Court Assessment of Individual Abilities & Limitations*

Court assessments of an individual’s abilities, limitations, and need for supports throughout a case are at the heart of adult guardianship, and could be a priority for WINGS. Stakeholders could conduct research, education, and training, or seek changes in statute or court rule.

Robust, fine-tuned assessments can:

- help prevent unnecessary guardianship orders by showing the basis for appointment does not exist or a less restrictive option would suffice;
- promote limited guardianship orders aligned with an individual’s abilities and needs;
- identify needs for family and community supports, services, and technology that can enhance self-determination;
- encourage modification or termination of an order and restoration of rights;
- target critical protections needed to address abuse; and
- refine a guardianship care plan.

Your WINGS could focus on specific strategies to improve court assessments, encourage limited orders, and raise awareness of restoration of rights.

This Action Tool includes:

- Stakeholder action strategies
- Background
- Resources with links to access information quickly.

*Italicized terms are used generally and may differ in your state. Words in blue are hyperlinks to important resources.
Ten WINGS Stakeholder Action Strategies

Here are ideas for WINGS action to improve court assessments and promote limited orders. Whatever path your WINGS chooses, be sure to build in evaluation outcome measures.

- **Highlight the Issue**: Structure a presentation or panel discussion with judges, guardians ad litem, clinicians, and lawyers on current practices, solutions, and obstacles in getting better assessments and drafting limited orders.

- **Conduct a File Study**: Design and implement a file study of assessments that courts use to determine the need for, and scope of, adult guardianship orders. For an example of such a study, see “Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study.” Focus on whether the assessment affects the nature and scope of the order. WINGS also could promote such studies by a stakeholder or other qualified researchers.

- **Revise Assessment Forms**: Determine whether courts in your state use different forms for clinical assessments and court orders, or whether there is a standard state form. Evaluate the form/s for their focus on individual functioning and specific areas of decision making. See the “Model Clinical Evaluation Report” in the handbook for judges developed by the ABA Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges (one in a series of three assessment handbooks).

- **Promote Training for Clinicians**: Reach out to state medical societies and state chapters of the American Psychological Association to include them in WINGS discussions. Join with them to sponsor educational sessions or produce educational materials for physicians, psychologists, psychiatrists, social workers, or other clinicians that might conduct guardianship assessments. Use the ABA Commission on Law and Aging & American Psychological Association handbook for psychologists on assessment.
Promote Training for Court Investigators/Guardians Ad Litem: Examine current materials and training programs for court investigators and guardians ad litem in assessing an individual’s abilities, limitations, and need for supports. Make any needed improvements to refine or update the trainings.

Conduct Training for Judges: Work with your state’s court judicial educator to develop and conduct training for judges on assessing abilities, understanding clinical reports, gathering evidence, identifying less-restrictive options, recognizing the need for supports and supported decision making, and restoring rights. Start by reviewing the ABA/APA/NCPJ handbook for judges on assessment. In the District of Columbia, the Superior Court conducted a judicial education session on assessment using the Handbook. Utah WINGS is developing a judicial protocol for establishing limited guardianship orders.

Conduct Training for Lawyers: Use the ABA/APA handbook for lawyers on assessment, and the ABA PRACTICAL Tool for Lawyers to educate lawyers throughout the state about identifying supports and less-restrictive options. Minnesota WINGS has used the PRACTICAL Tool in training and outreach to legal audiences and other professionals, to help assess the need for a guardian and avoid unnecessary guardianships by using robust assessments and less-restrictive decision-making options.

Identify and Support Statutory Changes: Study your state’s statutory definition of “incapacity” or comparable term triggering need for appointment of a guardian. Determine if any changes are needed, and engage selected WINGS stakeholders in pursuing legislative action.

Raise Awareness about Supported Decision Making: The concept of supported decision making is shifting our understanding of “capacity” and the need for a guardian. Sponsor – or support stakeholders such as the Protection and Advocacy Agency in sponsoring – educational and training sessions for multiple audiences. Several WINGS have had speakers from the
National Resource Center for Supported Decision-Making at stakeholder meetings or larger summits.

✓ Raise Awareness about Restoration of Rights: Conduct a file study of restoration of rights, or conduct interviews with stakeholder groups to learn about awareness of the option and need for advocacy. As an example, see the Florida Developmental Disabilities Council study.

Key Background

State Law on Assessment of Abilities and Limitations

What findings does your state statute require to appoint a guardian? What evidence generally forms the basis of the decision?

- **State guardianship statutes** typically use some or all of four elements to define “incapacity” or a comparable term:
  - Medical condition
  - Functional abilities
  - Cognitive abilities
  - Risk of harm without appointment of a guardian.

- State guardianship statutes set out the kinds of experts eligible to conduct an assessment for a guardianship determination – typically a physician, but some states include psychologists, social workers, or nurses.

- There is little data and research on clinical assessments and their use in guardianship proceedings in practice.

State Law on Limited Guardianship

- Almost every state has statutory language preferring, encouraging, or allowing limited orders based on an individual’s abilities and needs. Statutory language generally encourages courts to promote maximum choice and independence.
• The National Probate Court Standards provide that courts should “tailor the order appointing a guardian or conservator to the facts and circumstances of the specific case. Each order should specify the duties and powers of the guardian or conservator, including limitations to the duties and powers, the rights retained by the respondent . . .”

• There is little data and research on limited orders, but they appear to be used infrequently.

Model Elements of Assessment and Judicial Determination

A 2006 handbook for judges by the ABA Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges set out six elements or “pillars of capacity:”

• Medical condition producing functional limitation;
• Cognitive abilities such as memory, reasoning, and use of language;
• Everyday functioning involving the ability to provide for one’s basic needs;
• Consistency of choices with life values, preferences, and patterns;
• Risk of harm and level of assistance needed; and
• Means to enhance capacity – supports and accommodations

Emergence of Supported Decision Making

The concept of “supported decision making” is changing the way we view “capacity” and the need for guardianship.

• Article 12 of the U.N. Convention on the Rights of Persons with Disabilities states that people with disabilities “enjoy legal capacity on an equal basis with others in all aspects of life” – and that governments must provide supports that enable people to exercise this right.

• Supported decision making is defined as “a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the ‘need’ for a guardian” (Blanck & Martinis, 2015). Examples of decision supports include:
- Supportive, trusted family and friends who can work with an individual on making decisions that reflect his or her values and preferences;
- A structured network or “circle of support” that meets regularly to help an individual with planning, problem-solving, and decision making;
- Supportive community services such as those provided through the Older Americans Act or Independent Living Centers; and
- Accommodations, assistive technology, and communication techniques that can boost understanding and decision-making ability.

- The federal Administration on Community Living has funded a National Resource Center for Supported Decision-Making to advance the use of supported decision making as a recognized alternative to guardianship through educational programs and development of policies and practices.

New Uniform Law Provisions

In July 2017, the Uniform Law Commission approved a revised Uniform Act, the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act. The new Uniform Act is ready for adoption by state legislatures.

The Act incorporates the concept of supported decision making by setting out the “basis for appointment of a guardian” as a finding by clear and convincing evidence that the individual

“lacks the ability to meet essential requirements for physical health, safety, or self care because: (A) [the individual] is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and (B) [the individual’s] identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternatives. . .”

Restoration of Rights

- Each state guardianship statute has a provision for termination of the court order and restoration of rights.
In practice, use of restoration procedures appears infrequent, and guardianship orders may remain in place beyond the period of need – or may never have been needed since a less-restrictive option could have sufficed. There is little data and research on use of restoration procedures, but the ABA Commission on Law and Aging, with the Virginia Tech Center for Gerontology, completed a preliminary study in 2017.

## Resources


- American Bar Association Commission on Law and Aging & American Psychological Association Handbooks:

- American Bar Association Commission on Law and Aging, state statutory guardianship charts:
https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartcapacityandinitiation.authcheckdam.pdf

  https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartclinicaleval.authcheckdam.pdf

  https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartlimitedguardianshipofthepersonandproperty.authcheckdam.pdf


  http://www.asaging.org/blog/emerging-neuroscience-financial-capacity


  http://www.supporteddecisionmaking.org

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