.

3. Confidentiality and Privacy Protections

A person who has been determined to be incapacitated retains the right to be treated humanely, with dignity and respect, and the right to privacy.²⁴⁵

²⁴³ See Florida Statute § 744.441 (2).

²⁴⁴ "Public Guardian DNR Legislation Unintended Consequences Examples," *The Florida Public Guardianship Coalition*, October 2021; Provided in Appendix M, of this report.

²⁴⁵ Florida Statute § 744.3215 (1)(d) & (o).

a. Transparency vs. Dignity of Individual

Problems / Concerns

How do we balance the rights of privacy, confidentiality, and dignity of the individual in guardianship with the need for greater transparency of the guardianship process?

Commentary

Florida's guardianship courts must strike a balance between the need for transparency of the guardianship process – for purposes of accountability and oversight – and the rights of privacy for the individual in guardianship.

As discussed in Section V of this report, this Task Force unanimously agreed that increased data collection and information sharing by Florida's guardianship courts is essential to make meaningful improvements to Florida's guardianship process. Additionally, the collection and sharing of general guardianship case information in Florida may foster increased trust by the public regarding the integrity of Florida's guardianship court processes.

However, as was also mentioned in Section V of this report, the question of how much, if any, of this data or more specific case information can be shared with the public remains unresolved by this group.

Advocates for change to Florida's guardianship system demand greater public transparency in guardianship cases. Advocates argue for less confidential restrictions and greater visibility of the court process and case information for each guardianship case with the hopes of deterring abusive guardianship practices and decisions, while also seeking to hold perceived wrongdoers in the guardianship process accountable.

Elder law and probate law practitioners conversely argue that the guardianship process involves an inquiry by the court into sensitive, confidential, and protected information concerning a vulnerable adult subject to guardianship. Guardianship cases involve the use of all forms of confidential information concerning the AIP or ward, including, but not limited to mental health evaluations, mental health treatment records, medical treatment information and records, financial records, banking information, and sensitive personal identification information of the individual subject to guardianship.

The goal for a more transparent guardianship process and the need for greater information regarding Florida guardianships must be carefully weighed against protecting the privacy and confidentiality considerations of the persons under guardianship.

Public Testimony

- Statutory discrepancy exists between who is entitled to receive a copy of the guardianship report – based upon privacy and confidentiality considerations of the examining physician’s report – versus who can object to the guardianship report. Maybe the physician’s report and other confidential, medical information should be separately filed from the guardianship report to remedy this conflict.
- Public records laws must be considered along with applications used by the courts to collect guardianship data and information (e.g., GIRAFF Program).
- Fees for guardians and attorneys should be publicly disclosed and available.

b. Consent of Individual

Problems / Concerns

Should courts rely upon the consent and determination of each individual in guardianship to strike a balance between individual rights and public access?

Commentary

The balancing act between public access and transparency with the individual rights of privacy and confidentiality is not limited to guardianship case records and evidence; these considerations and concerns also apply to the openness of the guardianship court processes and hearings.

Who decides if a guardianship case hearing will be open to the public or occur in private? As with all decisions regarding the administration of the guardianship court case process, this decision ultimately rests with the guardianship judge.

However, if the right to privacy is a non-delegable right, always retained by the person in guardianship, doesn’t the decision regarding whether to waive this right to privacy remain with the AIP or ward?

Many advocates for reforming Florida’s guardianship system have suggested that the decision of whether the court process is open to the public should only be made by the individual subject to guardianship. One such advocate suggests that an AIP should be immediately contacted, after a petition has been filed, and provided with an explanation of the individual’s rights and options regarding the guardianship process. According to this suggestion, the AIP would be notified from the outset that his or her right to privacy extends to whether the case proceedings will be open to the public and the AIP can elect whichever option he or she prefers.

This proposed choice by the AIP and/or ward places the individual subject to guardianship in the driver’s seat for how he or she would like to see the process conducted – but when the person’s capacity to make informed decisions

regarding his or her care or finances has been placed at issue, is this a fair responsibility to place upon the AIP or ward?

As one elder law advocate stressed before this Task Force, guardianship cases involve testimony and evidence regarding some of the most intimate, and sometimes embarrassing, details of the lives of vulnerable adults who are the subjects of guardianship. Maintaining the individual's dignity and privacy must be fundamental to how the guardianship case process is carried out.

Additionally, ensuring privacy during the proceedings (e.g., by conducting hearings at the bench or in private chambers) may be the only way to achieve participation by the individual in guardianship during the guardianship decision-making process.²⁴⁶ If we want a vulnerable individual to feel comfortable disclosing sensitive information before the court, the courts may need to limit the number of disinterested spectators who are present in the courtroom during the proceeding.

Public Testimony

- AIP's and wards should be asked from the very beginning of the hearing whether they want a proceeding to be open or closed to the public.
- A knowing waiver of the individual's right to privacy should be made either on the record or in writing before the court because this is a non-delegable right not removed by a determination of incapacity.

4. Conflicts of Interest

a. Attorneys for Guardian

Problems / Concerns

Is there an inherent conflict of interest caused by the dual representation role of an attorney for the guardian, who also serves as attorney for the ward in most guardianship cases?

Commentary

Florida Rules of Professional Conduct provide:

²⁴⁶ See "Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, Appendix 2," *American Bar Association Commission on Law and Aging – American Psychological Association*, (May 2006), pp. 59, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_bk_judges_capacity_longer_version.pdf.

“A lawyer shall not represent a client if the lawyer’s exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person..., unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.”²⁴⁷

Presumably neither exception to the rule apply to the dual representation of a guardian and ward in guardianship because:

- (1) The attorney *could* reasonably anticipate the representation will be adversely affected for either guardian or the ward whenever the attorney is asked to explain or defend any decision made by the guardian with respect to the care of the ward, or when the attorney files for compensation of the guardian by the ward;²⁴⁸ and
- (2) One of the two clients in this representation role has likely been deemed legally incapable of expressing such consent (i.e., the ward after a determination of incapacity has occurred).

Public Testimony

- The ward should have an advocate throughout the entirety of the guardianship process who has no financial interest derived or tied to the continuation of the guardianship case.
- The state should review the practices surrounding court-appointed attorneys, including how they are compensated (i.e., should be paid by the state and not by the ward in involuntary proceedings) and how long they are involved in the case (i.e., not discharged once guardianship has been established).

b. Professional Guardian Examiners

Problems / Concerns

²⁴⁷ Fla. Rule Prof. Conduct 4-1.7 (b).

²⁴⁸ When the attorney for the guardian is be placed in the position of justifying or defending a guardian’s specific actions taken with respect to the ward, the attorney cannot simultaneously evaluate and argue the guardian’s choice from the perspective of what is in the best interests of the ward.

This is especially true if the attorney for the guardian files and assists with fee petitions of the guardian, which are to be paid from the ward’s assets. The attorney for the guardian cannot both petition and justify the requested compensation of the guardian and simultaneously represent what is truly in the best interests of the ward (which would arguably less compensation or no compensation coming from the ward’s assets).

Should professional guardians be considered qualified experts who may serve on examining committees?

Commentary

While the topic was not thoroughly discussed by this Task Force, some questions and concerns were posed by the Task Force about the practice in some circuits to include professional guardians among the qualified professionals who may serve on an examining committee per [s. 744.331, F.S.](#)²⁴⁹

The determination as to who is qualified to serve as an expert examining committee member falls within the discretion of each guardianship court judge.²⁵⁰

While professional guardians are not expressly listed as qualified professionals who may serve on an examining committee as provided in [s. 744.331 \(3\)\(a\), F.S.](#), they are also not expressly precluded serving if a court determines that based upon a professional guardian’s “knowledge, skill, experience, training, or education [the guardian] may, in the court’s discretion, advise the court in the form of an expert opinion.”²⁵¹

This Task Force received testimony on July 28, 2021, that one or more professional guardian(s) presently serve(s) on examining committees in Florida. Some Task Force members and members of the public expressed concern over professional guardians serving as examining committee members because of a potential conflict of interest.²⁵²

²⁴⁹ Examining committees must consist of at least one member who is a psychiatrist or other physician. The remaining members may be composed of a number of professions “or any other person who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion.” Florida Statute § 744.331 (3)(a).

²⁵⁰ *See id.*

²⁵¹ *Id.*

²⁵² Florida Statute s. 744.331 (3) provides other restrictions on who may serve on the examining committee in a specific case, but these restrictions apply to preexisting relationships between the parties involved in the case and do not necessarily anticipate or preclude a guardian from subsequently being appointed to serve as guardian in the case.

Florida Statute s. 744.446 (3) provides that a guardian may not serve on a case if he or she has a connection to “any member of the appointed examining committee,” unless such relationship is disclosed to the court.

While it seems highly unlikely that any judge in this state would appoint a professional guardian to a case for a ward that he or she has first examined for capacity (and for

It seems highly improbable than any guardianship judge would appoint an individual to serve as a professional guardian in a case for the same ward whom the individual has assessed as an examiner, so the conflict-of-interest concern applies more generally to the self-service of the profession or guardianship industry.

However, it should be noted that in the 2004 report, the Guardianship Task Force specifically recommended that “professional guardians *should* be added to the list of persons who may serve on the examining committee.”²⁵³ The 2004 Guardianship Task Force reasoned that professional guardians would be qualified to serve because they are well-educated about guardianships, alternatives to guardianship, and incapacity issues of the individuals they serve.²⁵⁴

In 2004, the task force recognized “the difficulty courts have [with] finding persons willing to serve on the examining committee...”²⁵⁵ And while a lack of available statewide data on this issue prevents this Task Force from objectively assessing the overall availability of qualified examining committee members on a circuit-by-circuit basis, the Task Force received anecdotal testimony that this is still a relevant concern for many jurisdictions in Florida today.

5. Costs of Guardianship

“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 ward’s [assets].”²⁵⁶

whom the guardian has presumably recommended guardianship be established), the possibility nevertheless exists and is *legally permitted* to occur based upon each judge’s discretion.

²⁵³ Governor’s Guardianship Task Force, “2004 Final Report of the Guardianship Task Force,” (December 2004), pp. 10, *available at*: <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/09/2004-Guardianship-Task-Force-Final-Report.pdf>. (emphasis added).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at pp. 13.

²⁵⁶ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 33, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

The public concerns surrounding the potential profitability of guardianship by the professionals involved has been well documented by the media.²⁵⁷ Unfortunately, due to the lack of uniform data collection on guardianship, both in the State of Florida and nationally, guardianship abolitionists are often left to their own imaginations regarding the “exorbitant” expenses charged in guardianship cases. And when guardianship case details appear in the media – such as one story describing how a ward’s estate was reduced by over \$300,000 in guardianship fees and expenses during his first three years in guardianship²⁵⁸ – these cases often provide concrete, substantiated examples for those opposed to guardianship to cite in arguments for reform.

Fees charged vary by professional (guardians, attorneys, etc.) and the determination regarding the reasonableness of a fee is left to each individual guardianship court. Fees in guardianships typically vary due to the complexity of the case,²⁵⁹ and what is considered a standard, minimum rate often depends on where in the state the professional practices.

Prior task forces have discussed establishing a guide regarding the reasonableness of guardianship fees or rates, or the creation of statewide, uniform guardianship fee or rate, in order to address public concerns of excessive guardianship fees.²⁶⁰ However, there are serious concerns that the creation of a flat fee or fee cap on guardianship cases may drive qualified and capable professionals away from serving and/or continuing to serve in an already overburdened and overtaxed industry.²⁶¹

²⁵⁷ See Hannah Critchfield, “A Brandon woman, 92, fought her guardianship. Things escalated quickly.” *Tampa Bay Times*, (Aug. 26, 2021), available at: <https://www.tampabay.com/life-culture/2021/08/26/a-brandon-woman-92-fought-her-guardianship-things-escalated-quickly/>.

²⁵⁸ Heidi Blake and Katie J.M. Baker, “They Both Fought to Break Free from Guardianship. Only One Escaped,” *BuzzFeed News*, (Sep. 19, 2021), available at: <https://www.buzzfeednews.com/article/heidiblake/guardianship-conservatorship-marriage-couples>.

²⁵⁹ See *id.*

²⁶⁰ See Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018) pp. 3-4, available at: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

²⁶¹ “There is a need to recruit highly qualified, motivated, and trained professionals into the guardianship field – both as guardians and attorneys.”

Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003),

One additional factor attributing to great expenses in guardianship cases are the costs associated with investigating, intervening, and remedying problems caused by the lack of overall oversight in guardianship.

“The cost of non-compliance includes fees for an investigator, an attorney, an accountant, and other professionals as may be required, in addition to any physical, emotional, or financial losses a ward may sustain. Lack of monitoring by the court imposes increased costs directly on vulnerable wards – or in the case of indigent wards, on the taxpayers – and drains resources. Lack of proper court oversight of guardianship cases merely shifts monitoring responsibilities to attorneys, family members, and others who may not be properly trained or equipped to perform the functions of a professional guardianship monitor. In addition, non-compliance results in more judicial activity, which in turn results in additional costs to Florida’s citizens.”²⁶²

As noted in many of the recommendations of this report, the first step to truly analyzing and addressing these subjects of great public concern is for the State of Florida to collect data on guardianship cases (including data regarding the fees charged in these cases) in order to objectively measure the size and scope of the problem.

a. Professional Guardian Fees

Problems / Concerns

Should guardian fees be standardized and/or capped around the state?

Commentary

Cases alleging fraud and abuses of power by professional guardians in the media raise serious concerns about how guardians are compensated.²⁶³

pp. 4, *available at*:

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

²⁶² Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), pp. 4, *available at*:

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

²⁶³ One Florida guardian was documented to have charged a ward “more than \$70,000 [in fees] by the time regulators launched an investigation...” Heidi Blake and Katie J.M. Baker, “Beyond Britney: Abuse Exploitation and Death Inside America’s Guardianship Industry,” *BuzzFeed News*, (Sep. 17, 2021), *available at*:

<https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears>.

According to a Guardian Fee Workgroup report from 2009, a statewide fee survey was conducted and determined that guardian fees vary across the state from \$40 an hour to \$150 an hour.²⁶⁴ The survey found that each judicial circuit had different practices and determined the reasonableness of guardianship fees at different rates, even when considering similarly experienced guardians and cases which were similarly complex.²⁶⁵ The survey revealed that in one judicial circuit, the determination of reasonable compensation depended upon the number or percentage of pro bono guardianship cases a guardian carries; meaning that a professional guardian with ten years of experience would earn less than a relatively new and inexperienced guardian who is willing to take on more pro bono cases.²⁶⁶

While regional practices and the complexities associated with each case are the primary explanations for the variance in guardianship fees and rates, it can be difficult to comprehend how one professional guardian charges at a rate of \$150 an hour, while another similarly situated professional guardian may only charge at a rate of \$40 an hour, simply due to the particular region of the state in which the guardian practices.²⁶⁷

Prior Task Force Support

The 2018 Guardianship Workgroup recommended the creation of “a working group consisting of a cross-section of stakeholders to determine whether a statewide rate structure should be established for [guardian] fees...”²⁶⁸ The workgroup also mentioned the possibility that guardians and their attorneys could be required to file “annual projected fee budgets” in guardianship cases to disclose “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.”²⁶⁹

²⁶⁴ Thirteenth Judicial Circuit Guardian Fee Workgroup, “Final Report,” *Thirteenth Judicial Circuit*, (Aug. 3, 2009), pp. 1, *available at*: <https://www.fljud13.org/Portals/0/Forms/pdfs/ejc/fee%20packet-guidelines.pdf>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *See id.*

²⁶⁸ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 3, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

²⁶⁹ *Id.* at pp. 39.

Public Testimony

- One public commenter suggested that all fees charged in guardianship (i.e., attorneys fees and guardian fees) should be included and detailed in the accounting and should be fully transparent for review by the public.
- The suggestion was made to create a matrix of professional guardians which would show details about each professional guardian, including their rate per hour of work as a guardian.
- Another suggestion is made that professional guardians could be guaranteed minimum, flat rate for their services, regardless of where they practice in the state, so that the guardian would only be asked to justify compensation charged at a rate above the minimum amount; this could facilitate more expedient approval of fee payments to the guardian while creating more uniformity in practices statewide.
- Professional guardians expressed frustration that they are forced to justify and argue over every penny they request in fees, even when there is no question that they have performed the work as required; guardians are eager to see more reliability in their compensation and to have less arguments over their fees before the courts.
- One presenter noted that the fees and expenses associated with the guardianship case are often increased in contentious cases by family members or other interested parties who file “frivolous complaints.”

b. Attorney’s Fees

Problems / Concerns

Should attorney’s fees be publicly disclosed in all guardianship cases and/or should these fees be standardized or regulated across the state?

Commentary

Just as guardian fees are called into question for reasonableness, so too are the fees for the attorneys involved in the case; in some contentious cases, there may be several attorneys involved and normally all fees will be billed at the expense of the ward. And just like the guardianship system requires competent and qualified professional guardians to serve, so too does guardianship rely upon competent and qualified attorneys who are familiar with the complicated nuances of guardianship law. However, the transparency and extent of these fees

receives great public scrutiny, especially since the fees are more than likely sought to be paid from the assets of the ward him- or herself.²⁷⁰

The costs involved in guardianship are complicated and can double, triple, or quadruple easily when there are disputes involved in the case. As one guardianship attorney points out in a Tampa Bay Times article investigating the reasonableness of a Brandon woman's guardianship proceeding, the more people involved in the process and the more complications involved in the case ultimately means more expense for the ward.²⁷¹

“It’s a tragedy how much time is being put into this case because of the various people that are out there... people who are trying to involve themselves in the process inappropriately. It causes us an awful lot of extra work, and it’s going to cost [the ward] an awful lot of extra money.”²⁷²

Perhaps the biggest tragedy is the fact that many of these costly complications and contentious guardianship battles occur when one or more interested person in the case suspects fraud, abuse, or other inappropriate conduct has been caused or facilitated by the guardianship itself. As pointed out in the Tampa Bay Times article, some of the individuals who were “trying to involve themselves in the process” (i.e., those causing the extra work and extra cost to the ward) were advocates claiming to voice direct concerns from the ward.²⁷³ Cases like this demonstrate how costly it can be when there is a lack of consensus as to what is in the best interests of the individual in guardianship.

Hopefully this Task Force’s recommendations with respect to more consistent and formalized court monitoring practices across the state will aid in reducing some of the overall costs involved in guardianship cases. However, the public concerns regarding the fees charged by professionals in the guardianship system at expense to the ward is likely to remain an ongoing challenge for guardianship workgroups in the future.

²⁷⁰ “Typically, the estate of the person under guardianship pays the fees of everyone involved, from their guardian, to their guardian’s lawyer, to their own attorney, to the petitioner’s attorney.”

Hannah Critchfield, “A Brandon woman, 92, fought her guardianship. Things escalated quickly.” *Tampa Bay Times*, August 26, 2021, available at: <https://www.tampabay.com/life-culture/2021/08/26/a-brandon-woman-92-fought-her-guardianship-things-escalated-quickly/>.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *See id.*

Public Testimony

- The guardianship system inherently incentivizes litigation for the attorneys involved because it means more attorney's fees will be charged in the case.
- The guardianship system awards those involved with fees or other forms of payment, which incentivizes the continuation of guardianship.
- Too much of the ward's money is being spent in the courts in order to simply safeguard the basic rights that are supposed to be guaranteed to the ward.

c. Court Costs for Indigent Individuals

Problems / Concerns

How do we address inconsistent processes and results concerning the cost of guardianship cases around the state?

Commentary

The practice of the clerks of court addressing the issue of fees charged in guardianship cases for indigent wards apparently varies across the state.

As noted in Section VI of this report, the lack of statewide uniformity in guardianship practices results in inconsistent results for guardianship fees as charged for indigent wards and/or indigent petitioners. Hopefully the creation of more uniform statewide forms, processes, and practices will result in less discrepancies by circuit on issues concerning court costs and fees for indigent individuals.

Prior Task Force Support

The 2018 Guardianship Workgroup partially addressed the issue when recommending "probate courts, pursuant to 744.2008, Florida Statutes, to waive the filing fees and court costs for guardianship... when the proposed guardian... is a public guardian, regardless of who files the petition."²⁷⁴ The 2018 report states that "circuit and county practices vary greatly as to the frequency with which such waiver occurs."²⁷⁵

Public Testimony

- As one member of this Task Force expressed in his initial goals for this Task Force, we need to consider how to help families with limited means who need

²⁷⁴ Judicial Management Council Guardianship Workgroup, "Final Report," Supreme Court of Florida Judicial Management Council, (June 2018), pp. 41, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

²⁷⁵ *Id.*

access to guardianship processes in order to help their vulnerable loved ones.

- As a guardianship attorney pointed out during public comment, consistency and guidance is needed across the state as to when clerks should waive filing fees when a ward is indigent, especially if the petitioner is *not* indigent.

6. Criminal and Social Service Investigations

a. Central Abuse Hotline

Problems / Concerns

Are all individuals in the guardianship process complying with mandatory reporting requirements for abuse, neglect, and exploitation of vulnerable adults?

Commentary

There is a concern regarding whether abuse, neglect, and exploitation involving guardianship cases is being reported to Florida's Central Abuse Hotline, as required by statute. Conversely, there is a concern whether abuse, neglect, and exploitation allegations involving guardianship are being appropriately "screened-in" by the Central Abuse Hotline for further review and investigation by Adult Protective Services.

As discussed in Section V of this report, one area of concern raised during the presentations from court monitors to this Task Force is the likelihood that many cases of suspected exploitation, abuse, or neglect involving wards under guardianship are not being reported to Florida's Central Abuse Hotline, which is mandated by [s. 415.1034, F.S.](#)

*"Any person... who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited must immediately report such knowledge or suspicion to the central abuse hotline."*²⁷⁶

The Central Abuse Hotline is the gatekeeper for all reports made to the Florida Department of Children and Families (DCF).²⁷⁷ The hotline is responsible for screening calls pertaining to abuses of both children and vulnerable adults, and routing them accordingly to the appropriate unit, when they are "screened in" or accepted for investigation by DCF.²⁷⁸

²⁷⁶ Florida Statute § 415.1034 (1).(emphasis added).

²⁷⁷ See generally Florida Statute § 415.103.

²⁷⁸ *Id.*

Testimony provided by presenters to this Task Force and during public comment suggest that, while the courts themselves may be inconsistent in reporting cases to the hotline, many cases were reported to the hotline by interested parties in the guardianship case. The public comment suggests an overall lack of response by Florida's governing agencies and organizations to abuses in guardianship, including a lack of response or investigation by DCF when cases are reported.

Unfortunately, this Task Force did not have the time or opportunity to request information or comment from DCF regarding statistical data on reports of abuse, neglect, or exploitation involving guardianship cases as historically made to the Central Abuse Hotline. This may be a relevant area for review and analysis by future guardianship workgroups or task forces.

b. Adult Protective Services

Problems / Concerns

What processes are in place or should be established to encourage collaboration and reduce duplication of efforts between APS and court monitors?

Commentary

Both existing court monitoring programs and those programs established in the future should establish an interagency relationship and policy for working with DCF's Adult Protective Services (APS).

One court monitor who presented before this Task Force noted that she has worked with APS during investigations of misconduct by guardians in the past, however no information was provided as to a formalized policy or process for how APS, clerks of court inspectors, and court monitors work together to avoid a duplication of efforts or to otherwise collaborate during concurrent investigations.

APS is a state-run investigation department that is tasked with investigating, as well as providing protective services and other necessary interventions in, cases of abuse, neglect, and exploitation of vulnerable adults.²⁷⁹

Wards under guardianship are by definition, vulnerable adults, as they are individuals who have been determined to lack the capacity or ability to "perform [some] normal activities of daily living or to provide for his or her own care or protection..."²⁸⁰ When a ward is the victim of fraud or exploitation by a guardian, attorney, or other professional or fiduciary while under guardianship, such conduct will almost always meet the statutory criteria for further investigation by

²⁷⁹ See generally Florida Statute § 415.101.

²⁸⁰ Florida Statute § 415.102 (28).

APS.²⁸¹ Abuse and neglect of wards by guardians or other responsible caregivers should always meet the statutory jurisdiction for an APS investigation.

APS may provide a previously unexplored partnership opportunity for Florida's guardianship system by assisting in the intervention and prevention of abuses against vulnerable adult wards. Not only should APS be considered as a potential stakeholder for future guardianship workgroups and task forces, but APS should also be included in the process of creating formalized court monitoring programs statewide.

c. Law Enforcement

Problems / Concerns

Are abuse and exploitation in guardianship cases, especially by guardians, being sufficiently criminally investigated or enforced in Florida?

Commentary

Serious abuses of vulnerable adults under guardianship should be criminally investigated and, when appropriate, prosecuted.

This Task Force did not hear testimony from law enforcement or prosecutors as to the process by which criminal investigations may be initiated when the misconduct occurs in guardianship. The Task Force heard from inspectors and investigators of clerks' offices across the state who described the auditing process and administrative investigation process some clerks' offices perform on behalf of OPPG.

There was a concern expressed several times during public comment that abuses by guardians are criminally uninvestigated and underenforced. The public comment suggests more should be done to ensure the criminal justice system is part of the enforcement response when things go wrong, as well as a deterrent to future abuses in guardianship.

As evidenced numerous times in this report, Florida's guardianship laws and processes are complicated and nuanced. Criminal investigations into the abuse of authority by a guardian require some understanding of guardianship laws and administrative rules which regulate the guardian's conduct. Law enforcement investigators need additional training, guidance, and resources when it comes to criminal conduct involving a guardianship case.

The work of future workgroups or task forces involving guardianship should consider the issue and whether there are any solutions which would encourage

²⁸¹ See Florida Statute § 415.102 (8).

or facilitate the criminal investigation of abuses in guardianship by sworn law enforcement in the future.

Public Testimony

- Training and education should be provided to law enforcement regarding crimes occurring in guardianship cases.
- Just as the process needs to be clarified for how and when DCF is notified of abuse, neglect, or exploitation in a guardianship case, so too should the process by which a court or any other personnel in the guardianship process notifies criminal investigators of alleged criminal misconduct be clarified and explored.

d. Prosecution

Problems / Concerns

Are abuse and exploitation in guardianship cases, especially by guardians, being prosecuted in Florida and how are the state's attorneys notified of these cases?

Commentary

Continuing from the prior subsection regarding the under-investigation and overall lack of enforcement of crimes committed in guardianship cases, the need for training and education on guardianship processes is not exclusive to criminal investigators. Criminal prosecutors who oversee complicated criminal investigations, and are later responsible for charging and prosecuting wrongdoers, must also be included in this discussion and in the goal of increased education and resources for crimes involving guardianship cases.

This Task Force heard during several presentations that criminal matters are often referred to the local state attorney's office for further review. Unfortunately, most state attorneys' offices in Florida do not have the resources or capability to investigate individual crimes and cases of guardianship misconduct. State attorneys' offices primarily rely on the criminal investigation and determination of probable cause to be performed by local law enforcement.

Future task forces or workgroups should consider how to include criminal prosecutors and criminal investigators in the creation of guardianship laws, policies, and practices, to address concerns of an overall lack of criminal enforcement with respect to guardianships in Florida.

7. Delinquent and Incomplete Reporting by Guardian

a. Court Notification

Problems / Concerns

What processes can be implemented to ensure that both the courts and OPPG are notified when guardians are substantially noncompliant with their statutorily provided guardianship case requirements?

Commentary

As described in Sections V and XII of this report, the lack of statewide data collection, coupled with the lack of interagency communication and information sharing creates a silo effect which complicates the adequate monitoring of guardians statewide.

In a recent audit of Orange County's Administration of the Guardianship Program, the Orange County Comptroller sampled 359 inventories and 344 accountings filed in guardianship cases for Orange County.²⁸² The Orange County Comptroller noted that 97 of the 359 inventories and 112 of the 344 annual accountings were not filed by their respective due dates.²⁸³ The Comptroller's report also reflects that the Guardianship Court was not timely notified of the delinquent and outstanding reports in approximately half of these situations.²⁸⁴

Some individual courts have established processes to monitor whether individual professional guardians are maintaining their professional reporting obligations to the court with timely and complete accountings and filings, but this is not the case for *all* guardianship courts in Florida.²⁸⁵

²⁸² "Audit of the Orange County Clerk of Court's Administration of the Guardianship Program," *Orange County Comptroller's Office*, (March 2021), Report No. 489, pp. 52, available at: https://www.occompt.com/download/Audit%20Reports/rpt489_2.pdf.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ General Magistrate Kimberly Davis Bocelli of the 20th Judicial Circuit described to this Task Force on July 28, 2021, how she worked with the Lee County Clerk of Court to create a regularly updated spreadsheet on guardians practicing in Lee County, which reflects whether each guardian is maintaining his or her obligations to timely file reports and information with the court. General Magistrate Davis Bocelli explained that this practice was not in place before she took her position in Lee County and that she is unaware if other counties or circuits have similar processes in place.

Additionally, even when the information is being collected and compiled into a regular report by individual clerks of court, the information is not typically shared outside of the individual county or circuit.

In order to facilitate greater information sharing and transparency of information involving professional guardians in Florida, courts must adopt practices for effectively monitoring the compliance of guardians in the timely and accurately reporting in their assigned guardianship cases. These processes will also necessarily require that the courts promptly report chronic or substantive problems involving delinquent and incomplete reporting by professional guardians to OPPG for review. Further, the information will need to be maintained in such a way so as to be accessible by courts in other jurisdictions when they are considering the appointment of a professional guardian in a new case.

Public Testimony

- Recurring problems with professional guardians who fail to meet filing deadlines or other reporting obligations before the court should be reported or made available for review by OPPG for disciplinary considerations.
- Guardians should be required to file quarterly accountings, as opposed to annual accountings, so that fraud and other problems can be caught by the court sooner.
- The clerks' case management systems should track each guardian's compliance with filing deadlines.
- Each judge should be able to access relevant information about professional guardians, including the number of wards a guardian is serving at any given point in time.

b. Accountability and Discipline

Problems / Concerns

How can we encourage and enforce filing requirements in guardianship cases?

Commentary

The failure by guardians to timely and accurately file accountings and other reports with the court has a ripple effect, which often results in delayed audits and a delay in identifying serious problems involving a guardianship when they exist. Whether the responsibility belongs to the courts, to OPPG, or is a combined responsibility of both, there needs to be accountability and consequences for guardians who substantially and/or consistently fail to meet their statutory reporting obligations to the court.

This Task Force heard numerous guardianship case examples of both professional and family guardians who failed to timely and accurately report to the court. Unfortunately, the Task Force did not hear of any accountability or action being taken to remedy this problem, even for frequent or chronic offenders.

This accountability or professional consequence should be considered by future workgroups or task forces when considering the other recommendations made in this report for professional guardian information collection and tracking statewide.

Public Testimony

- There is often limited enforcement capability or remedy for the guardianship court when a guardian has failed to file a final accounting in a case after the ward has passed away because the jurisdiction of the court has technically concluded.
- Even when the court determines a guardian has failed to timely report, or has failed to provide additional information when requested, there is often no consequence for the guardian, absent potential removal from the case.

8. Family Guardianships

a. Education and Training

Problems / Concerns

Should family guardians be required to undergo minimum, mandatory training in Florida?

Commentary

Section XI of this report addresses the need for enhanced education for all professionals *and parties* in guardianship, including family guardians.

The education and training for family guardians has been criticized as insufficient and appears to be frequently waived by courts; further, family guardians are not regulated or overseen by any state or administrative agency.

While OPPG is responsible for providing education and training resources for family guardians, OPPG has no regulatory authority over family guardians because family guardians are not registered or licensed by the state.

Testimony and presentations provided to this Task Force suggest that the existing education and training available for family guardians is often waived, either totally or in part, by the guardianship court judge. Testimony and presentations before this Task Force also suggest that family guardians are more frequently responsible for tardy or incomplete filings, as well as other errors in the

guardianship process, likely attributable to, among other things, a lack of professional training and education in guardianship processes.

However, representatives of family guardians remind us that family guardians are “family members who are performing difficult, unpaid, and thankless work, solely from a sense of familial devotion and duty.”²⁸⁶ “A family member guardian is required to hire an attorney, provide detailed personal information, undergo a credit check, post a fiduciary’s bond, attend an 8-hour training course, and file detailed initial and annual personal financial reports.”²⁸⁷

The very reason that many courts waive some or all of the family guardianship training is because we do not want to create too many barriers or obstacles for well-intended family guardians.

Prior Task Force Support

The 2018 Guardianship Workgroup recommended that judicial circuits hold “semi-annual training sessions for nonprofessional/family guardians and guardian advocates regarding how to complete annual reports and proper maintenance of documentation.”²⁸⁸ The workgroup noted that “[s]uch 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...”²⁸⁹

Public Testimony

- One professional guardian recommends that more training be provided to both professional and family guardians regarding ethics and fiduciary responsibilities.
- A professional guardian also recommends that family guardians should be required to post surety bonds, not just professional guardians.

²⁸⁶ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), pp. 6, *available at*:

<https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

²⁸⁷ *Id.*

²⁸⁸ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 40, *available at*:

https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

²⁸⁹ *Id.* at pp. 41.

- If OPPG cannot regulate and provide better oversight for family guardianships, maybe some other state agency or regulatory body should be created for this purpose.

b. Resources for Guardians

Problems / Concerns

What can Florida do to better support family guardians?

Commentary

As non-professional guardians who are provided with limited education or training in guardianship, family guardians need additional resources and support, which could be provided through local, state, or federal legislation and funding.

On September 14, 2021, this Task Force heard testimony from two family guardians regarding their personal experiences with Florida’s guardianship system and process. Both family guardians testified how costly the guardianship process was for their families and how both guardians suffered significant personal, professional, and financial setbacks and expense in order to serve as a family guardian.

Family guardian, Julie, testified that since she decided to become her father’s guardian, she was forced to take an early retirement from work, lost her employer insurance benefits, and is now tapping into her 401K with significant financial penalties, as she has no source of income to support herself.²⁹⁰ However, as she noted she is “one of the lucky ones.”²⁹¹

Family guardian, Heather, testified that her family was forced into the guardianship process after another family member filed a report with DCF claiming that her grandmother was not being adequately cared for.²⁹² Heather explained to this Task Force that family guardianship is a full-time job and she relied *heavily* on the expertise of guardianship attorneys.²⁹³ As a result of her decision to serve as her grandmother’s family guardian, Heather ended up filing for bankruptcy because she used all of her resources to pay for attorney’s fees and court costs to ensure her grandmother’s continued care and support.²⁹⁴

²⁹⁰ Guardianship Improvement Task Force Public Meeting, September 14, 2021, Julie’s Presentation, *recording available at*: https://youtu.be/Hup41N_XKXQ?t=4266.

²⁹¹ *Id.*

²⁹² Guardianship Improvement Task Force Public Meeting, September 14, 2021, Heather’s Presentation, *recording available at*: https://youtu.be/Hup41N_XKXQ?t=4565.

²⁹³ *Id.*

²⁹⁴ *Id.*

Both Julie and Heather expressed how essential guardianship resources are for family guardians, as they are frequently left without compensation and without a road map of the guardianship system or process. While Julie and Heather both expressed gratitude for the capable and empathetic representation of their respective guardianship attorneys, both family guardians suggested that Florida could do more to assist those who assume the care and responsibility of an aging or disabled adult relative in guardianship.

Prior Task Force Support

In public hearings held by the 2018 Guardianship Workgroup, the group received several successful and helpful comments for assisting families with alternative dispute resolution processes in guardianship. “Successful examples included:

- Assisting a family in identifying less restrictive alternatives that met the person’s decisionmaking [sic] 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.”²⁹⁵

9. Guardian Advocacy

a. Rights Retained

Problems / Concerns

What does the “capacity to do some, but not all, of the tasks necessary” for the care of one’s person or property language in s. 744.3085 mean?

Commentary

According to General Magistrate Davis Bocelli during her testimony given before the Task Force on July 28, 2021, the use of “some, but not all” in s. 744.3085 leaves the retention of rights by a person in a guardian advocacy unclear and ambiguous.

²⁹⁵ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 61, *available at* https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

The question as to whether a person subject to a guardian advocacy always retains their non-delegable rights (e.g., the right to vote) is not addressed by the guardian advocate statute. And because guardian advocacy does not contemplate an incapacity adjudication process by the court, there are many rights which remain in limbo, or potentially remain in effect, which the Legislature may or may not have intended remain.

Clarification is needed as to individual rights retained under a guardian advocacy.

Prior Task Force Support

The 2018 Guardianship Workgroup recommended that the courts should require that “orders appointing... guardian advocates... list all rights retained, removed, and delegated to the guardian or guardian advocate.”²⁹⁶

b. Oversight

Problems / Concerns

Is the oversight of guardian advocacy sufficient to protect vulnerable adults?

Commentary

The lack of oversight or regulation for guardian advocacy provides the potential for abuse.

Similar to the discussion regarding a lack of regulation or oversight for family guardians, guardian advocates do not have a formalized regulation nor an oversight agency or organization. OPPG is not responsible for regulating guardian advocates, so all oversight is left to the courts on a case-by-case basis.

While the lack of oversight was cited as a concern before this Task Force, no specific testimony or example was provided to the Task Force regarding abuse or fraud by a guardian advocate.

10. Professional Guardians

a. Compensation Standards

Problems / Concerns

Shouldn't a professional who has rendered services be timely compensated? Is this standard different for guardians?

²⁹⁶ *Id.* at pp. 2.

Commentary

Professional guardians are often required to explain or justify every billable hour to the court, even for uncontested and “reasonable” fees assessed in the normal course of a guardianship.

In her presentation before this Task Force on September 14, 2021, professional guardian, Irene Rausch, described the thankless and often contentious circumstances surrounding professional guardianship cases.²⁹⁷ Ms. Rausch cited unreliable compensation and consistent delays in obtaining court approval for work already performed by professional guardians as barriers to attracting new, qualified candidates to the guardianship industry.

As Ms. Rausch described, she is forced to justify every penny she requests in compensation and must jump through hoops unlike any other professional in this state because the court rules and procedures demonstrate a manifest lack of trust in guardians.

Prior Task Force Support

The 2003 Committee on Guardianship Monitoring noted that “many highly qualified professionals have left the guardianship field, and many professionals believe that the current guardianship compensation system – which is cumbersome and slow – discourages many from entering the profession... [according to the Pinellas County Guardianship Association] it is not unusual for professional guardians to wait six months for their first payment. Additionally, guardian fees are frequently reduced by the presiding judicial officer, without informing the guardians about the documentation the court would like. These difficulties are compounded by the heavy load of indigent cases for which professional guardians receive no compensation... [which in some cases may be] up to 50 percent of a professional guardian’s caseload...”²⁹⁸

b. Billable Hours

Problems / Concerns

What are the billable hour standards and guidelines for guardians?

²⁹⁷ Guardianship Improvement Task Force Public Meeting, September 14, 2021, Irene Rausch Presentation, *recording available at*: https://youtu.be/Hup41N_XKXQ?t=4825.

²⁹⁸ Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, “Guardianship monitoring in Florida: Fulfilling the Court’s duty to protect wards,” (2003), pp. 17-18, *available at*: <https://www.flcourts.org/content/download/218232/file/guardianshipmonitoring.pdf>.

Commentary

To avoid any confusion as to standards for billing practices of professional guardians, professional guardians should have clear, statewide billing standards and practices.

This Task Force heard examples of professional guardians who billed for services performed for multiple wards at once – the guardian would perform one hour of work (e.g., visiting the bank), during which he or she would perform tasks for multiple wards at once, and then the guardian would bill each ward for a full hour of work. There have been circumstances where guardians who have utilized these false and misleading billing practices have billed for more hours of work than exist in the given day, week, or month.

c. Harassment by Parties

Problems / Concerns

How do we address and reduce the conflict between family members of the individual in guardianship and the professional guardians hired to provide for their care and protection?

Commentary

Professional guardians often become the target for ire of interested parties who disagree with the court's decisions in a guardianship case.

In her presentation before this Task Force on September 14, 2021, professional guardian, Irene Rausch, also expressed how difficult it is for professional guardians to deal with challenging family members of the ward in contentious guardianship cases.²⁹⁹ These family members often file frivolous complaints against the guardian, which end up resulting in additional work and fees billed to the ward for guardian's and attorney's fees.

Public Testimony

- There need to be alternative dispute resolution processes available, which may be used to address concerns by family members without financially draining the assets of the ward.
- One elder law practitioner suggests that Elder Care Coordinators should be utilized in these scenarios.

²⁹⁹ Guardianship Improvement Task Force Public Meeting, September 14, 2021, Irene Rausch Presentation, *recording available at*: https://youtu.be/Hup41N_XKXQ?t=4825.

d. Transparent Practices

Problems / Concerns

Should guardianship fees be publicly disclosed and accessible?

Commentary

A resounding theme and complaint addressed in public comment before this Task Force was the need for greater transparency and accountability of guardianship processes. Members of the public have expressed concerns regarding the secrecy of the guardianship processes, especially when it comes to billing practices of guardians and their attorneys. Members of the public have requested greater transparency in the practices and billing by guardians in guardianship cases.

Public Testimony

- One public commenter suggested that all fees charged in guardianship (i.e., attorney's fees and guardian fees) should be included and detailed in the accounting and should be fully transparent for review by the public.
- The suggestion was made to create a matrix of professional guardians which would show details about each professional guardian, including their rate charged per hour of work as a guardian.

11. Statewide Health Care Surrogate / Proxy Database

As discussed in Section IX of this report, health care surrogates, advance directives, and other designations of proxy may be appropriate as less restrictive alternatives to guardianship. And as discussed in Section X of this report, advance directives and health care surrogates may be useful for health and residential care providers when an isolated, incapacitated patient requires a person with authority to make medical and residential care decisions on their behalf.

So how do we know when an advance directive or proxy designation exists?

“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... 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.”³⁰⁰

For many individuals, these legal documents, are kept somewhere safe, secure, and private (if they exist, in the first place), which means that the document is not necessarily available or disclosed unless the principal him- or herself provides it when needed.

These were some of the considerations the 2018 Guardianship Workgroup had in mind when it recommended that the Legislature create “a searchable, statewide repository for durable powers of attorney, designation of health care surrogates, and designations of preneed guardians.”³⁰¹ The workgroup’s recommendation anticipated use by guardianship courts and that the proposed legislation would “[s]tatutorily [authorize] the recording of designations of health care surrogate and [create] a searchable, centralized, statewide repository for those designations, durable powers of attorney, and designations of preneed guardians [which] would increase the ability of courts to locate these possible alternatives to guardianship.”³⁰²

The use registries or databases by the State of Florida to track essential or designated contacts is not a new concept. The Florida Department of Highway Safety and Motor Vehicles created such a list in 2007 with the Emergency Contact Information (ECI) program.³⁰³ “The ECI is a secure system that only law enforcement nationwide can access in order to contact your designated family or friends in response to an emergency situation.”³⁰⁴ Because emergency contact information “could not be printed directly on a license... the information [has been] included in the D.A.V.I.D. (Driver And Vehicle Information Database) system which is a secured database used by most law enforcement agencies in the State of Florida.”³⁰⁵ The information cannot be used for any other purpose than to notify the designated contact(s) for an individual in the event of an emergency.³⁰⁶

³⁰⁰ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 14, *available at*: https://aaapq.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ “Emergency Contact Information History,” *Florida Highway Safety and Motor Vehicles*, *available at*: <https://www.flhsmv.gov/driver-licenses-id-cards/emergency-contact-information-history/>.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *See id.*

An argument can be made (and has previously been made) that a database similar to the ECI would be very useful to the courts, DCF, health care providers, and others in emergency situations when a vulnerable adult has lost capacity.

a. Accessibility by Health Care Professionals Statewide

Problems / Concerns

How do we ensure health care professionals are aware of advance care decisions for incapacitated patients in their care?

Commentary

In addition to the general need and support for an advance directive and proxy statewide database, there is a compelling reason for health and residential care professionals to have access to such a database.

As discussed in Section X of this report, in Florida health care providers may rely upon the substituted judgment and decision-making capabilities of health care proxies when a patient is unable to consent to his or her treatment or care. Also discussed in Section X is how important it is for health care providers to exhaust all reasonably available alternatives *prior to* petitioning a court to appoint a guardian to make medical decisions on behalf of an isolated, vulnerable adult patient in their care.

The use of a registry or database like those discussed above could assist health and residential care providers with identifying, and possibly locating or contacting, a vulnerable patient's designee, as opposed to petitioning the court to appoint a professional, unknown third party for this purpose.

Public Testimony

- A statewide database should be considered, which stores patient consent forms, next of kin information, health care proxy information, and other advance directives and/or durable powers of attorney, which would offer a singular location for Florida health care providers to search for appropriate patient support systems and would also be accessible by the guardianship courts to search for pre-need planning designations as alternatives to guardianship.

b. Limited Use

Problems / Concerns

Who should have access to a pre-need planning registry?

Prior Task Force Support

The use and accessibility of such a database would necessarily require sufficient privacy and confidentiality protections be in place, especially when addressing health care surrogacy designations.

“Legislation would be necessary to authorize the filing of designations of health care surrogates... and to create a public record exemption to protect the privacy of a person filing such designation.”³⁰⁷

12. Public Information and Resources

a. Explanation of Rights

Problems / Concerns

How do we ensure AIP’s and wards are aware of their rights in Florida’s guardianship process?

Commentary

AIP’s have certain enumerated rights that they retain throughout the determination of capacity process, and some even after an adjudication of incapacity has been made; perhaps these rights should be clearly outlined and provided to AIP’s and wards automatically as part of the guardianship case process.

The filing of a suggestion of incapacity, bringing the AIP within the jurisdiction of a guardianship court, can be a startling and bewildering process for those individuals coherent enough to recognize and participate in the guardianship court proceedings. While each AIP is guaranteed the competent representation of a court-appointed attorney to assist them through this process, it could assist both the AIP and their support system (i.e., family members and friends) to have a summarized explanation of the person’s rights in a guardianship proceeding.

Prior Task Force Support

“There is a need for outreach and education to persons under guardianship and their families. Persons under guardianship [need] more education about their rights under guardianship... Families are also uninformed about the resources for

³⁰⁷ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 18, *available at* https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

fostering greater independence and self-determination in their family members with disabilities.”³⁰⁸

Public Testimony

- The AIP should be immediately contacted and provided with a list of their rights, options, and ADA accessibility information when a petition is filed against him or her.
- One Task Force member suggested the creation of an “elder guide” which would be immediately provided to any person who becomes involved in a guardianship case, and which would inform the person of their rights, their options, and what to expect from the guardianship process.

b. Overview of Guardianship Process

Problems / Concerns

What resources are available or can be developed to address the lack of clear information and guidance on Florida’s guardianship laws and processes for any AIP, ward, or interested person seeking to educate him- or herself on the guardianship process?

Prior Task Force Support

“[T]he Stakeholders’ Work Group acknowledged that there was not an existing ‘place’ where those inquiring about [guardianship case processes, such as] the restoration of capacity [,] could easily access information... The Stakeholders’ Work Group concluded that the most effective way to address [this lack of information on guardianship processes, such as the] restoration of capacity would be further outreach, education and an easily accessible website. It was also suggested that some people would not have Internet access and offering the materials in a manual form would be beneficial....”³⁰⁹

“The website and accompanying manuals [would] be designed for persons under guardianship, their families, self-advocates, guardians, the legal community, and other interested parties... The Project Team... has identified the following tools to be designed:

- An easy-to-understand explanation of the restoration process in Florida.

³⁰⁸ The Florida Developmental Disabilities Council / Guardian Trust, “Restoration of Capacity Study and Work Group Report,” *Florida Courts*, (Feb. 28, 2014), pp. 33, available at: <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>.

³⁰⁹ *Id.* at pp. 34.

- A directory of resources and activities for self-determination, independent living, and least-restrictive alternatives...
- Directories of relevant agencies and legal offices.
- Instructions on developing a Progressive Capacity Restoration Plan...
- Resources for physicians that focus on assessing functional abilities instead of the existence of a diagnosis only.
- Resources for attorneys to assist in the restoration process including relevant statutory law, relevant case law, sample briefs and legal pleadings.”³¹⁰

Public Testimony

- There is no publicly available list of resources for family members concerned with guardianship – they are forced to hire an attorney first to ask questions – there should be information available for public consumption, as well as a list of qualified persons whom the family can contact if they have general questions about guardianship.

c. Guides for Individuals in Guardianship

Problems / Concerns

Should we provide AIP’s and wards with more resources and education on guardianships?

Commentary

In addition to providing individuals who may be subject to guardianship, or those who are already in guardianship, with a list of the rights that are always retained, individuals in guardianship should have access to other resources and guides which will help them navigate and understand the guardianship process.

Individuals in guardianship should receive guidance and assistance with all aspects of guardianship, including guidance on how to raise concerns or problems in the guardianship with the court, court monitors, or other supervisory authorities.

Prior Task Force Support

The 2018 Guardianship Workgroup recommended that guardians should be required to file an annual attestation that the guardian has informed the ward of

³¹⁰ *Id.* at pp. 36.

his or her right to have removed rights restored and what the process is for restoring those rights.³¹¹

The 2014 Restoration Work Group recommended the creation of both guides and training workshops which would “focus on raising awareness of a person under guardianship’s rights, including the right to a continuing review of the appropriateness of the guardianship and the legal process for restoring rights...”³¹²

Public Testimony

- Counseling and support groups should be offered for wards to assist them with regaining capacities and independence, especially for incapacities associated with substance abuse disorders.
- There should be re-introduction programs or ‘life after guardianship plans’ available to assist former wards with their reintegration into independent and autonomous living.

d. Guides for Family Members and Persons Assisting Individuals in Guardianship

Problems / Concerns

What resources can we develop to assist the friends and family member advocates of the person in guardianship?

Prior Task Force Support

Just as individuals within guardianship need guidance and resources to navigate the guardianship system, so too do family members and other individuals who may advocate on behalf of a vulnerable adult ward.

In an ad hoc survey conducted by the 2014 Work Group, “respondents reported difficulties in navigating the legal process or in obtaining public services. This often stemmed from a lack of resources and an overtaxed system. Family members were not aware that while they may have difficulty finding attorneys to establish guardianship, the restoration process permits the appointment of a court-appointed attorney... Families [also] reported that they were advised most

³¹¹ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 29, *available at*: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

³¹² The Florida Developmental Disabilities Council / Guardian Trust, “Restoration of Capacity Study and Work Group Report,” *Florida Courts*, (Feb. 28, 2014), pp. 33, *available at*: <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>.

commonly by the school system to pursue legal guardianship when their dependent children turned 18 years of age. As a result, families did not pursue alternatives to guardianship, such as durable power of attorney.”³¹³

Public Testimony

- The courts should maintain a list of court-approved / available “supervisors” or observers who can facilitate supervised visitation with the ward, when this has been ordered by the court as a condition for visitation by friends or family members with the ward.

13. Rehabilitation-Focused Guardianship Process

a. Presumption of Restoration

Problems / Concerns

Do Florida’s guardianship processes and laws favor restoration?

Commentary

Florida’s guardianship laws and processes should reflect a preference towards, and rebuttable presumption of, the restoration of an individual in guardianship’s rights and capacities – especially for individuals in guardianship with developmental or intellectual disabilities.

Florida’s guardianship laws provide that a person who has been determined incapacitated retains the right to “be restored to capacity at the earliest possible time.”³¹⁴ Further the guardian is supposed to “[a]ssist the ward in developing or regaining capacity, if medically possible.”³¹⁵ However, Florida’s guardianship practices seem to suggest that once a person has been placed in guardianship, they are presumed unlikely to have their rights restored.

Florida’s guardianship system provides many barriers to individuals restoring their rights once placed under guardianship.³¹⁶ “Unless the individual under guardianship has access to rehabilitation and education that aims to build capacity and a guardian who has included him or her in making decisions, the

³¹³ *Id.* at pp. 33.

³¹⁴ Florida Statute § 744.3215 (1)(c).

³¹⁵ Florida Statute § 744.361 (13)(g).

³¹⁶ See The Florida Developmental Disabilities Council / Guardian Trust, “Restoration of Capacity Study and Work Group Report,” *Florida Courts*, (Feb. 28, 2014), pp. 14, available at: <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>.

individual is likely to be ill equipped to demonstrate their functional capacity to make and carry out decisions.”³¹⁷

Florida’s criminal justice processes may seem an unusual place to look for examples or suggestions for improvement to Florida’s guardianship system, but the criminal courts’ mental health process offers many parallels and similar concerns to those addressed in guardianship. As mentioned earlier in this section,³¹⁸ Florida’s criminal court mental health processes may involve some loss of independence and autonomy for an individual who has been either deemed incompetent to proceed or adjudged not guilty by reason of insanity and has also been involuntarily committed or placed in treatment. While the primary objectives of the criminal court (e.g., to ensure a fair prosecution and administration of justice for criminal defendants and the state) differ slightly from those of the guardianship court (e.g., to protect the safety and wellbeing of vulnerable, incapacitated adults and oversee management their property), both courts have the shared responsibilities of:

- (1) Supervising the safety and care of the individual through the least restrictive, adequate forms of supervision and treatment;³¹⁹ and
- (2) Protecting the rights of the individual while under the jurisdiction and supervision of the court.

It is also important to note that neither of these court processes are intended to punish or penalize the vulnerable individual under supervision – the goal is instead to protect and (hopefully) restore.

The criminal court’s motivation for treating and restoring an individual’s mental health and capabilities is either to restore the individual’s competency so that he or she may stand trial for the criminal charges pending against him or her (for individuals deemed incompetent to proceed),³²⁰ or to restore the individual’s “sanity” to the point where he or she no longer presents a danger to him or herself, or others (for individuals adjudged not guilty by reason of insanity).³²¹ Because the criminal court’s ultimate goal is the restoration of the individual’s condition and to release them from inpatient treatment as soon as practicable, “[e]ach [forensic] client [is entitled to receive] such medical, vocational, social,

³¹⁷ *Id.*

³¹⁸ See 2-g, pp. 113 of this report (Section XV. Other Topics Recommended for Future Consideration).

³¹⁹ See Florida Statute § 916.302 (1)(c).

³²⁰ See Florida Statute § 916.12. See *also* Florida Statute § 916.13.

³²¹ See Florida Statute § 916.15. See *also* Fla. Rule Crim. Pro. 3.217 (b).

educational, and rehabilitative services as the client's condition requires to bring about a return to court for disposition of charges or a return to the community."³²²

Public Testimony

- Shouldn't the goal be to *consistently* monitor for improvement so that the person is no longer a "ward of the state?"
- A suggestion was made that Florida should have a re-introduction program or 'planning for life after guardianship' process for individuals whose rights have been partially or completely restored.
- Counseling resources and support groups should be established for individuals in guardianship whose incapacity relates to substance abuse disorders or related problems.

b. Encouraged Independence

Problems / Concerns

Does Florida's guardianship system encourage autonomy and independence for the individuals in guardianship?

Commentary

Florida statutes establish independence as a basic right that is always retained by an "incapacitated individual,"³²³ at least to the extent that is reasonable and appropriate given the individual's capabilities and preferences. However, the degree of independence afforded to individuals in guardianship is varied across the state and – depending upon who you ask – appears to be non-existent in many guardianships.

"The concept of independence has become central to policy agendas promoting aging in place, and it also underpins the values associated with the assisted living movement... older people still generally prefer to age in place in their own homes often because they fear that moving to a collective or institutional living environment will inevitably mean losing their independence. Theorists have explained this fear as reflecting the *disempowering effect* of institutional settings in reducing people's sense of self-determination..."³²⁴

³²² Florida Statute § 916.107 (4)(a).

³²³ See Florida Statute § 744.3215 (1)(f).

³²⁴ Sarah Hillcoat-Nallétamby, "The Meaning of 'Independence' for Older People in Different Residential Settings," *The Journals of Gerontology: Series B*, vol. 69, no. 3, (May 2014), pp. 419 – 430, available at: <https://doi.org/10.1093/geronb/gbu008>. (internal citations omitted).

While such fears are not necessarily reflective of in-patient care settings, this psychological disempowerment effect caused by dependency and institutionalization is very real and can substantially impair an individual's health and quality of life through "*engineered dependency... boredom, sign of a loss of independence or engagement in meaningful and purposive activities... loneliness and isolation...*"³²⁵ An individual's independence, autonomy, and overall happiness may be enhanced and encouraged in any setting by providing opportunities for "conviviality, social interaction, and participation, a strengthened sense of purpose, self-esteem, and belonging."³²⁶

Independence and autonomy are integral to the human condition, as they are critically tied with concepts of self-identity, self-esteem, purpose, as well as "control and freedom over one's movements, thoughts, and decisions..."³²⁷

Encouraging as much independence and autonomy for an individual in guardianship is synonymous with treating the individual "humanely, with dignity and respect..."³²⁸ as well as "[r]ecognizing that every individual has unique needs and abilities..."³²⁹

Public Testimony

- Our goal in guardianship should be to honor and respect the individual's choices and decisions whenever possible.
- Guardianship practices should always allow the individual in guardianship to maintain as much control over their lives as possible.
- The guardianship process should not allow a person to seize and isolate the ward from others, especially when this is clearly inconsistent with the ward's intent or expressed wishes.

c. Individualized Care and Training Plan

Problems / Concerns

How are we determining appropriate care for individuals in guardianship?

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Florida Statute § 744.3215 (1)(d).

³²⁹ Florida Statute § 744.361 (13).

Commentary

“Recognizing that every individual has unique needs and abilities...”³³⁰ should mean that each individual receives individualized treatment and care which reflects those abilities.

As one member of this Task Force stated early into the process, guardianship should not be treated as a “one-size-fits-all” solution.

Florida’s criminal court mental health statutes provide a bill of rights for “forensic clients” (i.e., criminal defendants who have been committed to a treatment facility), which outlines specific rights that each person is entitled to with respect to treatment.³³¹

“Every forensic client shall be afforded the opportunity to participate in activities designed to enhance self-image and the beneficial effects of other treatments or training...”³³²

“[E]ach client shall have and receive, in writing, an individualized treatment or training plan which the *client has had an opportunity to assist in preparing.*”³³³

These individualized treatment plans required by criminal statute, afford individuals in treatment with an opportunity to have input in the overall planning process. While a ‘client’s’ participation in treatment planning may not be possible in every case, those who are able to participate in planning are provided with greater autonomy.

Prior Task Force Support

The 2018 Guardianship Workgroup recommended that some guardians should develop a proactive “Progressive Rights Restoration Plan that is designed to help the ward... take incremental steps toward restoration of one or more rights.”³³⁴ While the workgroup recommended that these plans be used “[i]n cases where appropriate,” the workgroup supports the principle that guardianships should be

³³⁰ *Id.*

³³¹ Florida Statute § 916.107 (2).

³³² *Id.* at (2)(c).

³³³ *Id.* at (2)(d).(emphasis added).

³³⁴ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, (June 2018), pp. 30, *available at* https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

viewed as a temporary solution in most cases, as opposed to a permanent, unchangeable process.³³⁵

Public Testimony

- As one Task Force member stated in their initial goals for this Task Force, we should allow individuals in guardianship to maintain as much control over their lives as possible.
- Many members of the Task Force and members of the public have suggested Florida's laws should give the ward a voice in the guardianship process and to participate in decision-making regarding the ward's person or care.

d. Multiple Paths to Restoration

Problems / Concerns

How accessible is the restoration of capacity process?

Commentary

Because Florida's guardianship laws establish that every person who has been determined incapacitated retains the absolute right to "be restored to capacity at the earliest possible time,"³³⁶ there should be multiple methods and opportunities provided for accomplishing this goal.

Guardians are statutorily tasked with assisting "the ward in developing or regaining capacity, if medically possible,"³³⁷ and the guardian must also "[n]otify the court if the guardian believes that the ward has regained capacity..."³³⁸ And while many guardians have dutifully carried out this responsibility, such a requirement nevertheless places a guardian in a position of choosing between suggesting a ward's rights be restored to the court versus maintaining a steady source of income (i.e., the continuation of serving as guardian in the individual's case) – this inherently poses a conflict of interest.

Additionally, a guardian may oppose or object to a ward's own suggestion of incapacity – that is if a ward is somehow able to file such a suggestion with the court on his or her own.³³⁹ A guardian's objection or opposition to a motion to terminate guardianship for a ward he or she may serve is not considered a conflict of interest because a guardian may have relevant information regarding

³³⁵ *Id.*

³³⁶ Florida Statute § 744.3215.

³³⁷ Florida Statute § 744.361(13)(d).

³³⁸ *Id.* at (13)(e).

³³⁹ See Florida Statute § 744.464.

the ward's lack of capacity for the court to consider during a review of capacity.³⁴⁰

Based on the concerns and obstacles inherent with this restoration of capacity process, there should be multiple options or paths for a person to raise the suggestion, and achieve restoration, of capacity.

Public Testimony

- Periodic review of guardianship should be conducted by a *neutral* party to determine whether a guardianship should be continued and whether any less restrictive alternatives may be available and appropriate.

14. Sale of Property

a. Affidavits / Disclosures

Problems / Concerns

What steps can Florida take to reduce conflicts of interest in guardianship cases with respect to the management of property?

Commentary

Guardians of property are responsible for managing a ward's property and assets, which may in many circumstances necessitates a ward's real and/or personal property be sold to provide liquid assets for the ward's care. However, as mentioned in testimony before this Task Force, the sale of property creates a potential for conflicts of interest – especially for dubious individuals seeking to take advantage of Florida's guardianship system.

In one account described during public comment, a ward's property was purportedly undervalued and sold by a professional guardian to a family member of the facility owner where the ward resides. Further details provided by the commenter suggested that the facility owner and guardian had some sort of *quid pro quo* arrangement, which incentivized the intentional below-value sale of the property to a related family member.

The sale of property is not the only concern involving the management of property in guardianships – anything from property repairs to storage fees can present similar conflicts of interest challenges and concerns. In one presentation

³⁴⁰ See Erica Wood, et. al, "Restoration of Rights in Adult Guardianship: Research and Recommendations," *American Bar Association, Commission on Law and Aging*, (July 2017), pp. 54-55, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf.

by an associate inspector general, the Task Force heard testimony about a guardian who commissioned a family member to perform repairs to a ward's home at the ward's expense. The same guardian also purchased items for improvements to the ward's home through a buyer membership club, which provided rewards to the guardian for each purchase made (at the ward's expense). Such an example highlights the concern, how do we know these decisions are being made in the best interests of *the ward*?

Public Testimony

- Everyone involved in the purchase of real property belonging to a person under guardianship should be required to sign an affidavit or disclosure, so that all parties are equally culpable and responsible if some impropriety later comes to light.
- A guardian should be required to provide proof to the court in all estate sales or sales of real estate that the sale was publicly posted for a minimum period of time to allow for bona fide offers and reduce the potential for collusion.
- Disclosure affidavits should be required of guardians when they utilize the services of friends or family members in care of the ward or ward's property.
- Affidavits by the guardian regarding the sale, and process for identifying and accepting the highest bid would assist with ensuring the guardian is fulfilling his or her obligation, while an affidavit from the purchaser of property disclosing any relationship with the ward or individuals responsible for the care or supervision of the ward would assist the court with ensuring transparency of the process.

b. Initial Recovery Period

Problems / Concerns

Should Florida establish a waiting period or grace period in guardianship cases which would prevent the sale of real property and other significant decisions from being made during the first 30, 60, 90, etc. days of the guardianship case, which may be waived for good cause with the court?

Commentary

“Unfortunately, for patients hospitalized for all manner of emergencies, surgery, or illness, the assessment of capacity to determine what comes next likely occurs very promptly after admission on what might be the patient's worst day. Trauma medications, urinary tract infections, electrolyte imbalances, dehydration, or other short-term conditions can all diminish [a] patient's capacity even if the individual's cognitive abilities will likely improve. Up to a third of patients 70 years old and older experience delirium in the hospital – which typically lasts from a couple of

days to a few weeks—and the rate is much higher for those in intensive care or undergoing surgery.”³⁴¹

“Commentators often tout the importance of avoiding prolonged hospital stays to reduce the risk of hospital-borne infections. However, a few extra days in the hospital may be sufficient for some patients to avoid nursing home placement [and the need for guardianship] ... Accelerating the judicial proceedings also gives the patient less time to recover capacity and for other less restrictive legal alternatives to emerge, thus catapulting the patient into a swift and significant deprivation of rights.”³⁴²

“In a matter of a few weeks after the fateful capacity evaluation at the hospital, guardians can clean out the individual’s home and dispose of all their possessions. Even if individuals are eventually able to terminate their guardianships, they will be unable to resume their prior lives or regain their belongings.”³⁴³

If a stated goal of guardianship is to restore a person’s capacity whenever possible, shouldn’t we give a person in guardianship sufficient time to heal and restore capacity before the guardianship process alters significant aspects of that person’s life?

Public Testimony

- There shouldn’t be a need to rush the sale of property in many guardianship cases, so the courts could consider holding the sale of assets in abeyance for the first 180 days of the guardianship process to allow the person time to recover.

15. Trusts and Guardianship

a. Disclosure Requirements

Problems / Concerns

Should trusts, especially special needs trusts and/or pooled trusts, which pre-date and exist outside of the guardianship case and assets nevertheless be mandatorily disclosed to the court in initial inventories and regular accountings?

³⁴¹ Alison Hirschel and Lori Smetanka, “The Use and Misuse of Guardianship by Hospitals and Nursing Homes,” *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, (May 10-14, 2021), pp. 4- 5, *available at* <http://law.syr.edu/uploads/docs/academics/Hirschel-Smetanka.pdf>. (internal citations omitted).

³⁴² *Id.* at pp. 15. (internal citations omitted).

³⁴³ *Id.* at pp. 17. (internal citations omitted).

Commentary

Trusts are often used to avoid the guardianship process, however individuals with trusts may nevertheless come within the jurisdiction of a guardianship court and process. What authority or supervision the guardianship has with respect to pre-existing trusts presents a topic of debate amongst elder law and probate law practitioners.

However, as noted in some of the “horror story” examples of guardianship, nefarious guardians have utilized the obscurity and privacy surrounding trusts to facilitate double-billing and other financial fraud from wards’ assets.³⁴⁴ When trusts are not disclosed to the court or when they are managed completely outside of the court’s purview, they provide a significant potential for exploitation to occur.

Prior Task Force Support

“Whether to list a trust on an initial inventory has long been an issue for guardians, attorneys, and the court. It has not always been clear if and when the court may have authority over trust assets and what responsibilities a guardian may have over them. The [2004 Governor’s Guardianship] Task Force recommends statutory language that adds the listing of trusts to the verified inventory.”³⁴⁵

Public Testimony

- Florida should require the attendance and attestation of an independent, third-party witness for all initial inventories.
- Trusts belonging to or directly benefitting the ward should be disclosed and annually reviewed by guardianship courts, regardless of whether the court has any authority over them.

³⁴⁴ “Professional guardians have stolen tens of millions of dollars from hundreds of people and exploited obscure trust fund laws to conceal their financial activity from the courts. One guardianship nonprofit drained the accounts of more than 800 people, while another professional guardian transferred money from several of her wards’ accounts into a trust controlled by her husband.”

Heidi Blake and Katie J.M. Baker, “Beyond Britney: Abuse Exploitation and Death Inside America’s Guardianship Industry,” *BuzzFeed News*, (Sep. 17, 2021), available at: <https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears>.

³⁴⁵ Governor’s Guardianship Task Force, “2004 Final Report of the Guardianship Task Force,” (Dec. 2004), pp. 20, available at: <https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/09/2004-Guardianship-Task-Force-Final-Report.pdf>.

b. Compensation / Reimbursement of Guardian

Problems / Concerns

Should a guardian be legally permitted to seek compensation and/or reimbursement from a ward's assets that are held in trust if there are sufficient funds and assets available for such expenses within the guardianship?

Commentary

As reported in one Florida guardianship case, the guardian moved hundreds of thousands of wards' funds "into opaque trust funds that shielded her from court scrutiny."³⁴⁶ The guardian purportedly moved over \$600,000 of one ward's funds into a trust account, which the guardian then utilized without court approval.³⁴⁷

The use of trust accounts to compensate and reimburse guardians provides the potential for double-billing and other fraudulent activity to occur unless the trust information is fully transparent and accessible by the court.

³⁴⁶ Heidi Blake and Katie J.M. Baker, "Beyond Britney: Abuse Exploitation and Death Inside America's Guardianship Industry," *BuzzFeed News*, (Sep. 17, 2021), available at: <https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears>.

³⁴⁷ *Id.*

XVI. Next Steps

This Task Force was created to make statutory recommendations to the Legislature in order to improve the guardianship process in Florida. However, it became apparent from the very first meeting of this Task Force that all three branches of government are needed to address Florida's guardianship challenges. Thus, this report is being submitted for consideration by the leadership of the Florida Legislature, as originally intended, but will also be provided to Governor Ron DeSantis and Chief Justice Charles Canady. The Chair of the Task Force plans to meet with various members of the Legislature to explain the Task Force's work and recommendations, as well as to answer any questions legislators may have. The Task Force members and staff also remain ready and willing to assist as needed.

The Task Force agreed upon ten specific recommendations to improve the guardianship system in Florida, however, this report discusses a number of concerns beyond these ten Task Force recommendations. Numerous concerns were raised by experts who presented before the Task Force, Task Force members, Task Force staff and, perhaps most importantly, from members of the public. Those additional concerns are set forth in Section XV (Additional Focus Areas of Concern Identified by Task Force) and Section XIV (Other Topics for Future Consideration) of this report.

Many of those additional concerns pertained to existing guardianship laws not being fully or consistently followed across the state. Certainly, statutory changes can fix some of these problem areas where individual circuits, counties, and individuals are not following the current law by providing more clarity in the existing statutes and probate rules. Other concerns raised before this Task Force appear to be more aptly attributed to clerks, courts, attorneys, and other professionals failing to take advantage of useful aspects of the law that already exist, such as Elder Care Coordination and mediation. Increased education and training may address some of these concerns, which is why this Task Force recommended increasing the available training and education resources in guardianship for all parties and professionals involved in the process, as well as enhancing some of the existing guardianship education requirements provided by statute. But still more needs to be done.

Without question Florida's guardianship process significantly impacts all three branches of Florida's government on a regular basis. The judicial branch deals directly with a steadily increasing number of guardianship cases every day. Further, executive branch agencies, including the Office of Public and Professional Guardians in the Department of Elder Affairs and the Department of Veterans' Affairs also encounter guardianship-related challenges and issues on a regular basis. And with the recent media attention garnered by the *#FreeBrittany* movement, among other major guardianship stories appearing in local media, the Legislature encounters public concerns regarding guardianship on a regular, if not daily, basis.

Addressing and implementing changes to the guardianship process has the potential to save huge amounts of taxpayer dollars every year – which is certainly something each branch of our state government can prioritize and agree upon.

A multitude of task forces have looked at the guardianship process in Florida over the past 20 years, but many of the same or similar problems in guardianship nevertheless persist. Beyond the creation of a permanent guardianship task force or workgroup by the Legislature, as the Task Force recommends in this report, Florida’s guardianship system would most benefit from participation by all three branches of government working together to eliminate silos and create a more holistic approach to guardianship.

With its constantly increasing older adult population, Florida needs immediate and effective solutions to address the increasingly challenging guardianship needs of its citizenry. The Task Force urges the leadership of Florida’s three branches of government to commit the time, talent, and resources necessary of each branch to solving these critical issues.

As this report was being finalized the National Center for State Courts (NCSC) announced that NCSC researchers would begin working on projects aimed at improving the guardianship process in four states – ideally with the result that successes could be shared with other states.³⁴⁸ Perhaps unsurprisingly, each of those projects focuses a “problem” this Task Force has also identified in Florida.

Those four state pilot projects are:

- Maryland – Offering education and mediation to divert guardianship cases from the health-care-to-guardianship pipeline.
- Massachusetts – Creating an Office of Guardianship and Conservatorship Oversight within the Administrative Office of the Massachusetts Probate and Family court.
- Minnesota – Conducting an assessment of Minnesota’s guardianship and conservatorship program to report on the program’s strengths and opportunities for improvement.
- Nevada – Increasing the use of data in decision making and providing better training for guardians and judges to promote consistency among the districts.³⁴⁹

All four projects are federally funded and will involve mapping guardianship data to the National Probate Court Standards and the Conservatorship Accountability Project –

³⁴⁸ NCSC @ the Center, “NCSC launches guardianship projects in four states,” *National Center for State Courts* (Nov. 3, 2021), Press Release, *available at* <https://www.ncsc.org/newsroom/at-the-center/2021/nov-3>.

³⁴⁹ *Id.*

another primary recommendation identified by this Task Force. Florida can and *should* learn from these projects, as well as from any future projects piloted by other states. The Task Force recommends that all three branches of government in Florida monitor and study the results from those and similar projects identified in other states.

Going forward, just as Florida’s prior workgroups and task forces on guardianship have observed, “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 [sic] assistance.”³⁵⁰

There are a lot of next steps needed for the improvement of Florida’s guardianship system, but there is no *final* step in this process. Florida must continuously strive for improvements to existing guardianship legislation, rules, and practices, to make Florida’s guardianship system truly the ***greatest*** in the nation.

³⁵⁰ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, *Florida Courts*, (June 2018), available at https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

XVII. Conclusion

As Florida’s population continues to grow and age, public policy demands a highly effective guardianship system. Recognizing this demand, the 2021 Guardianship Improvement Task Force, organized by Florida’s Clerks of Court and with members from various guardianship viewpoints, compiled ten specific recommendations for improving Florida’s guardianship system, which are set forth on pages six and seven of this final report.

“Some of the recommendations in this report will require close coordination among the three branches of government...”³⁵¹ Therefore, the Task Force respectfully urges Governor Ron DeSantis, Chief Justice Charles Canady, and leadership of the Florida Legislature to review the ten recommendations in this report and implement legislation, rules, and processes consistent with these recommendations. Only with the commitment of the time, talent, and resources of all three branches of government can Florida provide a truly great guardianship system.

Although the Task Force has completed its work, members stand ready to help the executive, judicial, and legislative branches with any important next steps –especially the enactment of legislation that better protects Florida’s vulnerable and incapacitated persons.

³⁵¹ Judicial Management Council Guardianship Workgroup, “Final Report,” Supreme Court of Florida Judicial Management Council, *Florida Courts*, (June 2018), pp.65, available at: https://aaapg.net/wp-content/uploads/2019/01/Guardianship-Workgroup-Report_FINAL_2018_06_15.pdf.

XVIII. Member Perspectives

The Operational Plan and Guidelines approved by the Task Force permitted Task Force members to prepare minority position reports for inclusion in this final report. These minority reports have been assembled and included in this section of the GITF Report as “Member Perspectives.”



EFFICIENCY OF STATEWIDE INVESTIGATIONS

RECOMMENDATION

EXECUTIVE SUMMARY: The Clerks’ Statewide Investigation Alliance recommended during Task Force meetings that the Inspector General Investigators conducting statewide investigations on behalf of the Office of Public and Professional Guardians Guardianship receive the ability to more efficiently obtain documentation and information from third-parties through the use of subpoenas. The Inspector General Investigators already have the ability to issue subpoenas to third-parties in their home counties pursuant to statute.

On July 1, 2014, Committee Substitute/House Bill 635 (Guardianship), introduced by then House Representative Kathleen Passidomo (now Senate President-Designate Passidomo), and Senate Bill 634 (Guardianship) by Senator Jeff Brandes, became law which enabled Florida Clerks to issue subpoenas to nonparties to compel production of documentary evidence. This provision greatly augmented the Clerk’s permissive ability to perform enhanced audits and investigations about the conduct and reports of court-appointed guardians pursuant to **Section 744.368(5), Florida Statutes**, as defined by **Section 744.102(2), Florida Statutes**.

During a House Civil Justice Subcommittee hearing on February 19, 2014, Passidomo stated, “...the reality is we need to give the clerks the ability to do their statutory required job...” when addressing the subpoena provision.

Now, pursuant to **Section 744.368(7), Florida Statutes**, the Clerk may issue subpoenas to nonparties to compel production of documentary evidence. The ability to issue subpoenas during an audit or investigation has proven a useful tool for Clerks to obtain relevant records efficiently.

The Clerks' Statewide Investigation Alliance ("SIA"), a partnership between six clerk offices of inspectors general from Palm Beach, Pinellas, Polk, Lee, Sarasota, and Okaloosa counties, performs enhanced audits and investigations and advises the court for all guardianship case proceedings for our respective jurisdictions pursuant to Section 744.368, Florida Statutes, and Section 744.368(5), Florida Statutes. The professional services of the SIA is available to all Florida Clerks upon request.

From July 1, 2014 through December 31, 2020, the SIA identified **more than \$23.0 million** in financial deficiencies, misconduct, material errors, and fraud in large part because of the provisions enacted by the Florida Legislature and signed into law by the Governor in 2014.

On March 10, 2016, the Florida Department of Elder Affairs, Office of Public and Professional Guardians ("OPPG") was created and statutorily charged with educating, regulating, and, when necessary, disciplining state-registered professional guardians. On June 23, 2017, the OPPG's rulemaking pursuant to Florida Administrative Code 58-M2.009 was authorized.

The OPPG finalized an inter-governmental memorandum of understanding with the SIA to professionally investigate legally sufficient complaints that the conduct of state-registered professional guardians violated a Florida Guardianship Law, Chapter 744, or an OPPG administrative rule. The SIA provides independent and objective professional investigative services to the OPPG.

When performing investigations on behalf of the OPPG, the SIA does not have a statutory tool to obtain third-party records. For some completed investigations, the SIA was unable to reach a conclusion of fact whether an allegation was substantiated ("true") or unfounded ("false"). Approximately 8.4 percent of allegations investigated by the SIA yielded "unsubstantiated" conclusions. "Unsubstantiated" means that the IG investigator was unable to collect sufficient evidence, documents, or information to make a conclusion of fact by a preponderance of the evidence. In many cases, there may have been some indications that the allegation may be true, that the conduct of the guardian did violate a standard or statute, but the indication failed to reach the evidentiary standard.

The SIA recommends that the Task Force Final Report include provisions to issue subpoenas for investigations about the conduct of state-registered professional guardians and offer third-parties, wards, guardians, and other interested persons due process protections for related provisions. For consideration, draft bill language is attached to this memorandum.

The SIA has steadily ramped up investigative activities as an agent of the OPPG. The SIA investigated more than 1,629 legally-sufficient allegations that state-registered professional guardians violated a statute or rule; and the SIA has issued an increasing number investigation reports: 31 reports (2017), 46 reports (2018), 70 reports (2019), and 76 reports (2020).

The Clerk of the Circuit Court & Comptroller for Palm Beach County, Division of Inspector General, on behalf of the Clerks' Statewide Investigation Alliance, is available to answer inquires.

Sincerely,

A handwritten signature in blue ink that reads "A Palmieri". The signature is fluid and cursive.

Anthony Palmieri, JD, CFE, CIG, CIGI, CIGA, CIA, CCSA
Deputy Inspector General & Chief Guardianship Investigator
Division of Inspector General
Clerk of the Circuit Court & Comptroller for Palm Beach
County

Administrative Coordinator
for the Clerks' Statewide Investigation Alliance

Vice Chair
for the Guardianship Improvement Task Force

Attachment

ATTACHMENT

Explanation:

- Expansion of the ability for Clerks' Statewide Investigation Alliance investigators to issue subpoenas, administer oaths, and take depositions for legally sufficient complaint investigation about the conduct of a state-registered professional guardian.
- Offer due process protections to wards, state-registered professional guardians, attorneys, and other third-parties with obtaining third-party records.

Proposed Change:

744.2004 Complaints; disciplinary proceedings; penalties; power to administer oaths, take depositions, and issue subpoenas; enforcement. —

(1) By October 1, 2016, the Office of Public and Professional Guardians shall establish procedures to:

(g) Coordinate, to the greatest extent possible, with the clerks of court to avoid duplication of duties with regard to the financial audits prepared by the clerks pursuant to s. 744.368. For the purpose of any investigation conducted by a Clerk acting as an agent of the Department pursuant to a contract or other agreement, the Clerk shall have the power to administer oaths, make inspections, issue subpoenas with notice and supported by affidavit, and compel the attendance of witnesses and the production of books, papers, documents, and other evidence. The Clerk shall exercise this power on its own initiative while investigating pursuant to this section. Challenges to, and enforcement of, the subpoena and orders shall be handled as provided in s. 120.569.

We Must Invest in Keeping People Out of Guardianships

Michael Lincoln-McCreight & Viviana Bonilla López

By the time a guardianship case has been filed, things have already gone wrong. The Guardianship Improvement Task Force has focused on ways to improve the guardianship system. It has identified policies, practices, and rules that can be changed to make the system fairer and less ripe for abuse. These reforms are important. But we must also invest in keeping people with disabilities and older adults out of the guardianship system entirely.

A guardianship can strip a person of some or all of their rights, including the rights to: vote, marry, personally apply for government benefits, have a driver license, travel, work, contract, sue and defend lawsuits, manage their property, decide where to live, make medical decisions, and decide who their friends are and who to spend time with. How we choose to exercise these rights is what makes us who we are. Removing any of these rights is severe and should only happen when there is no other option under Florida law.

As discussed in the report, Supported Decision-Making (SDM) is an alternative to guardianship that allows a person with a disability to keep their rights and make their own decisions with the support of people they trust. It's an option many Florida families are already using and that has been enacted into statute in at least 16 states and the District of Columbia. Florida must act to pass a Supported Decision-Making law that requires judges to consider SDM before appointing a guardian, third parties to honor SDM agreements, and schools to provide families information on SDM whenever they provide information on guardianship. An SDM law will provide guidance and uniformity to a tool that is already changing lives in Florida.

Several task force members have proclaimed that Florida's guardianship laws are among the best in the country. But the stories shared by those who made public comments and the numerous investigative pieces on abuses committed by guardians in Florida tell a different story. Small tweaks to the ways in which we strip people of their rights are not enough. Instead, we must seek to avoid guardianships altogether.

Ken Burke, CPA
Chairman Guardianship Improvement Task Force
Clerk of the Circuit Court and Comptroller
Pinellas County, Florida
315 Court Street, Clearwater, FL 33756

Dear Mr. Chairman

On behalf of the Florida Department of Veterans Affairs, I very much appreciate the Task Force considering the following amendment to the draft Guardianship Improvement Task Force report. While I regret that the Task Force voted down the amendment, I ask that its content and rationale be included in the member comments section. FDVA proposed the following:

Strike the following:

Area 6, 2. "Prohibit health and residential care providers, or counsel retained for their benefit, from recommending (directly or indirectly) the appointment of any specific professional guardian for any patient or client in their care."

and replace it with the following:

Area 6, 2. "Health care and residential care facilities may propose, recommend or pre-select a guardian for a resident in a guardianship petition when the facility has been unsuccessful in locating family members who are actively engaged in the coordination of care to the resident. The unavailability of actively engaged family members must be asserted in any petition."

Rational:

I am concerned that a blanket prohibition of long term care facilities assisting residents with guardianship issues will negatively impact the relationship between SNFs and their residents when the facility is trying to do what is in the best interest of the resident. In many cases facilities provide care to a resident who has no engaged family members or close friends. If a new law was to deem the facility unable to recommend or suggest a guardian, this will often leave the resident without someone to make decisions or speak for the resident, leaving both the resident less protected and the facility unable to comply with statutes and regulations because the facility and resident would have no party to authorize or consent to treatment or participate in a plan of care.

Furthermore, the report justification for the draft language does not support the extreme step of walling off long term care facilities from assisting residents with guardianships. The report does not list any examples of this type of guardianship abuse in Florida skilled nursing facilities. Rather it cites where instances of abuse occurred in other states or other health care settings. Should we not have data that shows there is a pervasive problem before we tie the hands of those long term care providers who seek to work in the best interests of their residents. Blanket prohibitions should be made on sound data, not be made based on anecdotal incidents in other states.

This provision is also not in the best interest of the residents. The lack of a guardian leads to an inability to access otherwise available reimbursement, not only for care provided by the facility, but also for other medical and health services which the resident needs.

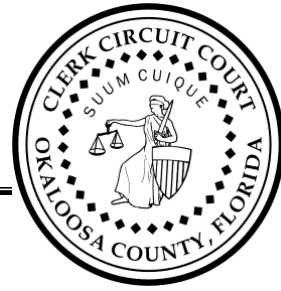
The amendment I propose limits the facilities recommendation in the case when there is no other individual (family member or friend) to assist with selecting a guardian. Also, concerns about conflicts of interest by a facility proposing a guardian should be alleviated by the judicial oversight in appointing a professional guardian, added by the Legislature to section 744.312, Florida Statutes.

I thank you for inclusion of this into the report.

Bob Asztalos
Deputy Executive Director
Florida Department of Veterans Affairs

JD PEACOCK II

CLERK OF CIRCUIT COURT & COMPTROLLER, OKALOOSA COUNTY, FLORIDA



The Honorable Ken Burke, Chair
Guardianship Improvement Task Force
c/o 3544 Maclay Blvd.
Tallahassee, FL 32312

Re: Task Force Member Perspective

First, let me say that I have been honored to serve our community and state in the capacity of Task Force member. This is such an important issue and will only take on increased significance to the citizens of Florida as our population continues to age.

In addition to the good priorities in the Task Force report, I have an issue that may be taken as a priority should the legislature choose to take it up. The question of client-attorney privilege between the Guardian and the Guardian's attorney is one of the most significant concerns I have, especially when the guardian's attorney is being paid from the ward's assets. While court precedent may have indicated that an attorney has a "Duty of Care" to the Ward, this duty does not breach the attorney-client privilege. There also seems to be precedent that the Ward is the real client. However, these precedents seem to be lost on some attorneys hired by the guardian. We have seen several instances when questioning a guardian's actions that the guardian's attorney will act in an adversarial manner representing the guardian at the expense of the ward.

There is also the issue of a guardian's attorney knowing of an improper action by the guardian and instead of reporting the issue to the court, the attorney acting under their obligations to their "client" will request to be removed from the case rather than reporting the actions to the court. Again, while being paid by the ward.

I believe that the solution is to make all parties appointed to serve the ward responsible for acting in the best interest of the ward. If the guardian must have an attorney assist them with the administration of the guardianship, then court rules and/or statutes could be amended so that the guardian recommends to the court an attorney and not "hire". This way the attorney has a client relationship with the ward instead of the guardian.

I believe a clarification regarding the guardian's attorney's responsibility to the ward would create better communication with the court on issues of concern in a case. The standard should be: Anybody paid from the ward's assets should have the best interest of the ward in mind above all other parties.

OKALOOSA COUNTY COURTHOUSE • 101 EAST JAMES LEE BLVD. • CRESTVIEW, FLORIDA 32536 • (850) 689-5000

COURTHOUSE ANNEX EXTENSION • 1940 LEWIS TURNER BLVD. • FORT WALTON BEACH, FLORIDA 32547 • (850) 651-7200

**GUARDIANSHIP IMPROVEMENT TASK FORCE MEMBER PERSPECTIVES FOR
PUBLICATION IN FINAL
TASK FORCE REPORT**

Submitted by: Hillary Hogue
Date: December 2, 2021

Relative to the enumerated Task Force Recommendations presented in the Final Draft Task Force Report on pages 5-6 and continuing, as a Task Force member, I provide the following Member perspectives:

Focus Area #3: Increased Oversight Safeguards and Court Monitoring Processes Across the State

This recommendation for further "entities," for professional guardianship administration adds additional layers of bureaucracy that will disserve the goals of providing safe and beneficial living options for elder and disabled persons. Florida does not need any further "entities" or layers of bureaucracy to properly administer safe professional guardianships; for increased layers of bureaucracy serve to increase inefficiency and unaccountability.

Focus Area #4: Preserving the Rights, Dignity, and Autonomy of Alleged and Adjudged Incapacitated Persons

In order to preserve the rights, dignity, and autonomy of Wards and potential Wards, it is imperative to keep intact and in force through effective enforcement mechanisms (such as financial sanctions, guardian registration termination, and/or civil or criminal legal actions for elder exploitation) "advance directives and other pre-need estate planning documents," which are routinely voided in Florida guardianship cases. The goal should be to keep all such documents intact and in force until and unless proven to be invalidated by clear and convincing evidence to the contrary, as presented at formal evidentiary hearings, of their contents and intent, with a thorough review of the history of said documents and their immediate relevant predecessor documents. Such documents are the best evidence of the independent wishes of the individual prior to the initiation of incapacity proceedings. When such determinative documents are voided in guardianship proceedings, dignity and autonomy are robbed from the individual, depriving him/her of due process rights from the beginning of the guardianship process.

Focus Area #5: Ensuring the Use of Least Restrictive Alternatives (Including Advance Directives and Supported Decision-Making)

The proposed publicly-accessible online guardian database to protect the interests of the consumers (Wards and their families) and taxpayers, of necessity, should include all records of complaints against guardians, such as the letter attached hereto against professional guardian Susan Whitney, who remains guardian of minority severely-disabled Ward Ramon "Omar" Rojas through the present time; despite her years-long track record of "very unethical, aggressive, and inappropriate" conduct, profuse use of profanities, threatening verbiage against the Ward's family, "vulgar obscenities," and punitive retaliatory actions against the Ward and his family.

Virtually no discipline is ever imposed upon professional guardians; therefore, there is an urgent need to make records of complaints against guardians publicly accessible for the public's right to know when professional guardians, registered by the State of Florida, have track records of severe violations of law and professional ethical standards as well as histories of abuse of their Wards without receiving disciplinary measures by Florida state authorities.

In the case of professional guardian Lynrod Douglas, years of credible complaints from multiple sources against him were discounted and/or denied by Florida officials - until Lynrod was finally arrested and prosecuted for his heinous crimes against the voiceless, vulnerable victims forcibly placed for years by Florida officials in Lynrod's guardianship care. In 2021, Lynrod finally faces 15 criminal charges of stealing hundreds of thousands of dollars from his helpless Wards, using their life savings to pay off his mortgage and credit cards, purchase real property, and buy himself a Mercedes Benz. Under Lynrod's care, his Wards were tortured and neglected in a home owned and operated by fellow elder abuse criminal Bhoodram Parsaram, who was finally arrested for illegally restraining a patient to her bed and leaving all of the residents alone overnight. He was also accused of sexual molestation of women in his care. But not until a photograph of a 90-year-old woman trapped in her bed was received did Florida officials move to arrest Parsaram.

Focus Area #6: Health and Residential Care "Pipeline to Guardianship"

Guardian education cannot replace enforcement of guardianship laws. The only means to ensure best professional guardianship practices is to enforce laws/rules by holding professionals accountable and liable for their violations, through such enforcement mechanisms as financial sanctions, loss of guardian registration in the State of Florida, and civil and criminal penalties, for exploitation and other criminal actions against elderly and disabled Wards.

One of the best ways to truly educate guardians about the indelible and irreparable effects of guardianship abuse is for the State of Florida to establish a guardianship speakers bureau comprised of long-time experienced expert volunteer elder advocates, who have themselves personal knowledge of guardianship issues relative to the professional guardianships of their family members and others for whom they advocate. This volunteer guardianship body should comprise a corps of presenters for guardianship meetings, continuing education, conferences, seminars, workshops, and other professional guardian educational requirements every year throughout the State of Florida. This volunteer corps already comprises very active guardianship stakeholders in Florida and should be used as an asset by the State and this Task Force to truly improve and innovate Florida's guardianship processes and proceedings.

Focus Area #7: Enhanced Education and Qualification Requirements of Professionals and Parties in Guardianship

All guardianship improvement committees/groups should be comprised of unpaid volunteers who are true guardianship stakeholders, as are the dozens of elder advocates throughout the State of Florida, volunteering their expertise, efforts, talents, resources, and energy year-round to help Wards in guardianship crises. Amongst these experienced

guardianship experts, personally familiar with guardianship issues, are professionals such as physicians, authors, business owners, and educators whose unpaid work has laid the groundwork for this Guardianship Improvement Task Force!

Once the probate courts have routinely appointed professional guardians of the person and property for Alleged Incapacitated Persons, it is virtually impossible for the HCS and POA previously legally designated by the AIP to displace and replace the professional guardian, causing a whirlwind of animosity in the guardianship process from its onset and intense conflicts of interests for the professional guardian to retain control over the AIP and consequent financial benefits to the guardian, often over the course of many years. This scenario is played thousands upon thousands of times in probate courtrooms throughout Florida when no or minimal efforts are made to contact the HCS and POA previously legally designated prior to appointment of a professional guardian. In all circumstances, there should be an exhaustive but efficient process for pre-appointment guardians and their lawyers to contact all available HCS and POA options prior to filing guardianship petitions and/or holding guardianship hearings, which exhaustive, efficient process must be documented under oath as to which persons were contacted (identified by name, address, email, and/or telephone), when and how said persons were contacted, what their responses were, and any followup contacts with said persons, signed under penalty of perjury. This process will minimize conflicts of interest and long-term guardianship conflicts from the outset of the guardianship process.

Most importantly, this process will prevent illegal terminations/denials of advance directive designations previously made by the AIP.

Focus Area #8: Increased Accessibility and Transparency of Professional Guardians and the Guardianship Process

Transparency of the guardianship process is integral to ensuring human rights, civil rights, and Constitutional rights of the AIPs and Wards, who are commonly intentionally isolated from public view, communications with external persons, participation in normal daily and weekly outings and activities, and sequestered in their rooms apart from the critical elements of their previous lives, including their own spouses and children, clergymen and friends, daily routines, and personal possessions. Isolation, indeed, is the opposite of transparency and is widely globally regarded and prohibited as human torture. In no instance should an elder or disabled guardianship Ward of the State of Florida be held in solitary confinement/isolation, causing irreparable harm to any such Ward. In general, there is no/limited evidence of transparency in Florida's guardianship process and of true "supported decision-making" in the daily lives of Florida's elder and disabled guardianship Ward populations; and there is no requirement for sworn documentation of contacts actually made to effect "supported decision-making" with written input, filed with the court, from the prospective Ward and his/her closest family members and friends.

Focus Area #9: Need for Additional Work Group(s) Responsible for Accessing Florida's Guardianship System

Over the course of many decades, the State of Florida and its representatives at the state and national levels have held countless meetings, hearings, and conferences to improve

Florida's guardianship track record, which is increasingly eviscerated in the media, largely for the absence of all consequences for judicial failure/refusal to cautiously monitor guardianship cases, especially those in which reports of guardianship abuse are routinely ignored, discounted, or denied until the Ward dies and/or suffers irreparable harm. In media reports regularly surfacing about notorious Florida guardians committing heinous crimes against their Wards, it is impossible for the taxpayers to overlook the fact that said crimes were routinely committed by guardians against multiple Ward-victims over the course of many years under court supervision and with numerous persons reporting said crimes to the probate court to no avail until a guardian is finally arrested and prosecuted after lives are needlessly lost and human pain is needlessly suffered. Given Florida's prolonged efforts to improve and innovate its guardianship system, additional work groups are superfluous to success unless their intent is expressly to define and delineate effective enforcement mechanisms for Florida guardianship laws/rule.

Focus Area #10: Additional Focus Areas of Concern Identified by Task Force

Whatever verbiage is used to identify Florida's substantial guardianship Ward population is superfluous and superficial to the urgency to improve and innovate Florida's guardianship system through effective enforcement of existing guardianship laws.

Other Task Force Recommendations:

Substitution of ineffective counsel by a Ward should be a due process right afforded to every Ward upon request, particularly when his/her assets are paying for lawyers whose vested interests are not in the Ward's or prospective Ward's best interests.

"Interested parties" should include elder advocates who devote their expertise to helping Wards through their crises in guardianships without remuneration, sometimes involving hundreds of hours of unpaid assistance. Even when elder advocates are specifically requested by Wards to be present at hearings, probate courts often overrule the wishes and interests of the Wards, such that hearings are routinely held without the Wards present, without elder advocates present, and with ineffective counsels who may make no objections or limited objections on behalf of the Wards they are supposed to "zealously represent."

Lucrative guardianship "pipelines" via schools, medical facilities, and foster care, as referenced on page 92 of the Final Draft, should be discontinued and other least restrictive options put into play for the proper care of young adults with developmental disabilities, particularly the care of willing loving family members.

Religious and racial discrimination in professional guardianships must be eliminated, such that religious and racial minorities are able to practice in accordance with their faiths and races without obstructions and prohibitions from professional guardians who routinely prevent traditional observances for minority Wards, including special diets, attendance at religious services, and familial care of disabled youths and elders.

Professional guardians should be prohibited from using Wards' assets to pay themselves and their attorneys to oppose Wards' restoration of rights, which due process procedure must be easily and readily afforded to Wards.

Restoration of rights proceedings should be held before a jury upon request by the Wards.

See guardian complaint from Denise Wilson against Susan Whitney attached hereto.

Member perspectives relevant to Focus Area #6: Health and Residential Care "Pipeline to Guardianship"; Appendix C: The Use and Misuse of Guardianship by Hospitals and Nursing Homes

Perhaps the key element of professional guardianship is institutionalization, which is frequently determined on the basis of whatever is expedient for and/or financially beneficial to nursing homes, hospitals, and professional guardians that form a triangulation matrix determinative of the fates of multitudes of elders and disabled persons in the State of Florida. Per the detailed and well-documented report (Appendix C) of two Michigan legal counsels with "a combined more than fifty years of experience providing legal services and supporting nursing home residents, families, and long-term care ombudsmen," the health and residential care pipelines to guardianship pose a tsunami of overwhelming factors on persons who may be ill and/or incapacitated temporarily but become permanently institutionalized in guardianships. Although the specific references in the subject documented report pertain largely to Michigan guardianship cases, the same issues are commonplace and even normative in Florida's guardianship cases, as follows:

"Guardians may take away the individual's phone, direct the nursing home or assisted living facility to block calls and visits, limit access to lawyers and long-term care ombudsmen, control the person's assets, and make it nearly impossible for the person to seek [outside] help."

"Nursing homes also serve as barriers to protecting or asserting [Wards'] rights in proceedings initiated or supported by the facility. The institutions control the individual's medical records, employ the healthcare and social services staff who may be called upon to evaluate the individual, have access to experienced legal counsel who may have long-standing relationships with judges and court staff, and are privy to copious amounts of sometimes detrimental information about the individual ... [who] may not have regular access to their phones, computers, files, funds, and informal supports."

"In some cases, facilities staff who are petitioning for or supporting the petition for guardianship or resisting the termination or modification of the guardianship actively limit the individual's access to necessary resources, documents, and the court hearings and isolate the individual from family, friends, and advocates."

"Even if the individual manages to contact a lawyer to assist with appealing the guardianship or petitioning to modify or terminate it, some judges will not permit the lawyer to represent the individual"

"The impact on nursing home residents of having a guardian cannot be overstated. Residents often lose control of ... what food they are permitted to eat, with whom they can communicate, whether they are allowed to leave the building ..., what medication and treatment they can receive, and whether they will ever be discharged ... [whether they can] attend services at their lifelong church, communicate with their children, ... review their medical records, live in the unlocked portion of the facility, see their spouse, share a room with their sister, ... marry another resident, and return to their longtime home as well as a host of other issues."

"Placement decisions may be made for the convenience of the guardian Guardianship is a particular barrier for residents who want to move to the community [During COVID,] visitation bans extended not only to family members, but also to legal counsel and to ombudsmen. Residents were often prohibited from leaving the nursing home or threatened with being locked out or isolated for fourteen days if they did leave the premises Guardians can require their continued and indefinite institutionalization."

"In a matter of a few weeks after the fateful capacity evaluation at the hospital, guardians can clean out the individual's home and dispose of all their possessions. Even if individuals are eventually able to terminate their guardianships, they will be unable to resume their prior lives or regain their belongings [Infamous professional guardian] April Parks ... disposed of priceless heirlooms and valued personal possessions from the individuals for whom she served as guardian ... [But now] sentenced to sixteen-forty years in prison ... [on] charges of elder exploitation, theft, and perjury."

"Nursing homes initiate petitions for guardianship for some of the same reasons hospitals do Professional guardians prefer institutional placements While guardians are eligible for a \$100/month fee from the income of a nursing home resident who is a Medicaid beneficiary, they have no way to be paid for individuals who receive Medicaid-funded home and community-based services."

"Sometimes pressure for hospital discharge forces guardians to make decisions on the spot with scant information. Nursing home placement often becomes the default."

"It is common practice for nursing homes to pursue guardianship to resolve resident debt Guardianship proceedings [are] brought solely for the purpose of collecting a bill Facilities may also petition for guardianship to retain residents" but refuse to let the residents go home.

"The chain of events that begins soon after a patient arrives at the hospital to facilitate discharge may become an immutable force that alters the rest of the individual's life Accelerating the [guardianship] judicial proceedings ... gives the patient less time to recover capacity and for other less restrictive legal and practical alternatives to emerge,

thus catapulting the patient into a swift and significant deprivation of rights The patient's fate depends on ... the guardian."

Per "Michigan Supreme Court data, in 2019, 10,372 guardianship petitions were granted and only 174 -- fewer than two percent -- were denied."

Consistent with the above-referenced professional guardianship issues in the State of Michigan, cases known to Task Force Member Hillary Hogue demonstrate exactly the same patterns that have remained unresolved for generations in Florida, namely impositions of guardianships as matters of convenience and financial benefit to stakeholder agencies and organizations, often "catapulting the patient into a swift and significant deprivation of rights ... that alters the rest of the individual's life even if individuals are eventually able to terminate their guardianships, they will be unable to resume their prior lives or regain their belongings," severing Wards forever from their lifelong churches, intact families, and sense of personal dignity and sense of security.

Notably, amongst the List of Stakeholder Agencies and Organizations, Appendix F, there is no inclusion of invaluable credible volunteer elder advocate organizations home-based in Florida, which advocate organizations have no financial stake in providing services for Wards and their families but are deeply committed to, without compensation, protecting exactly the personal dignity and sense of security and due process rights due to Florida's elder and disabled guardianship Wards, a vulnerable and voiceless minority that must be served in the least restrictive settings proper for each individual, not default infinite institutionalization.

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Florida Rules and Regulations

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- Florida Statute § 44.1011
- Florida Statute § 44.407
- Florida Statute § 415.101
- Florida Statute § 415.102
- Florida Statute § 415.103
- Florida Statute § 415.1034
- Florida Statute § 655.80
- Florida Statute § 709.2102
- Florida Statute § 736.0105
- Chapter 744
- Florida Statute § 765.101
- Florida Statute § 765.102
- Florida Statute § 765.105
- Florida Statute § 765.401
- Florida Statute § 825.102
- Florida Statute § 825.1035
- Florida Statute § 916.107
- Florida Statute § 916.12
- Florida Statute § 916.13
- Florida Statute § 916.15
- Florida Statute § 916.302
- Florida Statute § 943.6871

Florida Rules of Criminal Procedure

- Fla. Rule Crim. Pro. 3.212
- Fla. Rule Crim. Pro. 3.217

Florida Rules of Professional Conduct

- Fla. Rule Prof. Conduct 4-1.7

Florida Rules of Probate Code

- Fla. Rule Prob. 5.685
- Fla. Rule Prob. 5.696
- Fla. Rule Prob. Appendix A

Meeting Recordings

- Guardianship Improvement Task Force Public Meeting, July 22, 2021, *recording available at: <https://youtu.be/DKP83myRMOM>.*
- Guardianship Improvement Task Force Public Meeting, July 28, 2021, *recording available at: <https://youtu.be/P0A1LKJnaig>.*
- Guardianship Improvement Task Force Public Meeting, August 5, 2021, *recording available at: <https://youtu.be/yvlfKYltyGJ>.*
- Guardianship Improvement Task Force Public Meeting, August 19, 2021, *recording available at: <https://youtu.be/XzhZcSKaf3s>.*
- Guardianship Improvement Task Force Public Meeting, September 2, 2021, *recording available at: <https://youtu.be/H3bn6i5MI24>.*
- Guardianship Improvement Task Force Public Meeting, September 14, 2021, *recording available at: https://youtu.be/Hup41N_XKXQ.*
- Guardianship Improvement Task Force In-Person Public Meeting, September 23, 2021, *recording available at: <https://youtu.be/squMgVeP30>.*
- Guardianship Improvement Task Force Meeting, November 15, 2021, *recording available at: <https://youtu.be/RDFXE0Mc23k>.*