

Rights of the incapacitated individual 2Hr FOR THE EXAMINING  
COMMITTEE MEMBER

Course presenters

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## **Course lesson plan**

Rights of the incapacitated individual 2Hr FOR THE EXAMINING COMMITTEE MEMBER is offered online (computer-based).

Online course offering: 11/09/2020 – 11/09/2021

## **PURPOSE**

The purpose of this course is to educate and reinforce the knowledge of Guardians, Nurses; ARNP, RN, Examining Committee Member other professionals who are working within various settings and the health care environment; as well as other individuals/ Professionals regarding rights of individuals determined incapacitated, procedures to determine incapacity, order determining Incapacity, details regarding abuse, neglect, or exploitation by a guardian and the availability of resources to aid the ward. The course includes current resources from the Florida Statutes Chapter 744.

## **Objectives**

At the end of this course the participants will be able to:

1. Describe the rights of individuals determined incapacitated
2. Discuss the procedures to determine incapacity
3. Discuss order determining incapacity
4. Define Abuse, neglect, or exploitation by a guardian
5. Discuss the availability of resources to aid the ward.

## The Rights of the Ward

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# Have an annual review of the guardianship report and plan

According to Florida Statutes 744.3215, rights of persons determined incapacitated

(1) A person who has been determined to be incapacitated retains the right:

- (a) To have an annual review of the guardianship report and plan.

## **CONTINUING REVIEW OF THE NEED FOR RESTRICTION OF HIS OR HER RIGHTS.**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
- (b) To have continuing review of the need for restriction of his or her rights.

## **RESTORED TO CAPACITY**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
- (c) To be restored to capacity at the earliest possible time.

## **TREATED HUMANELY**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
  - (d) To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation.

## **QUALIFIED GUARDIAN**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
  - (e) To have a qualified guardian.

## **INDEPENDENT AS POSSIBLE**

Florida Statutes 744.3215 states:

- (1) A person who has been determined to be incapacitated retains the right:
  - (f) To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as he or she expressed or demonstrated his or her preference prior to the determination of his or her incapacity or as he or she currently expresses his or her preference, insofar as such request is reasonable.

## **PROPERLY EDUCATED**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
  - (g) To be properly educated.

## **MANAGEMENT FOR PROPERTY**

Florida Statutes 744.3215 states:

- (1) A person who has been determined to be incapacitated retains the right:
  - (h) To receive prudent financial management for his or her property and to be informed how his or her property is being managed if he or she has lost the right to manage property.

## **SERVICES AND REHABILITATION**

According to Florida Statutes 744.3215:

- (1) A person who has been determined to be incapacitated retains the right:
  - (i) To receive services and rehabilitation necessary to maximize the quality of life.

## **DISCRIMINATION**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
- (j) To be free from discrimination because of his or her incapacity.

## **ACCESS TO COURT, COUNSEL, VISITORS**

According to Florida Statutes 744.3215:

- (1) A person who has been determined to be incapacitated retains the right:
- (k) To have access to the courts.
  - (l) To counsel.
  - (m) To receive visitors and communicate with others.

## **NOTICE OF ALL PROCEEDINGS**

According to Florida Statutes 744.3215,

- (1) A person who has been determined to be incapacitated retains the right:
- (n) To notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice.

# PRIVACY

According to Florida Statutes 744.3215:

- (1) A person who has been determined to be incapacitated retains the right:
- (o) To privacy.



Florida Statutes 744.3215 states:

(2) Rights that may be removed from a person by an order determining incapacity ***but not delegated to a guardian include the right:***

- (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.
- (b) To vote.
- (c) To personally apply for government benefits.
- (d) To have a driver license.
- (e) To travel.
- (f) To seek or retain employment.

(3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right:

- (a) To contract.
- (b) To sue and defend lawsuits.
- (c) To apply for government benefits.
- (d) To manage property or to make any gift or disposition of property.
- (e) To determine his or her residence.
- (f) To consent to medical and mental health treatment.
- (g) To make decisions about his or her social environment or other social aspects of his or her life.

(4) Without first obtaining specific authority from the court, as described in s. 744.3725, a guardian may not:

- (a) Commit the ward to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to chapter 393, chapter 394, or chapter 397.
- (b) Consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure or to the participation by the ward in any biomedical or behavioral experiment. The court may permit such performance or participation only if:

- 1. It is of direct benefit to, and is intended to preserve the life of or prevent serious impairment to the mental or physical health of the ward; or
  - 2. It is intended to assist the ward to develop or regain his or her abilities.
- (c) Initiate a petition for dissolution of marriage for the ward.
  - (d) Consent on behalf of the ward to termination of the ward's parental rights.
  - (e) Consent on behalf of the ward to the performance of a sterilization or abortion procedure on the ward.

# Abuse, Neglect, or Exploitation by a Guardian

According to Florida Statutes 744.359 regarding abuse, neglect, or exploitation by a guardian

- (1) A guardian may not abuse, neglect, or exploit a ward.
- (2) A guardian has committed exploitation when the guardian:
  - (a) Commits fraud in obtaining appointment as a guardian
  - (b) Abuses his or her powers; or
  - (c) Wastes, embezzles, or intentionally mismanages the assets of the ward.
- (3) 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.
- (4) This section shall be interpreted in conformity with s. 825.103.

825.103 Exploitation of an elderly person or disabled adult; penalties

- (1) "Exploitation of an elderly person or disabled adult" means:
  - (a) Knowingly obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to

benefit someone other than the elderly person or disabled adult, by a person who:

1. Stands in a position of trust and confidence with the elderly person or disabled adult; or
2. Has a business relationship with the elderly person or disabled adult
  - (b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent;
  - (c) Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian, trustee who is an individual, or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property. An unauthorized appropriation under this paragraph occurs when the elderly person or disabled adult does not receive the reasonably equivalent financial value in goods or services, or when the fiduciary violates any of these duties:
    1. For agents appointed under chapter 709:
      - a. Committing fraud in obtaining their appointments
      - b. Abusing their powers
      - c. Wasting, embezzling, or intentionally mismanaging the assets of the principal or beneficiary; or
      - d. Acting contrary to the principal's sole benefit or best interest; or
    2. For guardians and trustees who are individuals and who are appointed under chapter 736 or chapter 744:
      - a. Committing fraud in obtaining their appointments
      - b. Abusing their powers; or
      - c. Wasting, embezzling, or intentionally mismanaging the assets of the ward or beneficiary of the trust
  - (d) Misappropriating, misusing, or transferring without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer. This paragraph only applies to the following types of accounts:

1. Personal accounts
2. Joint accounts created with the intent that only the elderly person or disabled adult enjoys all rights, interests, and claims to moneys deposited into such account; or
3. Convenience accounts created in accordance with s. 655.80; or  
(e) Intentionally or negligently failing to effectively use an elderly person's or disabled adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver or a person who stands in a position of trust and confidence with the elderly person or disabled adult.

(2) Any inter vivos transfer of money or property valued in excess of \$10,000 at the time of the transfer, whether in a single transaction or multiple transactions, by a person age 65 or older to a nonrelative whom the transferor knew for fewer than 2 years before the first transfer and for which the transferor did not receive the reasonably equivalent financial value in goods or services creates a permissive presumption that the transfer was the result of exploitation.

(a) This subsection applies regardless of whether the transfer or transfers are denoted by the parties as a gift or loan, except that it does not apply to a valid loan evidenced in writing that includes definite repayment dates. However, if repayment of any such loan is in default, in whole or in part, for more than 65 days, the presumption of this subsection applies.

(b) This subsection does not apply to:

1. Persons who are in the business of making loans.
2. Bona fide charitable donations to nonprofit organizations that qualify for tax exempt status under the Internal Revenue Code.

(c) In a criminal case to which this subsection applies, if the trial is by jury, jurors shall be instructed that they may, but are not required to, draw an inference of exploitation upon proof beyond a reasonable doubt of the facts listed in this subsection. The presumption of this subsection imposes no burden of proof on the defendant.

(3)(a) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$50,000 or more, the offender commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$10,000 or more, but less than \$50,000, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If the funds, assets, or property involved in the exploitation of an elderly person or disabled adult is valued at less than \$10,000, the offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) If a person is charged with financial exploitation of an elderly person or disabled adult that involves the taking of or loss of property valued at more than \$5,000 and property belonging to a victim is seized from the defendant pursuant to a search warrant, the court shall hold an evidentiary hearing and determine, by a preponderance of the evidence, whether the defendant unlawfully obtained the victim's property. If the court finds that the property was unlawfully obtained, the court may order it returned to the victim for restitution purposes before trial on the charge. This determination is inadmissible in evidence at trial on the charge and does not give rise to any inference that the defendant has committed an offense under this section.



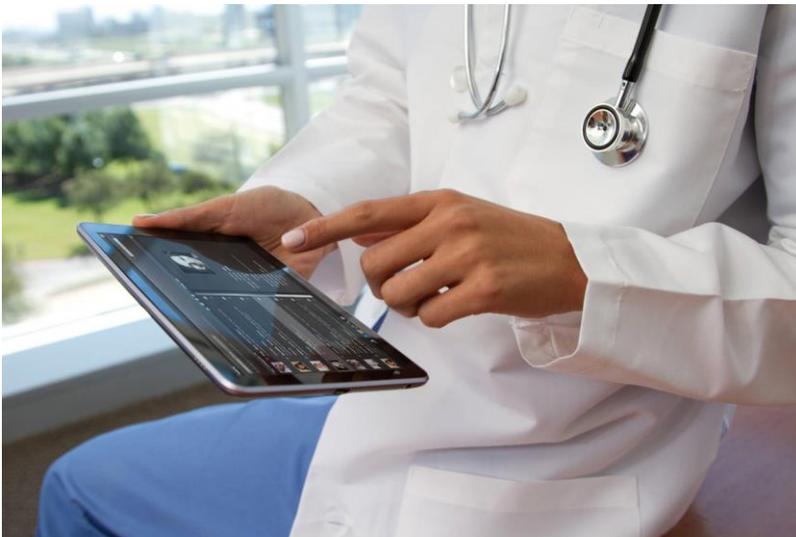
According to Florida Statutes 744.331:

744.331 (3)

(f) The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be filed by each examining committee member as part of his or her written report. The

comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision. The comprehensive examination must include, if indicated:

1. A physical examination
2. A mental health examination, and
3. A functional assessment.



According to Florida Statutes 744.331:

If any of these three aspects of the examination is not indicated or cannot be accomplished for any reason, the written report must explain the reasons for its omission.

(g) Each committee member's written report must include:

1. To the extent possible, a diagnosis, prognosis, and recommended course of treatment.

2. An evaluation of the alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.

3. The results of the comprehensive examination and the committee member's assessment of information provided by the attending or family physician, if any.

4. A description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.

5. The names of all persons present during the time the committee member conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.

6. The signature of the committee member and the date and time the member conducted his or her examination.

(h) Within 3 days after receipt of each examining committee member's report, the clerk shall serve the report on the petitioner and the attorney for the alleged incapacitated person by electronic mail delivery or United States mail, and, upon service, shall file a certificate of service in the incapacity proceeding. The petitioner and the attorney for the alleged incapacitated person must be served with all reports at least 10 days before the hearing on the petition, unless the reports are not complete, in which case the petitioner and attorney for the alleged incapacitated person may waive the 10 day requirement and consent to the consideration of the report by the court at the adjudicatory hearing. If such service is not timely effectuated, the petitioner or the alleged incapacitated person may move for a continuance of the hearing.

(i) The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examining committee members' reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing.

The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the reports' admissibility. For good cause shown, the court may extend the time to file and serve the written objection.

## The availability of local resources to aid the ward

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### **RESOURCES:**

[Florida Department of Children & Families \(DCF\)](#)

[FLORIDA Department of Education](#)

DOEA Programs and Services:

#### **Home and Community-Based Programs and Services**

- [Adult Care Food Program](#)
- [Alzheimer's Disease Initiative](#)
- [Community Care For the Elderly \(CCE\)](#)
- [Comprehensive Assessment & Review for Long-Term Care Services \(CARES\)](#)
- [Congregate Meal and Nutrition Sites](#)
- [Elder Farmers Market Nutrition Program](#)
- [Emergency Home Energy Assistance Program \(EHEAP\)](#)
- [Health & Wellness](#)
- [Home Care for the Elderly \(HCE\)](#)
- [Medicaid Long-Term Care Services](#)
- [Memory Disorder Clinics](#)
- [National Family Caregiver Support Program](#)
- [Nutritional Education for Older Adults](#)
- [Nutrition Programs](#)
- [Nutrition Services Incentive Program](#)
- [Older Americans Act \(OAA\)](#)
- [Program of All-Inclusive Care for the Elderly \(PACE\)](#)
- [Respite for Elders Living in Everyday Families \(RELIEF\)](#)
- [Senior Companion Program](#)

- Statewide Medicaid Managed Care Long-Term Care Program (SMMC LTC)
- Supplemental Nutrition Assistance Program

### **Other Programs and Services**

- Adult Protective Services
- Comprehensive Assessment & Review for Long-Term Care Services (CARES)
- Disaster Preparedness
- Elder Abuse Prevention Program
- Elder Helpline
- Hospice and End-of-Life Care
- Insurance, Medicare, and Medicaid
- Intergenerational Connections
- Housing
- Long-Term Care Ombudsman Program
- Nursing Home Services (Agency for Health Care Administration Website)
- Public Guardianship
- Senior Community Service Employment Program (SCSEP)
- Senior Legal Services & Senior Legal Helpline
- Serving Health Insurance Needs of Elders (SHINE)
- Silver Alert and ListServ
- Transportation

**For additional resources:**

## **DEPARTMENT OF ELDER AFFAIRS:**

### **OFFICE OF PUBLIC AND PROFESSIONAL GUARDIANS (OPPG)**

### **PROGRAMS & HOW TO APPLY FOR SERVICES**

## **OPPG FACT SHEET**

**FOR MORE INFORMATION**

**REVIEW THE**

**FLORIDA STATUTES 744**

### **CONTACT:**

#### **Florida Department of Elder Affairs**

4040 Esplanade Way  
Tallahassee, FL 32399-7000  
Phone: 850-414-2000  
Fax: 850-414-2004  
TDD: 850-414-2001  
Email: [information@elderaffairs.org](mailto:information@elderaffairs.org)

Questions about Programs and How to Apply for Services

Call the Elder Helpline at **1-800-96-ELDER (1-800-963-5337)** to find out information regarding eligibility to receive benefits and services from one or more programs.

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