

TRAIN FOR SUCCESS INC.
DUTIES OF THE EXAMINING COMMITTEE MEMBER
2Hr

Prepared by course Presenters:

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PURPOSE

The purpose of this course is to educate and reinforce the knowledge of the Examining Committee Members, Guardians, Nurses and other professionals who are working within various settings and the health care environment; as well as other students/ individuals regarding the duties of the Examining Committee Member, procedures to determine incapacity, dismissal of Petition, adjudicatory Hearing, order determining Incapacity, rights of persons determined incapacitated, various aspects of the rights of persons determined incapacitated, measures that can help to ensure that those rights are understood and honored and the availability of local resources to aid the ward.

Objectives

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

1. Describe the duties of the Examining Committee Member
2. Discuss the procedures to determine incapacity
3. Discuss dismissal of Petition
4. Describe adjudicatory Hearing procedures
5. Discuss order determining incapacity
6. Identify the rights of persons determined incapacitated
7. Describe the availability of local resources to aid the ward.

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EXAMINING COMMITTEE

According to Florida Statutes 744.331 (3) (a), within 5 days after a petition for determination of incapacity has been filed, the court shall appoint an examining committee consisting of 3 members.

One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or 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.



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Florida Statutes 744.331 (3) states that:

One of three members of the committee must have knowledge of the type of incapacity alleged in the petition. Unless good cause is shown, the attending or family physician may not be appointed to the committee.

If the attending or family physician is available for consultation, the committee must consult with the physician. Members of the examining committee may not be related to or associated with one another, with the petitioner, with counsel for the petitioner or the proposed guardian, or with the person alleged to be totally or partially incapacitated.

A member may not be employed by any private or governmental agency that has custody of, or furnishes, services or subsidies, directly or indirectly, to the person or the family of the person alleged to be incapacitated or for whom a guardianship is sought. A petitioner may not serve as a member of the examining committee.

COMMUNICATION

According to Florida Statutes 744.331 (3) (a):

Members of the examining committee must be able to communicate, either directly or through an interpreter, in the language that the alleged incapacitated person speaks or to communicate in a medium understandable to the alleged incapacitated person if she or he is able to communicate. The clerk of the court shall send notice of the appointment to each person appointed no later than 3 days after the court's appointment.

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According to Florida Statutes 744.331 (3) (b) A person who has been appointed to serve as a member of an examining committee to examine an alleged incapacitated person may not thereafter be appointed as a guardian for the person who was the subject of the examination.

Affidavit with the court

Each person appointed to an examining committee **must file** an affidavit with the court stating that he or she has completed the required courses or will do so no later than 4 months after his or her initial appointment. Each year, the chief judge of the circuit must prepare a list of persons qualified to be members of an examining committee. 744.331 (3) (c).

COMPLETE A MINIMUM OF 4 HOURS OF INITIAL TRAINING

According to Florida Statutes 744.331:

744.331 (3)(d) A member of an examining committee must complete a minimum of 4 hours of initial training. The person must complete 2 hours of continuing education during each 2-year period after the initial training. The initial training and continuing education program must be developed under the supervision of the Office of Public and Professional Guardians, in consultation with the Florida Conference of Circuit Court Judges; the Elder Law and the Real Property, Probate and Trust Law sections of The Florida Bar; and the Florida State Guardianship Association. The court may waive the initial training requirement for a person who has served for not less than 5 years on examining committees. If a person wishes to obtain his or her continuing education on

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the Internet or by watching a video course, ***the person must first obtain the approval of the chief judge before taking an Internet or video course.***



(e) Each member of the examining committee shall examine the person. Each examining committee member must determine the alleged incapacitated person's ability to exercise those rights specified in s. 744.3215.

In addition to the examination, each examining committee member must have access to, and may consider, previous examinations of the person, including, but not limited to, habilitation plans, school records, and psychological and psychosocial reports voluntarily offered for use by the alleged incapacitated person.

Each member of the examining committee must submit a report within 15 days after appointment.

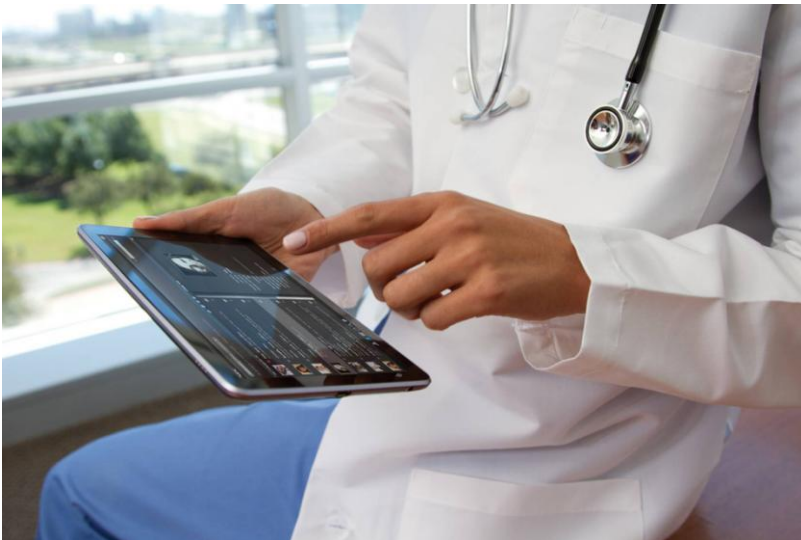
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(f) The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be filed by each examining committee member as part of his or her written report.

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.



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.

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Committee Member's written report

(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) A copy of each committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 5 days before the hearing on the petition.

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Dismissal of Petition

According to Florida Statutes 744.331 (4), if a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition.



ADJUDICATORY HEARING

According to Florida Statutes 744.331 (5):

(a) Upon appointment of the examining committee, the court shall set the date upon which the petition will be heard. The date for the adjudicatory hearing must be set no more than 14 days after the filing of the reports of the examining committee members, unless good cause is shown. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process.

(b) The alleged incapacitated person must be present at the adjudicatory hearing, unless waived by the alleged incapacitated person or the person's attorney or unless good cause can be shown for her or his absence. Determination of good cause rests in the sound discretion of the court.

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(c) In the adjudicatory hearing on a petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.



PROCEDURES TO DETERMINE INCAPACITY

NOTICE OF PETITION TO DETERMINE INCAPACITY

According to the Florida Statutes 744.33:

Notice of the filing of a petition to determine incapacity and a petition for the appointment of a guardian if any and copies of the petitions must be served on and read to the alleged incapacitated person. 744.331(1).

The notice and copies of the petitions must also be given to the attorney for the alleged incapacitated person, and served upon all next of kin identified in the petition.

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The notice must state the time and place of the hearing to inquire into the capacity of the alleged incapacitated person and that an attorney has been appointed to represent the person and that, if she or he is determined to be incapable of exercising certain rights, a guardian will be appointed to exercise those rights on her or his behalf.
744.331 (1).

ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON

According to the Florida Statutes 744.331 (2) (a), when a court appoints an attorney for an alleged incapacitated person, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6).

A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this chapter.

(b) 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.

(c) Any attorney representing an alleged incapacitated person **may not serve as** guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.

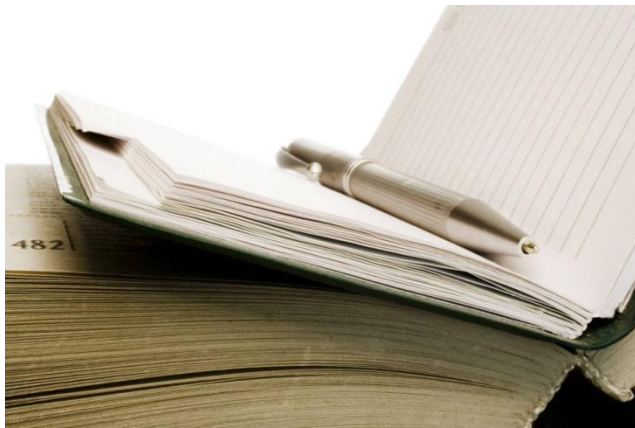
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Minimum of 8 hours of education in guardianship

According to the Florida Statutes 744.331 (2) (d):

Effective January 1, 2007, an attorney seeking to be appointed by a court for incapacity and guardianship proceedings must have **completed a minimum of 8 hours of education in guardianship.**

A court may 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. The education requirement of this paragraph does not apply to the office of criminal conflict and civil regional counsel until July 1, 2008.



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Order Determining Incapacity



According to Florida Statutes 744.331 (6):

If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity.

In determining incapacity, the court shall consider the person's unique needs and abilities and may only remove those rights that the court finds the person does not have the capacity to exercise.

A person is determined to be incapacitated only with respect to those rights specified in the order.

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According to Florida Statutes 744.331 (6):

(a) The court shall make the following findings:

1. The exact nature and scope of the person's incapacities,
2. The exact areas in which the person lacks capacity to make informed decisions about care and treatment services or to meet the essential requirements for her or his physical or mental health or safety,
3. The specific legal disabilities to which the person is subject, and
4. The specific rights that the person is incapable of exercising.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person.

A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person.

If the court finds there is not an alternative to guardianship that sufficiently addresses the problems of the incapacitated person, a guardian must be appointed to exercise the incapacitated person's delegable rights.

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Totally incapacitated

According to Florida Statutes 744.331 (6):

(c) In determining that a person is totally incapacitated, the order must contain findings of fact demonstrating that the individual is totally without capacity to care for herself or himself or her or his property.

(d) An order adjudicating a person to be incapacitated constitutes proof of such incapacity until further order of the court.

(e) After the order determining that the person is incapacitated has been filed with the clerk, it must be served on the incapacitated person. The person is deemed incapacitated only to the extent of the findings of the court. The filing of the order is notice of the incapacity. An incapacitated person retains all rights not specifically removed by the court.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and
2. A reasonable factual basis for that belief, the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian.

The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the agent.

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Rights of persons determined incapacitated

According to Florida Statutes 744.3215:

- (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.
 - (b) To have continuing review of the need for restriction of his or her rights.
 - (c) To be restored to capacity at the earliest possible time.
 - (d) To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation.
 - (e) To have a qualified guardian.
 - (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.

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- (g) To be properly educated.
 - (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.
 - (i) To receive services and rehabilitation necessary to maximize the quality of life.
 - (j) To be free from discrimination because of his or her incapacity.
 - (k) To have access to the courts.
 - (l) To counsel.
 - (m) To receive visitors and communicate with others.
 - (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.
 - (o) To privacy.
- (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.

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(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.

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The availability of local resources to aid the ward

RESOURCES:

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

[FLORIDA Department of Education](#)

DOEA Programs and Services:

Home and Community-Based Programs and Services

(click on links)

- [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 \(PACE\)](#)

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- [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 Services

- [Adult Protective Services](#)
- [Communities For a Lifetime](#)
- [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](#)

DEPARTMENT OF ELDER AFFAIRS:

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

**PROGRAMS & HOW TO
APPLY FOR SERVICES**

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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

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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.

TAKE EXAM

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