

# The 2021 Florida Statutes

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## JUDICIAL BRANCH MEDIATION ALTERNATIVES TO JUDICIAL ACTION

### **44.407 Elder-focused dispute resolution process.**— effective July 1, 2021

#### (1) LEGISLATIVE FINDINGS.—The Legislature finds that:

(a) Denying an elder a voice in decisions regarding himself or herself may negatively affect the elder's health and well-being, as well as deprive the elder of his or her legal rights. Even if an elder is losing capacity to make major decisions for himself or herself, the elder is still entitled to the dignity of having his or her voice heard.

(b) In conjunction with proceedings in court, it is in the best interest of an elder, his or her family members, and legally recognized decisionmakers to have access to a nonadversarial process to resolve disputes relating to the elder which focuses on the elder's wants, needs, and best interests. Such a process will protect and preserve the elder's exercisable rights.

(c) By recognizing that every elder, including those whose capacity is being questioned, has unique needs, interests, and differing abilities, the Legislature intends for this section to promote the public welfare by establishing a unique dispute resolution option to complement and enhance, not replace, other services, such as the provision of legal information or legal representation; financial advice; individual or family therapy; medical, psychological, or psychiatric evaluation; or mediation, specifically for issues related to the care and needs of elders. The Legislature intends that this section be liberally construed to accomplish these goals.

#### (2) DEFINITIONS.—As used in this section, the term:

(a) "Action," for purposes of using eldercaring coordination solely to address disputes regarding the care and safety of the elder, means a proceeding in which a party sought or seeks a judgment or order from the court to:

1. Determine if someone is or is not incapacitated pursuant to s. [744.331](#).
2. Appoint or remove a guardian or guardian advocate.
3. Review any actions of a guardian.
4. Execute an investigation pursuant to s. [415.104](#).
5. Review an agent's actions pursuant to s. [709.2116](#).
6. Review a proxy's decision pursuant to s. [765.105](#).
7. Enter an injunction for the protection of an elder under s. [825.1035](#).
8. Follow up on a complaint made to the Office of Public and Professional Guardians pursuant to s. [744.2004](#).
9. At the discretion of the presiding judge, address any other matters pending before the court which involve the care and safety of an elder.

The term does not include any action brought under chapters 732, 733, and 736.

(b) “Care and safety” means the condition of the elder’s general physical, mental, emotional, psychological, and social well-being. The term does not include a determination of capacity by the court under s. 744.331(5) and (6). Unless the parties agree otherwise, the term does not include matters relating to the elder’s estate planning; the elder’s agent designations under chapter 709; the elder’s surrogate designations under chapter 765; trusts in which the elder is a grantor, fiduciary, or beneficiary; or other similar financially focused matters.

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

(d) “Eldercaring coordination” means an elder-focused dispute resolution process during which an eldercaring coordinator assists an elder, legally authorized decisionmakers, and others who participate by court order or by invitation of the eldercaring coordinator in resolving disputes regarding the care and safety of an elder by:

1. Facilitating more effective communication and negotiation and the development of problem-solving skills.
2. Providing education about eldercare resources.
3. Facilitating the creation, modification, or implementation of an eldercaring plan and reassessing it as necessary to reach a resolution of ongoing disputes concerning the care and safety of the elder.
4. Making recommendations for the resolution of disputes concerning the care and safety of the elder.
5. With the prior approval of the parties to an action or of the court, making limited decisions within the scope of the court’s order of referral.

(e) “Eldercaring coordination communication” means an oral or written statement, or nonverbal conduct intended to make an assertion, by, between, or among the parties, participants, or eldercaring coordinator made during the course of eldercaring coordination activity, or before an eldercaring coordination activity if made in furtherance of eldercaring coordination. The term does not include statements made during eldercaring coordination which involve the commission of a crime, the intent to commit a crime, or ongoing abuse, exploitation, or neglect of a child or vulnerable adult.

(f) “Eldercaring coordinator” means an impartial third person who is appointed by the court or designated by the parties and who meets the requirements of subsection (5). The role of the

eldercaring coordinator is to assist parties through eldercaring coordination in a manner that respects the elder's need for autonomy and safety.

(g) "Eldercaring plan" means a continually reassessed plan for the items, tasks, or responsibilities needed to provide for the care and safety of an elder which is modified throughout eldercaring coordination to meet the changing needs of the elder and which takes into consideration the preferences and wishes of the elder. The plan is not a legally enforceable document, but is meant for use by the parties and participants.

(h) "Good cause" means a finding that the eldercaring coordinator:

1. Is not fulfilling the duties and obligations of the position;
2. Has failed to comply with any order of the court, unless the order has been superseded on appeal;
3. Has conflicting or adverse interests that affect his or her impartiality;
4. Has engaged in circumstances that compromise the integrity of eldercaring coordination; or
5. Has had a disqualifying event occur.

The term does not include a party's disagreement with the eldercaring coordinator's methods or procedures.

(i) "Legally authorized decisionmaker" means an individual designated, either by the elder or by the court, pursuant to chapter 709, chapter 744, chapter 747, or chapter 765 who has the authority to make specific decisions on behalf of the elder who is the subject of an action.

(j) "Participant" means an individual who is not a party who joins eldercaring coordination by invitation of or with the consent of the eldercaring coordinator but who has not filed a pleading in the action from which the case was referred to eldercaring coordination.

(k) "Party" includes the elder who is the subject of an action and any other individual over whom the court has jurisdiction in the current case.

(3) REFERRAL.—

(a) Upon agreement of the parties to the action, the court's own motion, or the motion of a party to the action, the court may appoint an eldercaring coordinator and refer the parties to eldercaring coordination to assist in the resolution of disputes concerning the care and safety of the elder who is the subject of an action.

(b) The court may not refer a party who has a history of domestic violence or exploitation of an elderly person to eldercaring coordination unless the elder and other parties in the action consent to such referral.

1. The court shall offer each party an opportunity to consult with an attorney or a domestic violence advocate before accepting consent to such referral. The court shall determine whether each party has given his or her consent freely and voluntarily.

2. The court shall consider whether a party has committed an act of exploitation as defined in s. 415.102, exploitation of an elderly person or disabled adult as defined in s. 825.103(1), or domestic violence as defined in s. 741.28 against another party or any member of another party's family; engaged in a pattern of behaviors that exert power and control over another party and that may compromise another party's ability to negotiate a fair result; or engaged in behavior that leads another party to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence. The court shall consider and evaluate all relevant factors, including, but not limited to, the factors specified in s. 741.30(6)(b).

3. If a party has a history of domestic violence or exploitation of an elderly person, the court must order safeguards to protect the safety of the participants and the elder and the elder's property, including, but not limited to, adherence to all provisions of an injunction for protection or conditions of bail, probation, or a sentence arising from criminal proceedings.

(4) COURT APPOINTMENT.—

(a) A court appointment of an eldercaring coordinator is for a term of up to 2 years and the court shall conduct review hearings intermittently to determine whether the term should be concluded or extended. Appointments conclude upon expiration of the term or upon discharge by the court, whichever occurs earlier.

(b) The order of appointment by the court shall define the scope of the eldercaring coordinator's authority under the appointment in the action, consistent with this section.

(c) The order shall specify that, notwithstanding the intermittent review hearings under paragraph (a), a party may move the court at any time during the period of appointment for termination of the appointment. Upon the filing of such a motion, the court shall timely conduct a hearing to determine whether to terminate the appointment. Until the court has ruled on the motion, the eldercaring coordination process shall continue. In making the determination, the court shall consider at a minimum:

1. The efforts and progress of eldercaring coordination in the action to date;
2. The preference of the elder, if ascertainable; and
3. Whether continuation of the appointment is in the best interest of the elder.

(5) QUALIFICATIONS FOR ELDERCARING COORDINATORS.—

(a) The court shall appoint qualified eldercaring coordinators who:

1. Meet one of the following professional requirements:
  - a. Are licensed as a mental health professional under chapter 491 and hold at least a master's degree in the professional field of practice;
  - b. Are licensed as a psychologist under chapter 490;
  - c. Are licensed as a physician under chapter 458 or chapter 459;
  - d. Are licensed as a nurse under chapter 464 and hold at least a master's degree;

e. Are certified by the Florida Supreme Court as a family mediator and hold at least a master's degree;

f. Are a member in good standing of The Florida Bar; or

g. Are a professional guardian as defined in s. 744.102(17) and hold at least a master's degree.

2. Have completed all of the following:

a. Three years of postlicensure or postcertification practice;

b. A family mediation training program certified by the Florida Supreme Court; and

c. An eldercaring coordinator training program certified by the Florida Supreme Court. The training must total at least 44 hours and must include advanced tactics for dispute resolution of issues related to aging, illness, incapacity, or other vulnerabilities associated with elders, as well as elder, guardianship, and incapacity law and procedures and less restrictive alternatives to guardianship; phases of eldercaring coordination and the role and functions of an eldercaring coordinator; the elder's role within eldercaring coordination; family dynamics related to eldercaring coordination; eldercaring coordination skills and techniques; multicultural competence and its use in eldercaring coordination; at least 6 hours of the implications of elder abuse, neglect, and exploitation and other safety issues pertinent to the training; at least 4 hours of ethical considerations pertaining to the training; use of technology within eldercaring coordination; and court-specific eldercaring coordination procedures. Pending certification of a training program by the Florida Supreme Court, the eldercaring coordinator must document completion of training that satisfies the hours and the elements prescribed in this sub-subparagraph.

3. Have successfully passed a Level 2 background screening as provided in s. 435.04(2) and (3) or are exempt from disqualification under s. 435.07. The prospective eldercaring coordinator must submit a full set of fingerprints to the court or to a vendor, entity, or agency authorized by s. 943.053(13). The court, vendor, entity, or agency shall forward the fingerprints to the Department of Law Enforcement for state processing, and the Department of Law Enforcement shall forward the fingerprints to the Federal Bureau of Investigation for national processing. The prospective eldercaring coordinator shall pay the fees for state and federal fingerprint processing. The state cost for fingerprint processing shall be as provided in s. 943.053(3)(e) for records provided to persons or entities other than those specified as exceptions therein.

4. Have not been a respondent in a final order granting an injunction for protection against domestic, dating, sexual, or repeat violence or stalking or exploitation of an elder or a disabled person.

5. Have met any additional qualifications the court may require to address issues specific to the parties.

(b) A qualified eldercaring coordinator must be in good standing or in clear and active status with all professional licensing authorities or certification boards to which the eldercaring coordinator is subject.

(6) DISQUALIFICATIONS AND REMOVAL OF ELDERCARING COORDINATORS.—

(a) An eldercaring coordinator must resign and immediately report to the court if he or she no longer meets the minimum qualifications or if any of the disqualifying circumstances occurs.

(b) The court shall remove an eldercaring coordinator upon the eldercaring coordinator's resignation or disqualification or upon a finding of good cause shown based on the court's own motion or a party's motion.

(c) Upon the court's own motion or upon a party's motion, the court may suspend the authority of an eldercaring coordinator pending a hearing on the motion for removal. Notice of hearing on removal must be timely served on the eldercaring coordinator and all parties.

(d) If a motion was made in bad faith, a court may, in addition to any other remedy authorized by law, award reasonable attorney fees and costs to a party or an eldercaring coordinator who successfully challenges a motion for removal.

(7) SUCCESSOR ELDERCARING COORDINATORS.—If an eldercaring coordinator resigns, is removed, or is suspended from an appointment, the court shall appoint a successor qualified eldercaring coordinator who is agreed to by all parties or, if the parties do not reach agreement on a successor, another qualified eldercaring coordinator to serve for the remainder of the original term.

(8) FEES AND COSTS.—The eldercaring coordinator's fees shall be paid in equal portions by each party referred to the eldercaring coordination process by the court. The order of referral shall specify which parties are ordered to the process and the percentage of the eldercaring coordinator's fees that each shall pay. The court may determine the allocation among the parties of fees and costs for eldercaring coordination and may make an unequal allocation based on the financial circumstances of each party, including the elder.

(a) A party who is asserting that he or she is unable to pay the eldercaring coordination fees and costs must complete a financial affidavit form approved by the presiding court. The court shall consider the party's financial circumstances, including income; assets; liabilities; financial obligations; and resources, including, but not limited to, whether the party can receive or is receiving trust benefits, whether the party is represented by and paying a lawyer, and whether paying the fees and costs of eldercaring coordination would create a substantial hardship.

(b) If a court finds that a party is indigent based upon the criteria prescribed in s. 57.082, the court may not order the party to eldercaring coordination unless funds are available to pay the indigent party's allocated portion of the eldercaring coordination fees and costs, which may include funds provided for that purpose by one or more nonindigent parties who consent to paying

such fees and costs, or unless insurance coverage or reduced or pro bono services are available to pay all or a portion of such fees and costs. If financial assistance, such as health insurance or eldercaring coordination grants, is available, such assistance must be taken into consideration by the court in determining the financial abilities of the parties.

(9) CONFIDENTIALITY; PRIVILEGE; EXCEPTIONS.—

(a) Except as provided in this subsection, all eldercaring coordination communications are confidential. An eldercaring coordination party, participant, or eldercaring coordinator may not disclose an eldercaring coordination communication to a person other than another eldercaring coordination party, participant, or eldercaring coordinator, or a party's or participant's counsel. A violation of this subsection may be remedied as provided in paragraph (g). If the eldercaring coordination is court ordered, a violation of this subsection may also subject the eldercaring coordination participant to sanctions by the court, including, but not limited to, costs, attorney fees and costs, and eldercaring coordinator's fees and costs.

(b) An eldercaring coordination party, participant, or eldercaring coordinator has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding eldercaring coordination communications.

(c) Notwithstanding paragraphs (a) and (b), there is no confidentiality or privilege attached to any signed written agreement reached during eldercaring coordination, unless the parties agree otherwise, or to any eldercaring coordination communication:

1. Necessary to identify, authenticate, confirm, or deny a written and signed agreement entered into by the parties during eldercaring coordination.
2. Necessary to identify an issue for resolution by the court, including to support a motion to terminate eldercaring coordination, without otherwise disclosing communications made by any party, participant, or the eldercaring coordinator.
3. Limited to the subject of a party's compliance with the order of referral to eldercaring coordination, orders for psychological evaluation, court orders or health care provider recommendations for counseling, or court orders for substance abuse testing or treatment.
4. Necessary to determine the qualifications of an eldercaring coordinator or to determine the immunity and liability of an eldercaring coordinator who has acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for the rights, safety, or property of the parties pursuant to subsection (11).
5. The parties agree may be disclosed or for which privilege against disclosure has been waived by all parties.
6. Made in the event the eldercaring coordinator needs to contact persons outside of the eldercaring coordination process to give or obtain information that furthers the eldercaring coordination process.

7. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report.

8. Necessary to protect any person from future acts that would constitute domestic violence under chapter 741; child abuse, neglect, or abandonment under chapter 39; or abuse, neglect, or exploitation of an elderly or disabled adult under chapter 415 or chapter 825, or are necessary in an investigation conducted under s. 744.2004 or a review conducted under s. 744.368(5).

9. Offered to report, prove, or disprove professional misconduct alleged to have occurred during eldercaring coordination, solely for the internal use of the body conducting the investigation of such misconduct.

10. Offered to report, prove, or disprove professional malpractice alleged to have occurred during eldercaring coordination solely for the professional malpractice proceeding.

11. Willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.

(d) An eldercaring coordination communication disclosed under any provision of subparagraph (c)1., subparagraph (c)2., subparagraph (c)5., subparagraph (c)8., or subparagraph (c)9. is confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(e) Information that is otherwise admissible or discoverable does not become inadmissible or protected from discovery by reason of its disclosure or use in eldercaring coordination.

(f) A party that discloses or makes a representation about a privileged eldercaring coordination communication waives that privilege, but only to the extent necessary for the other party or parties to respond to the disclosure or representation.

(g)1. An eldercaring coordination party or participant who knowingly and willfully discloses an eldercaring coordination communication in violation of this subsection, upon application by any party to a court of competent jurisdiction, is subject to remedies, including:

a. Equitable relief.

b. Compensatory damages.

c. Contribution to the other party's or parties' attorney fees and costs, the other party's or parties' portion of the eldercaring coordinator fees, and the other party's or parties' portion of the costs incurred in the eldercaring coordination process.

d. Reasonable attorney fees and costs incurred in the application for remedies under this subsection.

2. Notwithstanding any other law, an application for relief filed under this paragraph may not be commenced later than 2 years after the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than 4 years after the breach.



3. An eldercaring coordination party or participant is not subject to a civil action under this paragraph for lawful compliance with s. 119.07.

(10) EMERGENCY REPORTING TO THE COURT.—

(a) An eldercaring coordinator must immediately inform the court by affidavit or verified report, without notice to the parties, if:

1. The eldercaring coordinator has made or will make a report pursuant to chapter 39 or chapter 415; or

2. A party, including someone acting on a party's behalf, is threatening or is believed to be planning to commit the offense of kidnapping, as defined in s. 787.01(1), upon an elder, or wrongfully removes or is removing the elder from the jurisdiction of the court without prior court approval or compliance with the requirements of s. 744.1098. If the eldercaring coordinator suspects that a party or family member has relocated an elder within this state to protect the elder from a domestic violence situation, the eldercaring coordinator may not disclose the location of the elder unless required by court order.

(b) An eldercaring coordinator shall immediately inform the court by affidavit or verified report and serve a copy of such affidavit or report on each party upon learning that a party is the subject of a final order or injunction of protection against domestic violence or exploitation of an elderly person or has been arrested for an act of domestic violence or exploitation of an elderly person.

(11) IMMUNITY FROM AND LIMITATION OF LIABILITY.—

(a) A person who is appointed or employed to assist the body designated to perform duties relating to disciplinary proceedings involving eldercaring coordinators has absolute immunity from liability arising from the performance of his or her duties while acting within the scope of his or her appointed functions or duties of employment.

(b) An eldercaring coordinator who is appointed by the court is not liable for civil damages for any act or omission within the scope of his or her duties under an order of referral unless such person acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for the rights, safety, or property of the parties.

(12) MINIMUM STANDARDS AND PROCEDURES.—The Florida Supreme Court shall establish minimum standards and procedures for the qualification, ethical conduct, discipline, and training and education of eldercaring coordinators who serve under this section. Pending establishment of minimum standards and procedures for the discipline of eldercaring coordinators, the order of referral by the court may address procedures governing complaints against the appointed eldercaring coordinator consistent with this section. The Florida Supreme Court may appoint or employ such personnel as are necessary to assist the court in exercising its powers and performing its duties under this section.

