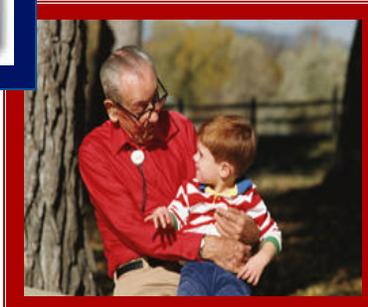


# Guardianship monitoring in Florida:

# Fulfilling the Court's duty to protect wards



**Guardianship** is the process by which a court finds a person's ability to make decisions so impaired because of mental and/or physical disabilities, that the right to make decisions is legally granted to another party. That party, known as a guardian, becomes the surrogate decision-maker in personal and/or financial matters for the incapacitated person, known as a "ward."

2003

# **GUARDIANSHIP MONITORING**

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## **DEDICATION**

*This report is dedicated to the memory of Kenneth R. Palmer, who proposed that guardianship monitoring be included as a study topic within the September 1, 1999, administrative order reauthorizing the Supreme Court Commission on Fairness. Mr. Palmer died of cancer at the age of 54, on April 20, 2001, having served as State Courts Administrator since 1984. The State Courts System and the Floridians it serves – including the wards who are the subject of this report – have lost a great leader, supporter, and defender.*

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## **MISSION OF GUARDIANSHIP MONITORING**

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***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.***

## ***EXECUTIVE SUMMARY***

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A guardian is a surrogate decision-maker appointed by the court to make personal and/or financial decisions either (1) for an adult with mental or physical disabilities who has been adjudicated incapacitated; or (2) for a minor in circumstances where the parents die or become incapacitated or if a child receives an inheritance, proceeds of a lawsuit, or insurance policy exceeding the amount allowed by statute. There are between 30,000 and 40,000 open guardianships in Florida at any given time. When the court removes an adult's rights to order his or her own affairs, there is an accompanying duty to protect the individual.

Guardianship is a distinct and unique type of judicial matter. Unlike other cases, guardianships may remain open for years or even decades, particularly in cases involving adults with developmental or mental disabilities. 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 inevitable aging of our State and Nation, situations leading to minor guardianships, and the incidence of developmental disabilities and mental disorders will influence public policy considerations for the foreseeable future. Already the Florida legal system is confronting and seeking answers to essential issues, such as how the courts will be able to adequately exercise their legal, ethical, and moral responsibilities to monitor guardianship cases and protect the incapacitated adults entrusted to their care.

The role of a guardian is highly complex, involving legal, social, financial, and psychological dimensions. While most guardians and attorneys do an admirable job, it is necessary for courts to actively exercise their oversight responsibility in guardianship cases in order to protect and preserve the interests of persons with a legal incapacity. 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. Accordingly, guardianship monitoring should be conducted in the least burdensome and disruptive manner possible that effectively accomplishes the goal of protecting wards.

***Based on its review, the Committee adopted the following findings, which are explained in greater detail throughout the report:***

- Most guardians and attorneys do an admirable job; however, there is a need for greater oversight, to protect individuals who are subject to guardianship.
- An ideal guardianship monitoring program encompasses four major service areas: (1) initial and on-going screening and reviewing of guardians; (2) reporting on the well-being of the ward; (3) reporting on the protection of the ward's assets; and (4) case administration.
- Minimum requirements for guardianship monitoring should be established and the monitoring process should be well defined.
- Insofar as possible, the monitoring process should be transparent and open, and communication between the monitor and the judge should be in writing and become part of the official court record.
- Uniform reporting forms should be adopted on a statewide basis.
- There is a need for a well-defined process for review of the annual plan and validation of the well-being of the ward.
- There is a need for well-defined financial audits, with graduating levels of review as appropriate. Guardianship cases should be audited based on a statistical random sampling, as well as when a problem is indicated.
- It is sound public policy for guardianship monitoring to be available in every judicial circuit. Monitoring will require additional resources in order to adequately oversee guardianship cases. The cost of monitoring can be mitigated through the effective use of technology.
- Existing guardianship monitoring programs that utilize well-trained and experienced professional staff are working well.
- Monitoring programs that rely entirely upon volunteers are not always efficient and effective. Although well intentioned, volunteers often lack knowledge and experience with the complex medical, legal, and financial issues involved in adult guardianship cases.
- There is a need for statewide equity in regard to compensation of attorneys and guardians. Additionally, guardian and attorney fees should be paid in a timely manner.
- There is a need to recruit highly qualified, motivated, and trained professionals into the guardianship field – both as guardians and attorneys.
- Judges would benefit from additional training on elder, disability, abuse and neglect, and guardianship issues.

## **INTRODUCTION**

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A guardian is a surrogate decision-maker appointed by the court to make either personal and/or financial decisions for a minor or for an adult with mental or physical disabilities. After adjudication, the subject of the guardianship is termed a “ward.”

Florida law requires the court to appoint a guardian for minors in circumstances where the parents die or become incapacitated, or if a child receives an inheritance or proceeds of a lawsuit or insurance policy exceeding the amount allowed by statute.

Adult guardianship is the process by which the court finds an individual’s ability to make decisions so impaired that the court gives the right to make decisions to another person. 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.

Florida law allows both voluntary and involuntary guardianships. A voluntary guardianship may be established for an adult who, though mentally competent, is incapable of managing his or her own estate and who voluntarily petitions for the appointment.

Legislative intent establishes that the least restrictive form of guardianship is desirable. Accordingly, Florida law provides for limited as well as plenary adult guardianship. A limited guardianship is appropriate if the court finds the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property; and if the individual does not have pre-planned, written instructions for all aspects of his or her life. A plenary guardian is a person appointed by the court to exercise all delegable legal rights and powers of the adult ward after the court makes a finding of incapacity. Wards in plenary guardianships are, by definition, unable to care for themselves.

Whether one is dealing with a minor whose assets must be managed by another or an adult with a disability who is not capable of making decisions for him/herself, when the court removes an individual’s rights to order his or her own affairs there is an accompanying duty to protect the individual. One of the court’s duties is to appoint a guardian. All adult and minor guardianships are subject to court oversight.

The legal authority for guardianship in Florida is found in Chapter 744, Florida Statutes. The court rules that control the relationships among the court, the ward, the guardian, and the attorney are found in Part III, Probate Rules, Florida Rules of Court. Together, these statutes and rules describe the duties and obligations of guardians and attorneys, as well as the court, to ensure that they act in the best interests of the ward, minor, or person who is alleged incapacitated.

In recognition of the court system’s responsibility to oversee guardianship cases and thereby ensure that wards are adequately protected, by administrative order dated September 1, 1999, former Chief Justice Major B. Harding directed the Supreme Court Commission on Fairness to “investigate and report on various models for guardianship monitoring.” The Commission established the Guardianship Monitoring Committee and charged it with fulfilling this directive.

Committee membership included probate judges, chief judges, court staff, representatives of the Statewide Public Guardianship Office, attorneys with experience in guardianship matters, academics, and professionals in the field of social work. In addition to relying on their considerable direct experience, the Committee reviewed available literature on the subject, visited Florida courts that are experimenting with innovative guardianship monitoring methods, and conducted public hearings around the state to receive input from guardians, clerks of court, attorneys, advocates, and other interested persons.

The Committee found that while most guardians and attorneys do an admirable job, more 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.

The emotional and financial complexity inherent in family guardianship situations may be compounded by the fact that the family has recently suffered a tragedy resulting in the need for a guardianship. 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 and financial reports.

Often, an elderly wife cannot spend her husband's share of their money on home repairs, birthday presents, or tax-preparer fees without first filing a written request with the court, which petition may or may not be granted. In the case of a minor guardianship, a parent cannot use the child's money to buy braces, cheerleading clothes, basketball shoes, or a prepaid college plan without doing the same. Accordingly, guardianship monitoring should be conducted in the least burdensome and disruptive manner possible that effectively accomplishes the goal of protecting wards and maintaining their pre-guardianship lifestyle.

The Committee found that it is sound public policy for guardianship monitoring programs to be adequately funded in every judicial circuit, either by the State of Florida or by local government. Regrettably, guardianship monitoring resources are, at best, marginally funded in this State. Only three circuits out of twenty – the Sixth, Thirteenth, and Seventeenth – have the advantage of full-time professional staff for this purpose, and only one of those programs – the Seventeenth – is partially funded by the State. The Committee recommends that where the caseload warrants, dedicated professional staff should be authorized. In those circuits whose caseloads do not warrant full-time dedicated staff, the court should be provided with access to trained and experienced monitors upon request.

This report documents what the Committee learned during the course of its review, and describes the elements of an ideal guardianship monitoring program.

## ***COMMITTEE PROCESS***

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The Committee was comprised of probate judges, chief judges, court staff, representatives of the Statewide Public Guardianship Office, attorneys with experience in guardianship matters, academics, and professionals in the field of social work.

The Committee commenced its examination with a literature review, followed in April 2000 with a two-day workshop in Ft. Lauderdale. During the workshop, the Committee developed a mission statement for guardianship monitoring, began to describe the monitoring process, and identified a preliminary list of issues to study.

Presentations were received from circuits that are implementing innovative approaches to guardianship monitoring, including a visit to the Thirteenth Judicial Circuit's Elder Justice Center and a presentation on guardianship initiatives in the Seventeenth Judicial Circuit. Two surveys were conducted in order to obtain information about guardianship monitoring practices in the twenty judicial circuits.

In the fall of 2000, the Committee hosted three public hearings – in Ft. Lauderdale, Tallahassee, and St. Petersburg – to gather testimony from attorneys, judges, professional and family guardians, clerks of court, family members, advocates, and other interested individuals. Additional outreach included posting information about the Committee's work on the Florida Courts Website ([www.flcourts.org](http://www.flcourts.org)) and publishing articles in professional newsletters.

The committee met four additional times in person and multiple times by telephone conference call, to discuss what it had learned and to develop this report.

## ***GROWING NEED FOR GUARDIANSHIP IN FLORIDA***

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Florida courts are facing a growing number of guardianship cases and issues. While there are currently no accurate statewide statistics on the number of open guardianship cases, responses to surveys by the Guardianship Monitoring Committee indicate there are in the range of 30,000-40,000 open guardianships in Florida at any given time. In 1996, there were more than 49,000<sup>1</sup> judicial reviews of guardianship issues, involving either a review of an annual plan or some other court action. This number grew to well over 63,000 in 2000, which represents a 28% increase within five years.

Furthermore, these figures represent only the persons for whom a formal guardianship has been sought. There are many other persons who do not require a guardianship because they obtained powers of attorney, health care directives, or other pre-planned documents in advance of incapacity. Unfortunately, there are thousands of incapacitated adult Floridians who may require a guardian, but whose needs remain undetected and unmet. The Statewide Public Guardianship Office estimates the unmet need to exceed 22,500 incapacitated persons statewide. Most of these individuals are indigent and would be eligible for public guardianship services. However, Florida's public guardianship program is woefully underfunded. The State currently funds only three programs, in Leon, Broward, and Hillsborough counties. Additionally, there are public guardianship programs in Miami-Dade, Palm Beach, Osceola, Volusia, Collier, and Lee counties that are funded with local public money. The total public guardianship capacity in Florida is currently less than 1,750. All existing programs are filled to capacity and cannot accept additional wards. The Department of Children and Families has expressed the immediate need for a public guardian to be appointed to represent 2,495 individuals with developmental disabilities who are coming to the age of majority.

**Scenario: An elderly wife has cared for her husband with Alzheimer's disease in their home as long as possible, but her own health and funds are being depleted. The parties, not accustomed to obtaining legal services, neglected to obtain Powers of Attorney in advance. The wife is now forced into the situation of placing her husband in a nursing home, obtaining guardianship, and selling some joint assets to pay the bills. The parties have been married for 47 years and meant it when they said "until death do us part."**

The remaining incapacitated adults who have not been brought to the court's attention and for whom no guardianship services exist, may be languishing without appropriate physical and/or mental care and their meager finances may be susceptible to unscrupulous persons. As John Grant, former executive director of the Statewide Office of the Public Guardian stated in a October 16, 2000, letter to former Chief Justice Charles Wells:

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<sup>1</sup> Per Summary Reporting System (SRS) data from the Office of the State Courts Administrator, run on September 6, 2001. Please note that SRS data are used as a base for workload measures for judges. These data are based on information received from the Clerks of Court.

Those to be served by a public guardianship program are some of Florida's most silent citizens. They don't have assets, they don't vote, and they are easily forgotten. But they are human beings, many of whom have lived exemplary lives, paying their taxes, educating their children, serving their community, and who now find themselves in the sunset years of life with neither family nor assets to manage for themselves.

Given the demographics of the Nation and State, the trend toward growth in the number of incapacitated persons – and accompanying guardianships – is certain to continue. The incapacitated population of tomorrow will have different social, demographic, health, and economic characteristics than that of today. According to reports by the United States Census Bureau<sup>2</sup> and other sources:

- The population of our State and Nation is aging at an unbelievable and unprecedented rate.
  - During the Twentieth Century, the lifespan of the average American nearly doubled.<sup>3</sup>
  - Over 2.7 million Floridians, or 18.3%, are 65 years and over, compared to the national average of 12.7%. In fact, this State has the greatest proportion of residents over 65, and nearly 8% of all Americans over the age of 65 live in Florida.
  - The “oldest old” – those aged 85 and over – are the most rapidly growing elderly age group. More than 310,000 Floridians, or 2.1%, are 85 years and over, compared to the national average of 1.5%.
  - Between 2010 and 2030, the over 65 population will rise over 70 percent.<sup>4</sup>
  
- The elderly in our country are becoming more racially and ethnically diverse.
  - In 1994, 10% of the elderly were a race other than White. By 2050, this proportion is expected to rise to at least 20%. Similarly, the proportion of elderly who are Hispanic is expected to climb from 4% to 16% over the same period.
  - In 1990, 12% of all elderly persons in the United States spoke some language other than English at home.

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<sup>2</sup> Unless otherwise indicated, the following elder data, statistics, and trends are drawn from the United States Census Bureau's Statistical Brief Sixty-Five Plus in the U.S. and 1997 Current Population Report by Jack McNeil, Americans with Disabilities Household Economic Studies, issued February 2001. See U.S. Census Bureau data at [www.census.gov/population/estimates/state/st98elderly.txt](http://www.census.gov/population/estimates/state/st98elderly.txt)

<sup>3</sup> Mental Health: A Report of the Surgeon General, [www.surgeongeneral.gov/library/mentalhealth/home.html](http://www.surgeongeneral.gov/library/mentalhealth/home.html)

<sup>4</sup> Policy Challenges Posed by the Aging of America, May 1998, Urban Institute Board of Trustees Meeting; see [www.urban.org/health/oldpol.html](http://www.urban.org/health/oldpol.html).

- Our elders are becoming more isolated from their families.
  - Most elders live alone.
  - Nationally, elders not living with relatives or living alone were more likely to be poor (25%) in 1992, than elders who are living in a familial-type relationship (6%).
  - Elderly parents living apart from their children are more likely to use social services than elderly parents residing with their children.<sup>5</sup>
  - Elderly women outnumber elderly men, and are less likely than men to live in a family setting. After age 75, most women are widowed and live alone, while most men are married and live with their wives. Thus, while most elderly men have a spouse for assistance, especially when health fails, most elderly women do not. In 1993, 8 in 10 noninstitutionalized elderly who lived alone were women.
  - The likelihood of living in a nursing home increases with age. In 1990, over 73,000 Floridians resided in nursing homes. Ninety percent of all nursing home residents are elderly; 7 in 10 are female, and 1 in 3 is a woman aged 85 or over.
- As the population ages, more people will face becoming dependent on others for help in performing the activities of daily living
  - The likelihood of having a disability increases with age. In 1997, among those 65 to 69 years old, 44.9% had some form of disability, 30.7% had a severe disability, and 8.1% needed personal assistance. For those 80 years old and over, 73.6% had some form of disability, 57.6% had a severe disability, and 34.9% needed personal assistance.
  - In 1990, elderly persons with a self-care or mobility limitation were more likely to be poor (20%) than elderly persons without such limitations (11%).
  - The rate of functional limitation is higher among elderly Blacks than Whites. Among the population 65 years and over, 59% of Blacks had one or more functional limitations compared with 49% of Whites. The limitations were more likely to be severe among elderly Blacks, as 40% had limitations that were severe compared with 27% of White elderly.<sup>6</sup>
  - Overall, in 1997 women made up the majority of the individuals with disabilities, including severe disabilities, and those needing personal assistance.

<sup>5</sup>Namkee G. Choi, "Patterns and Determinants of Social Service Utilization: Comparison of the Childless Elderly and Elderly Parents Living With or Apart from Their Children," *The Gerontologist*, Vol. 34, No. 3, 1994, pp. 353-362.

<sup>6</sup>United States Census Bureau's Statistical Brief Sixty-Five Plus in the U.S. and 1997 Current Population Report by Jack McNeil, *Americans with Disabilities Household Economic Studies*, issued February 2001; see [www.census.gov/population/estimates/state/st98elderly.txt](http://www.census.gov/population/estimates/state/st98elderly.txt)

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Additionally, adults of any age may become incapacitated and require the appointment of a guardian, on an either permanent or temporary basis. Oftentimes, guardianship is necessary to ensure the care of individuals with developmental disabilities who have reached the age of majority. Mental disorders may also require the appointment of a guardian. As stated in a recent report by the United States Surgeon General, “mental health and mental illnesses are important concerns at all ages.”<sup>7</sup> Some illustrative facts follow:

- Nearly 2 million people, or almost 22%, of the civilian noninstitutionalized population in Florida between the ages of 21 and 64, have a disability.<sup>8</sup>
- Developmental Disabilities:
  - A developmental disability is a chronic condition that significantly limits a person’s ability to speak, hear, see, walk, learn, or perform fundamental tasks involved in providing self-care, living independently, or earning a living.<sup>7</sup>
  - The majority of people with developmental disabilities have more than one disability, and most have disabling conditions that are intellectual or emotional in nature.<sup>7</sup>
  - Because their disabilities restrict their communication, mobility, and ability to care for themselves, people with developmental disabilities may rely on assistance from others.<sup>9</sup>
  - Seventeen percent (17%) of United States children under 18 have a developmental disability, and 2% of school-aged children in the United States have a serious developmental disability such as mental retardation.<sup>10</sup>
- Mental Disorders:<sup>11</sup>
  - Mental disorders are health conditions that are characterized by alterations in thinking, mood, or behavior associated with distress and/or impaired functioning.

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<sup>7</sup>Mental Health: A Report of the Surgeon General, [www.surgeongeneral.gov/library/mentalhealth/home.html](http://www.surgeongeneral.gov/library/mentalhealth/home.html).

<sup>8</sup>U.S. Census Bureau, Census 2000.

<sup>9</sup>Florida Developmental Disabilities Council, Inc., [www.fdcc.org](http://www.fdcc.org); see also Chapter 393, Florida Statutes.

<sup>10</sup>CDC National Center on Birth Defects and Developmental Disabilities, [www.cdc.gov/ncbddd/dd/](http://www.cdc.gov/ncbddd/dd/).

<sup>11</sup>Mental Health: A Report of the Surgeon General, [www.surgeongeneral.gov/library/mentalhealth/home.html](http://www.surgeongeneral.gov/library/mentalhealth/home.html); see also Chapter 394, Florida Statutes.

- Devastating disorders such as schizophrenia, depression and bipolar disorder, dementia including Alzheimer's disease, and a range of other mental disorders affect nearly one in five Americans in any year.
- In the United States, mental disorders collectively account for more than 15% of the overall burden of disease from all causes and slightly more than the burden associated with all forms of cancer.
- The social consequences of serious mental disorders, such as family disruption, loss of employment and housing, can be calamitous.

Florida's youth population (ages 0-19) has also shown increasing growth rates over the past 30 years and now accounts for over 25% of the State's population.<sup>12</sup> In circumstances where the parents die or become incapacitated or if a child receives an inheritance or proceeds of a lawsuit or insurance policy exceeding the amount allowed by statute, the court must appoint a guardian.

The inevitable aging of our State and Nation, along with situations leading to minor guardianship as well as the incidence of developmental disabilities and mental disorders, will influence public policy considerations for the foreseeable future, and individuals, families, and governments will be forced to confront social, economic, and ethical choices. Already the Florida legal system is confronting issues and seeking answers to essential issues, such as how the courts will be able to adequately exercise their legal, ethical, and moral responsibilities to monitor guardianship cases and protect the incapacitated wards entrusted to their care. The expanding cultural differences of wards in the future will also demand an increasing cultural competence among judges and court staff assigned to guardianship cases.

Scenario: A father is killed in an automobile accident, leaving a wife and three minor children. A guardianship is necessary to settle the case, allocate the proceeds between the mother and children, and receive the children's share of the proceeds.

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<sup>12</sup>Florida Demographic Summary, updated October 2002, The Florida Legislature, Office of Economic & Demographic Research; see [www.state.fl.us/edr/population.htm](http://www.state.fl.us/edr/population.htm).

## ***EFFECTIVE GUARDIANSHIP MONITORING IS ESSENTIAL***

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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 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.

***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.***

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.

## **THE CURRENT SITUATION IN FLORIDA IS DESCRIBED AT PUBLIC HEARINGS** ———

At public hearings around the state, the Committee heard testimony about the need for increased court oversight of guardianship cases, as well as adequate resources to enable all the professionals involved in guardianship to effectively and efficiently perform their respective functions.

### **Judicial Input**

#### **The Sixth Judicial Circuit**

The Sixth Judicial Circuit has professional guardianship monitoring staff who are funded by Pasco and Pinellas counties. The circuit is now utilizing the firms and audit procedures developed in the Seventeenth Judicial Circuit.

#### **The Thirteenth Judicial Circuit**

In larger circuits where the caseloads warrant a separate division, typically one or very few judges are assigned to the Probate, Guardianship, and Mental Health Division. In smaller circuits, guardianship cases are usually heard by any of the judges who are assigned to the general Civil Division. Judge Susan Sexton, Administrative Judge of the Probate Division in the Thirteenth Judicial Circuit, is the only judge assigned to oversee approximately 7,000 probate, guardianship, and mental health cases. When she was initially assigned to the division, she received only the guardian report and a computation of the financial report, which was performed by the clerk's office. As a judge, she was concerned that she had neither the time nor adequate training to properly review the financial reports and guardianship plans. She believes that additional judicial education should be provided on guardianship reports.

Prior to the establishment of the Elder Justice Center there was no case management and only limited judicial assessment for the guardianship cases in the Thirteenth Judicial Circuit. The Elder Justice Center was established in October 1999, through grant funding from multiple sources. With the Center's monitoring function, the court now has the ability to appropriately review guardianship cases and make informed decisions regarding the wards. The Elder Justice Center utilizes a guardianship monitoring program that includes both professional staff and volunteer interns from the University of South Florida School of Social Work and Stetson University College of Law. The Center's goal is to visit every ward at least once a year.

The length of time it takes to review a guardianship file is reported to range from 30 minutes to four hours, which includes review of the financial reports and guardianship plans. Guardianship plans are audited to determine whether the reports are complete. Elder Justice Center staff look for continuity and changes since the last reports were filed. They also review the reports to ensure that all questions have been thoroughly answered and adequate information has been provided. If a potential problem is noted in the initial review, it may result in the case being "flagged" and a court monitor being appointed by the judge pursuant to section 744.107, Florida Statutes.

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## **The Fifteenth Judicial Circuit**

Judge John Wessel, of the Fifteenth Judicial Circuit, told the Committee that during his service in the Probate Division he became aware that judges and clerks of court – despite their best efforts – were still missing a lot of problems in guardianship cases. He provided background information on the development of the AARP model for volunteer guardianship monitors. In the AARP model, courts utilize volunteers to research the files, visit the wards, and report back to the court. Judge Wessel noted that the AARP withdrew from the initiative in 1998 and the national project leader has since retired, so state courts are now on their own with implementation of the program.

Judge Wessel successfully implemented a volunteer monitoring program in the Fifteenth Circuit, with very little taxpayer funding. However, there are drawbacks to the volunteer model, he indicated. For example, the financial auditing function was excluded from the volunteer program in the Fifteenth Circuit because of confidentiality concerns. Other limitations of the program include the fact that they are only able to serve one-half of the county and the continuing challenge of motivating people to serve as volunteers.

Nevertheless, these volunteer monitors are the eyes and ears of the court, and are a safeguard for the ward. After receiving training, the volunteer is required to review the file, visit the ward, and complete report forms. The court has found that about 20% of the wards who are visited have some kind of problem that needs to be addressed. After reviewing the volunteer monitor's report, the court takes follow-up action when necessary and appropriate. If there appears to be a substantial problem, Judge Wessel may appoint an experienced professional court monitor to further investigate the situation, prior to court action.

## **The Seventeenth Judicial Circuit**

Bob Twomey, supervisor of the court monitor unit in the Seventeenth Judicial Circuit, spoke about their program which was established approximately six years ago. They perform two major functions: field investigations generated by court orders to guard against abuse and neglect, exploitation, and theft; and annual background investigations on prospective guardians. There are over 5,000 active guardianship cases in Broward County. The unit conducts about 400 field investigations per year, and their efforts have uncovered crimes that resulted in referrals to the state attorney for prosecution. Mr. Twomey noted that in his experience the majority of crimes are committed by family-member guardians, rather than professional guardians. Mr. Twomey believes every circuit should have a monitoring program for the protection of wards.

The Committee also received a presentation on the accounting software developed by the Seventeenth Circuit, which was designed to address inconsistencies and problems that were occurring on a regular basis. With input from the clerk of court and guardianship attorneys, the court developed and implemented standardized guardianship accounting and plan forms that allow the court to conduct more effective and efficient reviews of the initial inventory, annual accounting, initial plan, and annual plan.

The standardized reporting forms resulted in more complete filings, reduced correspondence between the court and the guardian, greater effectiveness and efficiency during the initial review of filings, a reduction in review time, a reduction in backlogged filings, and more time available to perform detailed audits.

The Seventeenth Circuit established a three-level audit program that utilizes the standardized forms:

- Level One: audit all annual accountings with a five-step audit process.
- Level Two: perform statistical sampling of all reports that are found to be in compliance at Level One with Level Two checklist.
- Level Three: perform statistical sampling of complaint reports from Level Two. Detailed in-house and field audits of supporting documentation will be performed on the selected sample.

### **The Eighteenth Judicial Circuit**

Judge Nancy Alley, from the Eighteenth Judicial Circuit, who served as both a professional guardian and a guardianship attorney prior to becoming a judge, expressed concern about the ability to do her job well in the absence of court staff to assist with reviewing guardianship cases. The clerks of court in the Eighteenth Circuit perform excellent financial audits, she said, but there are other problems that are not obvious on paper. Among the problems she has observed in guardianship cases: guardians are not filing their annual reports on time, guardians do not show up for hearings in response to orders to show cause, and guardians do not cooperate with their attorneys. If resources were available, she would hire a professional to assist in monitoring the timeliness of filings, reviewing the results of the clerk's audit, conducting spot checks, and performing mental health follow-ups.

### **Clerk of Court Input**

Jed Pittman, Clerk of Court in Pasco County, described guardianship monitoring as real follow-through on the statutory provisions that were enacted to protect the ward. His office utilizes certified internal auditors, and conducts comprehensive and thorough reviews of the financial accountings. The work of the court monitor supplements – not supplants – the clerk's review. Monitors are the eyes of the court. They can see whether the ward actually has lodging, food, clothing, and treatment appropriate to the ward's condition.

Wally Dye, the auditor in the Pasco County Clerk's Office, also spoke about the work of their office. He reported that they screen professional guardians; however, staff who work for professional guardians are not screened. He believes staff who work directly with wards should be required to meet some of the same requirements as guardians. Definitions of financial audits should be developed and auditing standards should be adopted, he recommended. He believes a statistical sampling should be done, because in their experience, reviewing only cases where a problem is reported is not sufficient to protect wards and their assets. Training, experience, and background of auditors in guardianship cases should also be defined, as there are currently no requirements in this regard.

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In his position at the office of the Collier County Clerk of Court, Bruce Brister audits guardianship cases with a total of approximately \$75 million in assets. The average case has about \$100,000 in assets earning 5% interest. He believes financial audits should be required in all types of guardianship cases, with different levels of audit review as appropriate. The auditor should be organizationally located in the Probate Department of the Clerk's Office, Brister said, because that structure has contributed to the success of the auditing program in Collier County, because it allows him to stay informed about case filings, hearings, and other matters.

### **Citizen Input**

Steve Howells, a program director with the Advocacy Center for Persons with Disabilities, Inc., said there is abuse, neglect, and misuse of wards' funds in Florida, as evidenced by the complaints received by the Advocacy Center as well as various media reports. He noted that wards are among the most vulnerable citizens in our State, and said that Florida courts need to have a monitoring system in place to protect wards. Scott Fisher, a citizen from Palm Harbor whose aunt had been a ward, spoke passionately about the court's duty to protect vulnerable individuals. He expressed concern that incapacitated persons will not be adequately protected as long as there are no appropriate standards, guidelines, and oversight, on a statewide basis.

### **Guardian Input**

Kerry Fitzgerald and Meg Wolf, then-President and Vice-President of the Broward County Guardianship Association, said it is a high calling to be appointed to serve on behalf of an incapacitated person, and high standards must apply. The Association supports the development of statewide standards for monitoring of guardianship cases. They noted that Florida's rapidly-aging society is vulnerable, and there is a great need for qualified professional guardians who are willing to provide loving care, security, and safety to clients, based on their individual needs.

Judith Baxter, a professional guardian in Pasco County, spoke about the need for uniformity in the system – among guardians, attorneys, clerks, and judges. The guardianship system should be effectuated in a mutually-respectful, cost-effective manner that results in the best service to the ward. The Committee heard that court practices in guardianship cases varies widely, not only from circuit to circuit but sometimes even within the same county. Additionally, the court's expectations are not always clear. Better communication among the court, attorney, and guardian saves time, as well as conserves the ward's assets.

Professionals from around the state spoke about the need for statewide equity in the compensation of guardians and attorneys. The Committee was advised 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. Donna Hicks and Correy Pastore, of the Pinellas County Guardianship Association, told the Committee 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 first 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. In some circuits, up to 50 percent of a professional guardian's caseload is pro bono.

Mr. Pastore also spoke about the guardianship monitoring program in the Sixth Judicial Circuit. He said the program is well-established, having been implemented in Pinellas County prior to 1990. When first implemented, the monitoring program was greeted with fear, but now everyone works together and the program works very well. He believes court oversight is necessary. In their circuit, the monitor first tries to resolve any issues informally, before the problem escalates. The guardian and attorney are notified before the monitor takes an issue to the court, but if the monitor cannot resolve an issue, Mr. Pastore believes it is the monitor's duty to notify the court.

John Grant, the initial and former Executive Director of the Statewide Public Guardianship Office, which was established in 1999, pointed out that currently in Florida, professional guardians have very limited licensing and training requirements, and there is no disciplinary process. Further, they are not treated as professionals. He believes Florida is facing not only a crisis in indigent guardians, but also in professional guardians. In some circuits, there is not a single active professional guardian, he pointed out.

Numerous members of the Florida State Guardianship Association spoke about the Association's efforts to increase professionalism, through the implementation of improved training, a mentoring program, and a statewide registry. Knyvett Lee, a professional guardian in Broward County, suggested that implementation of standards of practice would alleviate some of the problems guardianship monitoring addresses. Judith Baxter, President of the Pasco County Guardianship Council, explained that specialized knowledge is required to perform well as a professional guardian. She believes the 40-hour training course is inadequate, and that a more defined curriculum is necessary. She and other professional guardians appearing before the Committee support statewide standards relating to background, experience, and training of guardians.

Many people appearing at the public hearings provided input on the process of guardianship monitoring. Gary Armstrong, an accountant and professional guardian in Broward County, said he favors more structure and review in the court system. Court monitoring is particularly important in family guardianships, he observed, because only eight hours of training is required (as compared to the 40-hour course for professional guardians). Guardianship deals with complex, difficult issues, and he is hopeful that a formalized court monitoring process will be an educational tool to assist all guardians in improving service to wards. He advocated that monitoring be tailored to the individual needs, circumstances, and finances of the wards. In order to understand the situation, the monitors must familiarize themselves not only with the duties and responsibilities of the guardians but also the entire service delivery system. Data collected in concert with guardianship monitoring will provide information to decision makers such as the Supreme Court and Legislature, and this enhanced information could result in improvements to the entire guardianship system.

Knyvett Lee indicated she has had positive experiences with the monitoring program in the Seventeenth Judicial Circuit, but observed that there are problems with monitoring programs that rely entirely on volunteers. Concerns about volunteer monitors were repeated by professional guardians from around the state. Volunteer monitors were described as well meaning, but oftentimes lacking in knowledge and experience of the complex medical, financial, and legal issues involved in guardianship. Sylvia Winters, a professional guardian in Sarasota and Manatee counties, related that the former volunteer monitoring model in the Twelfth Judicial Circuit did not work well, and does not believe a volunteer organization can adequately perform the monitoring function. She related an incident wherein the volunteer monitor asked the guardian for guidance on how to investigate the case.

### **Attorney Input**

Matthew Maper, an attorney in Sarasota and then-president of the Florida State Guardianship Association, described guardianship as a social issue in a legal framework. While noting that checks and balances are important in ensuring the well being of ward, he believes the current statutory scheme – if fully implemented – would prevent many of the problems reported to the Committee. Joan Nelson Hook, an attorney, suggested that by raising the competency of guardians, Florida can lessen the need for monitoring.

Lauchlin Waldoch, at that time chair-elect of the Elder Law Section of The Florida Bar, expressed concern about the potential increased costs to the ward and guardian if another layer of bureaucracy is added to the system. She spoke about the need for flexibility in guardianship monitoring programs, to allow for different approaches in different areas of the state. Martin Mickler, a guardianship attorney in Jacksonville, suggested that the majority of problems result from inexperienced or incompetent guardians, rather than dishonest guardians. He noted that monitors should have appropriate qualifications.

Naomi Behar Smith, a guardianship attorney in Broward County, echoed the comments regarding the need for adequate training of guardian monitors. A well-trained and experienced monitor can do an excellent job. Conversely, poorly trained or inexperienced court monitors can have an adverse impact: (a) on the ward, especially if the monitor's fees are paid from the ward's assets; (b) on judicial resources, since monitor mistakes will require a general master or judge to review and/or correct; and (c) increased time on behalf of the guardian and attorney to respond.

For these reasons, Ms. Smith recommended that funding for monitor training be included in the committee's recommendations. Since guardianship monitoring will, in the long run, improve guardianship services for all wards, she believed the cost for the service and training should be spread across the board rather than paid from an individual ward's assets. Stephen Margulis, an attorney and professional guardian in Plantation, agreed. He said adequate funding is required for the work that needs to be done. Wards and guardians should not have to bear the entire cost of monitoring.

Mike Foreman offered comments and observations on behalf of the Guardianship Committee of the Real Property, Probate, and Trust Law Section of The Florida Bar. He spoke about the need for more uniformity among the trial courts, in regard to specialized forms, approval processes, and guardianship and attorney fees. The section is concerned with ensuring adherence to due process when monitors are utilized, and believes the guardian or attorney should be allowed to respond to the monitor's report. Mr. Foreman also called for encouraging practitioners to enter the guardianship field, where professionals are continually dealing with people in crises situations.

### **Veterans' Administration Input**

The Committee learned that the United States Department of Veterans Affairs performs extensive monitoring of VA guardianships, and that the system is working well. David Bentley, a field examiner with the U.S. Department of Veterans Affairs, is one of 10 field examiners in Florida. He said their program is very similar to the monitoring program utilized by the Seventeenth Judicial Circuit. They closely monitor every case and require formal accountings in some cases. Field investigation reports include 12 elements, including physical and mental condition, the continuing need for guardianship, and other issues.

There is a significant level of review and the VA will pursue and prosecute misuse of any amount of money or benefits. In about 2% of the cases they find criminal wrong doing, but in about 40% of the cases they have questions that can be resolved through administration action or other response. Even though they already conduct extensive review and monitoring, VA representatives believe it would still be appropriate for the court to closely monitor VA guardianship cases.

James Hollingsworth, a field examiner in the St. Petersburg office described a monitor as someone who goes out into the field and knocks on the ward's door, not someone who reviews paperwork. He believed it was important to know whether a ward is being cared for properly. Papers can be in perfect order, but problems are identified in the field not in the office. He observed that most attorneys and even some guardians do not actually visit the ward. Monitors also review the important aspect of the least restrictive environment.

According to Mr. Hollingsworth, the VA field examiners in Florida monitor 5,300 active guardianships, including both court and non-court cases. Each field examiner supervises about 500 cases. All wards are seen on a scheduled basis: every one, two, or three years, and more often if there is a problem.

Martin Mickler, a guardianship attorney in Jacksonville, spoke about the benefit of the checks and balances that are in place to ensure the wards' protection in VA guardianships. He also opined that scrutiny by the VA field examiner is a tremendous help.

## ***MINIMUM STANDARDS FOR GUARDIANSHIP MONITORING***

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The majority of guardians are law abiding and are diligently fulfilling their complex responsibilities. However, a small percentage are not properly handling guardianship matters, and as a result, monitoring may be necessary. Minimum requirements for court monitoring of guardianship cases should be established. While the system should be flexible and recognize that one size does not fit all, the individual circumstances of the ward should be the guiding factor rather than the individual circumstances of the circuit.

It is more efficient and effective – and therefore in everyone’s best interests – for the courts to be proactive in ensuring compliance. 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.

Attorneys and professional guardians who appeared before the committee repeatedly expressed concern about due process issues associated with confidential communications between the court and the guardianship monitor. The committee thoroughly explored and debated the matter. While the committee is sensitive to the fact that attorneys and guardians may perceive there is a potential ex parte communication issue, the committee believes that in reality there is no impropriety as long as proper court procedures are established, published, and followed. Because the guardianship monitor is an arm of the court and works at the direction of the judge, it is permissible for communication between the court and monitor to be confidential (see, for example, rule 2.051(c)(3)(b), Florida Rules of Judicial Administration). Nevertheless, the committee recommends that insofar as possible, the monitoring process should be transparent and open, and all communications between the monitor and the judge should be in writing, become part of the confidential portion of the court file, and copies provided to counsel and other interested persons as prescribed by Florida law.

The monitoring process should be well defined, and the level of review and action should be commensurate with any potential for harm to the ward. The court should begin with the least restrictive level of court monitoring that adequately addresses the concern. The following procedures apply to not only situations involving the well-being of the ward but also the protection of the ward’s assets.

1. In cases where there does not appear to be a risk of serious irreparable harm, the action steps by the court, based upon the problem identified, should include:
  - The judge enters an order appointing a monitor. The ward, guardian, attorney, and any other parties are notified of the appointment upon entry of the order, as prescribed by Florida law.
  - The monitor works with the appropriate entities to obtain additional information, and submits a written report of findings and recommendations to the court.
  - The court takes appropriate action based upon the report, up to and including setting a hearing if necessary. Since the committee learned that most guardianship deficiencies involve benign reporting discrepancies and errors, it seems likely that many monitoring issues will be resolved at this stage, without the need for a hearing. This alone should reduce the cost of guardianship oversight.
  - In extreme or egregious situations, the court should impose appropriate sanctions against the guardian and/or attorney to reinforce the serious nature of protecting wards and to encourage future compliance.
  
2. In cases where it appears there is substantial likelihood for serious irreparable harm (similar to the injunctive relief standard), immediate action steps by the court should include but not be limited to:
  - The judge enters an order appointing a monitor. At the judge's discretion, the order of appointment may not be made public until the judge determines whether there is probable cause.
  - The monitor works with the appropriate entities to obtain additional information, and submits a written report of findings and recommendations to the court.
  - Simultaneously, the court should immediately take any other appropriate actions the court deems necessary in accordance with Florida law, including:
    - Filing an abuse, neglect, or exploitation complaint with the Department of Children and Families, as required by statute.
    - Referral to local law enforcement agencies or the state attorney.
    - Conducting immediate hearings.
    - Issuing subpoenas and summonses.
    - Entering appropriate injunctions involving assets.
    - Provoking letters.

## **COMPONENTS OF AN IDEAL GUARDIANSHIP MONITORING PROGRAM** ---

There are four major service areas of guardianship monitoring directed to fulfilling the purpose. Each provides a distinct function and desired outcome in support of guardianship monitoring and can operate independently of the others. The four major service areas of guardianship monitoring are:

- 1. Initial and On-Going Screening and Reviewing of Guardians.**
- 2. Reporting on the Well-Being of the Ward.**
- 3. Reporting on the Protection of the Ward's Assets.**
- 4. Case Administration.**

Comprehensive court oversight of guardianship cases requires that all four components be addressed to some degree, depending on the number of cases within the circuit and other factors. The committee acknowledges the current lack of adequate funding for guardianship monitoring. The Seventeenth Circuit currently has some State funding for guardianship monitoring, which is combined with grant and county funds. County funding supports one full-time professional monitor in the Sixth Circuit. The Thirteenth Circuit has a mixture of local and grant funding that supports two full-time monitors and a cadre of students. Over the years, low-cost volunteer monitoring programs have been piloted with varying degrees of success in the Eighth, Twelfth, and Fifteenth circuits.

This funding situation may be impacted by the funding transition commonly known as "Article V: Revision 7." In 1998, Florida voters approved an amendment to the Florida Constitution relating to the funding for the judicial branch of government. Presently, well over half of the money that permits the trial courts to function comes not from the State but from the counties. Effective July 1, 2004, the State must assume a greater responsibility for funding the trial courts. This change, while representing a very small amount of the entire State of Florida budget, nevertheless poses a significant fiscal challenge to the Legislature. Under the amendment, the State will be responsible for funding most aspects of the State Courts System, offices of state attorneys and public defenders, and court-appointed counsel. It is unknown at this time what impact the funding transition may have on the court's duty to adequately monitor guardianship cases.

The committee recommends that guardianship monitoring be funded in every circuit, regardless of whether such funding is provided through the State or counties. Different models should be developed and implemented in the various circuits, depending on the caseload and other local requirements. At a **minimum**:

- Circuits that have a consistent guardianship caseload in excess of 2,500 should have a staffing complement that includes or allows access to case managers, investigators, accountants, and social workers. In most cases, these functions all fall within the definition of court monitor (see section 744.107, Florida Statutes).

- Circuits that have a consistent guardianship caseload ranging from 1,000-2,500 should have at least one full-time monitor, and access to supplemental resources on demand.
- Circuits with a consistent guardianship caseload of less than 1,000 should have access to a professional monitor and other resources, on demand.

It is sound public policy to safeguard the mental and physical health of wards, and it makes good fiscal sense to ensure that their financial assets are protected and prudently invested. These precautions will enable adults who are incapacitated to remain independent as long as possible, obviating the need for premature institutionalization or public assistance. The benefits realized from funding adequate court oversight of guardianship monitoring can potentially pay tangible and intangible dividends that outweigh the cost of the programs, both in terms of the conservation of scarce resources as well as fulfilling society's obligation to protect the well being of its most vulnerable members. Furthermore, pursuant to section 744.107, Florida Statutes, the expenditures in many cases need not be solely funded by public revenues.

## **1. INITIAL AND ON-GOING SCREENING AND REVIEWING OF GUARDIANS** \_\_\_\_\_

The Florida Statutes and Rules of Court provide requirements for the appointment and removal of guardians.

- Chapter 744, Florida Statutes, prescribes the requirements of (a) who may be appointed guardian of a resident ward, (b) considerations in appointment of a guardian, (c) application for appointment, (d) credit and criminal investigations, and (e) guardian education requirements.
- Rule 5.590, Probate Rules, prescribes the procedures for application for appointment as a guardian, disclosure statement, and filing. These apply to (a) individual applicants, (b) non-profit corporate guardians, (c) for profit corporations and associations, and (d) public guardians.
- Rule 5.650, Probate Rules, prescribes the procedures for resignation or disqualification of guardians, and appointment successor.

A guardianship monitoring program provides support to the presiding judicial officer to ensure that the requirements of the court rules and statutes are followed. To adequately screen and review prospective guardians as required by the Florida Statutes, a guardianship monitoring program should conduct timely investigations and issue a written report to the judge indicating:

- Whether the application has been filed and contains correct information.
- Whether the guardian meets the requisite statutory qualifications.
- Whether the guardian has satisfactorily completed the educational requirements.
- The guardian's credit history.
- Whether there are any confirmed reports of abuse or neglect by the guardian.
- Whether the guardian has a history of criminal conduct.
- The number of wards to whom the guardian has already been assigned.
- The well-being of other wards under the guardian's care.
- Whether the guardian is a party to any pending litigation.
- Compliance with the registry requirements in section 744.1083, Florida Statutes.

The extent to which the court is able to provide the desired screening services is dependent on the resources and funding available. This applies to both the scope of the initial screening and review, as well as to the frequency of subsequent reviews. The initial review is critical to the court's determination that the applicant for guardianship is in fact qualified and suitable for the position. Indeed, historically and unfortunately, through much of the state there has been no verification that applicants seeking appointment as guardian even meet the statutory requirements. To maintain the quality and integrity of guardians, it is important to also have an ongoing review system in place. Screening and reviewing are essential when a complaint is lodged by the family or other interested party.

However, not all incidences of abuse and neglect are reported, and it is important that there be an independent review performed on a periodic basis, preferably at least annually.

To be able to effectively screen and review prospective guardians and thereby comply with the statutory requirements, the following resources must be available to the court:

**Access to and/or funding for**

- Credit reporting services.
- Criminal history checks (state and federal).
- Abuse registry checks.
- Court docket checks.
- Hardware and software to maintain a database on status of guardians.
- Office supplies, telephone service, facsimile service, etc.
- Staff training on interpretation of credit, abuse, and criminal history reports.
- Employment verification checks.

**Staff with the following training, experience, and skills**

- Investigators.
- Administrative support.
- People who can review and interpret credit histories, criminal history checks, and abuse registry checks, and who are familiar with court procedures.
- Someone to fingerprint guardians.
- Information systems support and database administration.

## **2. REPORTING ON THE WELL-BEING OF THE WARD**

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Chapter 744, Florida Statutes, and the Probate Rules of Court define the authority of a guardian and the service and reporting requirements. These apply to the well-being of the ward as well as to the protection of the ward's assets.

A guardianship monitoring program assists with the coordination and oversight functions of the presiding judicial officer to ensure compliance with the requirements of the rules and statutes. To effectively and efficiently report on the well-being of the ward, a guardianship monitoring program should take the following steps.

To ensure that the well-being of the ward is adequately addressed, it is essential the court have the monitoring capacity to evaluate any complaints of abuse and neglect. However to prevent instances of abuse and neglect and to ensure that the ward is being properly cared for, it is also necessary for the court to conduct a periodic, preferably an annual, review of the guardianship plan as required by Florida Statutes, make site visits to the residence of the ward, and interview the care givers of the ward.

Because of increasingly limited resources and increasing caseloads, the courts will be faced with prioritizing the types of assessments they will be able to conduct. Accordingly, the following tasks are arranged in recommended order of importance, beginning with the minimum acceptable level to ideal. Realistically, scarce resources make it likely that desk work will be performed more frequently than visits; however, field investigation is preferable since that is an effective mechanism for discovering problems. Additionally, in determining when investigations/reviews should be conducted, the court should act first when there is a concern, and secondly on a random basis.

- A. Visits and field investigations should be made and suspected abuse or neglect should be reported to the court, prosecutors, law enforcement, the Department of Children and Families, and others as appropriate.
- B. Visits and field investigations should be conducted and a concise report in a standardized format, which would become part of the confidential portion of the official court record, provided to the court on the status of the ward indicating whether
  - There are signs of abuse or neglect.
  - The ward's food and shelter are adequate.
  - The medical, psychiatric, and physical treatment of the ward are appropriate.
  - A finding of whether the care being provided to the ward is consistent with the plan.
  - Any Baker Act proceedings have been initiated.
  - The ward is receiving any rehabilitation services and/or therapies.
  - The preferences of the ward have been considered.
  - The placement of the ward is proportionate to the ward's financial status.
  - The guardian's performance is adequate.

- C. An assessment of the least restrictive environment should be made and reported to the court, including information on:
- Whether the placement is the least restrictive option.
  - The ability of the ward to regain capacity and have partial or total restoration of his or her rights.
  - The appropriateness of alternatives to guardianship.
- D. Investigations should be conducted and a written report provided to the court on the completeness, accuracy, and validity of the annual plan that includes:
- A comparison of the plan against checklist(s) for appropriateness and completeness.
  - An assessment of the truthfulness of the information in the plan.
  - A confirmation that the ward actually resides where the plan indicates.
  - A determination that listed physicians are really licensed health care providers.

To be able to determine whether the well-being of the ward is being adequately addressed and protected, the following types of resources must be available to the court:

**Partnerships/alliances with**

- Educational facilities, such as community colleges or schools of social work, nursing, and gerontology<sup>13</sup>.
- Community resources and service providers.

**Access to and/or funding for**

- Transportation.
- Registries and directories of available services.
- Office supplies, telephone service, facsimile service, etc.
- Foreign language and sign language interpreters.

**Policies and procedures for staff, student interns, and volunteers**

- Manuals.
- Checklists.
- Protocols.

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<sup>13</sup>Florida is fortunate in being home to a number of excellent public and private colleges and universities. Partnerships with the court and these educational institutions can be a cost-effective use of presently-available resources to improve services with minimal fiscal impact.

### **Staffing requirements**

- Monitors.
- Visitors.
- An administrator.
- Administrative support.
- Trainer.
- Someone to coordinate and supervise monitors, student interns, and volunteers.
- Student interns and volunteers.
- Staff with knowledge of community resources, including private and not-for-profit groups as well as governmental agencies.
- Persons with social work backgrounds.

Training on volunteer management; acceptable quality of care; recognizing abuse and neglect; resources and facilities available in the community; the courts setting, environment, and procedures; and communicating with elders and persons with cognitive impairments.

### **3. REPORTING ON THE PROTECTION OF THE WARD'S ASSETS**

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The extent of the financial service of guardianship monitoring varies depending on the needs and circumstances of the individual ward. These variables affect not only the level of financial review and audit, but also the frequency. This monitoring function ranges from a brief review of the financial reports, to an audit upon receipt of a complaint, to random detailed financial reviews and audits, to reviews of how assets are invested and managed, to routine scheduled financial reviews and audits. This monitoring function allows the court to detect and investigate variances in the ward's assets.

Well-defined financial audits, pursuant to nationally-recognized auditing standards, should be conducted in every guardianship case, with different levels of audit review as appropriate. Financial auditing begins with a routine audit on every filing. This should be supplemented by a graduating range of stepped-up audits, when a problem is indicated. Furthermore, to sufficiently protect wards and their assets, guardianship cases should be audited based on a statistical random sampling. Definitions of financial audits should be developed and auditing standards should be adopted. Training, experience, and background of auditors in guardianship cases should also be defined, as there are currently no requirements in this regard.

It is instructive to look at the three-level audit program in the Seventeenth Circuit that applies specialized guardianship accounting software and standardized forms. This financial auditing program, which could be considered a model, utilizes the following levels of review:

- Level One: audit all annual accountings with a five-step audit process.
- Level Two: perform statistical sampling of all reports that are found to be in compliance at Level One, utilizing a Level Two checklist.
- Level Three: perform statistical sampling of complaint reports from Level Two. Detailed in-house and field audits of supporting documentation will be performed on the selected sample.

Initial routine financial audits are statutorily required to be conducted by staff in the office of the clerk of court. More in-depth financial audits, in those circuits where they are regularly conducted, are performed in some instances by the clerk's office and in others by court staff.

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<sup>14</sup>Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply. *Canon 3.A., Code of Judicial Conduct.*

Some committee members and individuals who spoke at the public hearings were of the opinion that placement of the financial audit function in the clerk's office rendered the function less effective and that the responsibility should be transferred from the clerks to the courts, which would require a statutory change. They also noted that clerks are not given this level of responsibility for any other category of cases. The court has the ultimate responsibility for monitoring the ward's well being; accordingly, they believe Canon 3A of the Code of Judicial Conduct<sup>14</sup> requires the responsibility for conducting financial audits to rest with the court. A presumed benefit of transferring the financial audit function from the clerk to the court would be decreasing the disparities among counties, increasing efficiencies, and promoting a stable protective environment for the ward.

However, other committee members and speakers at the public hearings were of the opinion that if the appropriate audit guidelines are established and followed, the audits could be adequately conducted by either the courts or the clerks. In some counties, the clerk of court has assumed the responsibility – and indeed taken the initiative – for conducting high quality and effective financial audits. The committee heard about auditing performed by the clerks in Charlotte and Pasco Counties, where the clerks' offices seem to be doing an admirable job of auditing the financial reports.

Accordingly, the Committee determined the auditing function could be effectively performed by either the clerk or court, if permitted by statute, as long as definitions and standards are adopted and auditor qualifications are adopted. If the function remains in the clerk's office, the committee recommends that it be organized as an independent audit unit which is required to request a hearing when a problem is identified. Further, all communication between the judge and the clerk's office should be in writing and become part of the official court record.

A guardianship monitoring program assists with the coordination and oversight functions of the presiding judicial officer to ensure compliance with the requirements of the rules and statutes. To effectively and efficiently report on the well-being of the ward's assets, a guardianship monitoring program should take the following steps.

Audits and field investigations are conducted and a written report is provided to the court on whether

- The initial inventory is complete and accurate.
- The annual financial accounting is complete and accurate, including
  - Verification from the depository that reported balances were accurate.
  - Identification of any questionable expenses, such as unusual attorney's fees, unusual guardian's fees, checks payable to "cash."
- Expenditures are consistent with court orders.
- The ward's property is being properly cared for and appropriate insurance has been secured and is up to date.
- Investments made on behalf of the ward are appropriate, including:

- Brokers' fees
  - Excessive turnover in investments.
  - Consistent/appropriate with the age of the ward.
  - Sale of property.
  - Speculative investments.
- Application for every benefit to which a ward is entitled.
  - Bonding, security, and bond premium payments are satisfactory and current.
  - Confirmation that the ward is receiving the appropriate income and there is no diversion of the income.
  - The ward's property and income taxes have been paid.
  - The ward's assets have been marshaled.
  - The ward's assets have been reviewed and balanced in keeping with FDIC and SEC limits.
  - Current address information is provided to the clerk of court.

To be able to determine whether the ward's assets are being adequately protected, whether application has been made for all the benefits to which the ward is entitled, and the ward's assets are being used to the ward's benefits, the following types of resources should be available to the court:

#### **Policies and procedures for staff**

- Uniform definitions of various types/levels of audits.
- Guidelines about appropriate expenditures.
- Guidelines about annual budgeting.

#### **Staffing requirements**

- Persons with bookkeeping skills.
- Persons with forensic accounting skills.
- Certified public accountants.
- Individuals with investment planning experience.
- Persons with knowledge about public and private benefit programs or entitlements to which wards may be entitled.

#### **Access to and/or funding for**

- pool of financial management monitors (for large asset cases)
- advice from a financial manager
- hardware and software for a financial audit database
- office supplies, telephone service, facsimile service, etc.

#### **Training on appropriate investment patterns for different types of wards**

## **4. CASE ADMINISTRATION**

Chapter 744, Florida Statutes, and the Probate Rules of Court provide a number of case reporting and recording requirements as part of the court oversight function for guardianship cases. Since guardianship cases may stay active for an extended period of time, the case-flow management and coordinating functions require ongoing attention. While case management is an independent component of guardianship monitoring, each of the other three components also requires case management and administrative support. Guardianship monitoring requires staff and information system support to review, process, and monitor the variety of reports required by rule and statute.

Judges, court managers, and program personnel can improve guardianship monitoring program performance by applying sound management principles and practices. To do so, they must have timely access to reliable information about the operations of the program. Such information could be obtained from the records management system or from surveys or customer satisfaction reports addressing the qualitative aspects of the services and activities. This information can be used to monitor and measure the program effectiveness and assist in defining the extent to which the program is achieving its purpose. The information can also be used to determine if the program is operating efficiently and to provide workload data to identify resource needs. Reliable performance information can also be used to provide external accountability, by describing in a meaningful fashion the work of court programs and the services they provide.

Each of the components of guardianship monitoring requires data relative to the specific services provided. All the components interrelate as well to the guardianship case flow of the court. 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 budgeting information. A number of technological innovations are under development in the guardianship domain, as described below and throughout this report, and should be encouraged as a mechanism for improving the quality of information that is available to court managers and decision makers.

The Electronic Court Filing Committee of the Real Property, Probate, and Trust Law Section of The Florida Bar studied the concept of electronic court filing in the probate and guardianship practice area. The Committee issued a White Paper in the fall of 2002 outlining a proposal that contemplates a limited electronic filing system that could later be progressively expanded to include all divisions of the trial court system. Properly implemented, electronic filing would allow easier access to filed documents, simplify the clerk of court's handling procedures, reduce data capture and storage costs, improve disaster recovery facilities, and reduce costs and time for attorneys and other users of the court system. The proposed system would be developed through a "filing intermediary" with a legal XML-capable server. Because the system would be based on open standards, any vendor could serve as a filing intermediary. The Electronic Court Filing Committee suggests that probate and guardianship are uniquely positioned to provide a proof of concept on a manageable scale, since these filings generally constitute 5 to 10% of circuit court case filings. Additionally, the Section estimates that up to 95% of filings in the probate and guardianship division are comprised of approximately 400 forms, and forms-based documents are significantly easier to deal with in an XML environment.

Any problems encountered with system implementation could be addressed before expansion. The Guardianship Monitoring Committee believes the Electronic Court Filing Committee's proposal holds significant promise for improving the judicial administration of guardianship cases.

The Statewide Office of Public Guardianship is developing a ward management software database, which is designed to capture guardianship data in standardized manner.

The Florida Court Technology Commission is charged with developing technological standards for automated court systems in the state. 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. Joint application development (JAD) sessions were held to assess the data needs of the trial courts in the various topical areas, including the probate, guardianship, and mental health division. Based on the outcome of the JAD sessions, technology standards were developed and adopted in the fall of 2002.

The information currently available, as well as the enhanced data that could be provided through improved technology, should be utilized by the court to oversee guardianship cases. The guardianship monitoring program along with the clerk of court's office assists with the coordination and oversight functions of the presiding judicial officer to ensure compliance with the requirements of the rules and statutes. To effectively and efficiently administer the case of the ward, a guardianship monitoring program should take the following steps:

**Review case files and enter data in conformity with the comprehensive guardianship data requirements contained in the probate, Guardianship and Mental/Medical Health Functional Requirements Document, Version 1.3, January 28, 2003, Supreme Court of Florida, Office of the State Courts Administrator, Trial Courts Needs Assessment Project.**

**Conduct follow-up on reports that are not**

- Timely filed.
- Completed.
- Approved by the court.

**Prepare orders to show cause for the court's consideration.**

**Schedule hearings, when appropriate and at the court's direction.**

## **Maintain a case inventory and notify the court of old cases.**

### **Report to the court on whether**

- Court orders approving reports have been entered.
- The ward's driver's license has been revoked, if required.
- Any other local provisions and administrative orders have been complied with.

In order to determine whether reports and documents have been filed timely and are complete, and other procedural requirements have been followed, the following types of resources must be available to the court:

### **Access to and/or funding for**

- Court dockets.
- Hardware and software for a case tracking and monitoring system or well-developed protocols and checklists.
- Office supplies, telephone service, facsimile service, etc.

### **Staffing requirements**

- Information systems staff and/or database administrator.
- Skilled, dedicated probate clerk.

### **Training for probate clerk.**

It is clear that computerization of much of these processes, and the use of relational databases, would significantly reduce the level of manpower necessary to effectively provide the guardianship oversight service required by the Legislature and result in a concomitant reduction in cost per case.

## **MINOR GUARDIANSHIPS**

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The Committee agreed to recommend that the Legislature increase the threshold dollar amount for minor guardianships. Prior to the completion of the Committee's work, the Legislature acted during the 2002 session by increasing the amount to \$15,000 (see section 744.387, Florida Statutes). The Committee commends the Legislature for increasing the jurisdictional amount in minor guardianships because that will allow limited judicial resources to be focused on the more complex guardianship cases.

The committee recommends the following additional changes regarding minor guardianships:

- Require secure custodial bank accounts, that cannot be changed, under the Uniform Transfer to Minors Act, for sums under the amount allowed by statute. In any underlying guardianship settlement, judges should require a receipt for the account to be filed, or the funds could be committed to the purchase of an Internal Revenue Code Section 529 Plan or other appropriate pre-paid college tuition plan.
- Allow simplified accounting for bank, stock, or brokerage accounts if there are no withdrawals other than those authorized by court order.

The proposed alternative to minor guardianship, for sums under the amount allowed by statute, would allow the court to review the alternative placement of the funds in a secure account such as a prepaid college fund or appropriate annuity.

## **EDUCATION AND TRAINING**

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### **Guardians**

In accordance with the Florida Statutes, professional guardians must complete a 40-hour training course approved by the Office of Statewide Public Guardianship (section 744.1085, Florida Statutes). Family members and other non-professional guardians must complete an 8-hour training course approved by the chief judge (section 744.3145, Florida Statutes).

The Statewide Public Guardianship Office; the Government Lawyers Section and the Elder Law Section of The Florida Bar; Stetson University School of Law; and others worked to develop a Basic Guardianship Training Manual. From this basic training program, the minimum curriculum content for the 40-hour professional guardian courses was developed. Information on these training programs is accessible on the Internet at <http://www.fmhi.usf.edu/guardian>.

The Committee discussed the need to gear training curricula to the specific type of guardianship to better prepare guardians for handling their case. The committee encourages the Real Property, Probate and Trust Law Section, the Government Lawyer Section, the Elder Law Section, and the General Masters Committee of the Family Law Section of The Florida Bar to develop training programs and/or videos targeting specific types of guardianship cases. This education and training might begin from the Government Lawyer Section.

### **Attorneys**

The committee discussed the need to differentiate between the practice of law and social work when handling guardianship cases and noted that a good guardianship lawyer is not necessarily trained as a guardian. The committee recommends the following training requirements for attorneys who handle guardianship cases:

- The Committee calls upon Florida law schools to place more emphasis on guardianship law issues and include curricula focused on elder, developmental disability, mental health, and substance abuse issues, from the very beginning.
- The Florida Bar's program for new attorneys, Practicing with Professionalism, should include a segment on guardianship, elder, developmental disability, mental health, and substance abuse issues to increase the awareness of practice in these areas of the law, recognizing that individuals with mental illnesses, developmental disabilities, or substance abuse problems may require the structured relationship of a guardianship.
- The committee encourages the Real Property, Probate and Trust Law Section, the Government Lawyer Section, the Elder Law Section, and the General Masters Committee of the Family Law Section of The Florida Bar to develop a training program for masters and guardianship attorneys.
- Attorneys who are inexperienced in guardianship law, such as personal injury attorneys and others, should be encouraged to take the existing 8-hour course. Further, attorneys who serve as guardians should not be allowed to automatically waive the 8-hour educational requirement.

These changes could be implemented through a statutory change, or the judge could encourage such education by allowing a higher fee after the non-certified attorney completes the training.

## **Judges**

In some of the larger urban circuits, one or more judges are assigned to a separate Probate, Guardianship, and Mental Health Division. Those judges develop knowledge not only about the applicable laws and procedures but also the problems and circumstances that often face wards. However, in the majority of the trial courts, guardianship matters are handled by judges assigned to the general Civil Division. Due to the diversity of matters before them, those judges do not have the same opportunity to develop expertise on the issues that frequently arise in guardianship cases.

- Additional training on guardianship law issues, including curricula focused on elder, developmental disability, and mental health matters, should be available to all judges through the Florida Conference of Circuit Court Judges. These topics are among those identified by the Florida Court Education Council as “critical training areas.” Judicial education on these issues should also be included in the general civil tracks, since most circuits do not have judges who hear probate cases exclusively.
- The Supreme Court should encourage judges to review the curriculum or participate in selected sections of the 40-hour professional guardian training, as promulgated by the Office of Statewide Public Guardianship, prior to the judge’s assignment to the probate division.

## **Probate Clerks and Court Staff**

Appropriate, specialized training for all court staff involved in guardianship matters would be beneficial. Accordingly, the Committee offers the following recommendations:

- The Florida Association of Court Clerks should develop a comprehensive training program for probate clerks on guardianship issues.
- The Florida Court Education Council should offer training on guardianship law, as well as elder, developmental disabilities, and mental health issues, for court staff with responsibilities relating to guardianship monitoring.

