

By Senator Diaz de la Portilla

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1 A bill to be entitled
2 An act relating to guardians and wards; amending s.
3 744.108, F.S.; providing that a guardian or attorney
4 is entitled to a reasonable fee for services and costs
5 if there is a proven benefit to the ward by the
6 actions of the guardian or the attorney; revising
7 criteria for award of fees for a guardian or attorney;
8 prohibiting fee awards when a conflict of interest
9 exists; providing that fees for legal services may
10 include reasonable charges for work performed by
11 paralegals; revising requirements for petitions for
12 guardian fees and attorney fees; amending s. 744.331,
13 F.S.; deleting obsolete language; revising the
14 requirements for the composition and appointment of an
15 examining committee; providing that the attending or
16 family physician may be appointed to the committee
17 unless good cause is shown; revising the requirements
18 for examinations and reports; authorizing family
19 members and caregivers to observe and record
20 evaluations; requiring that the court dismiss a
21 petition if an examining committee member concludes
22 that the alleged incapacitated person is not
23 incapacitated; revising provisions relating to
24 suspension of a trust, trust amendment, or durable
25 power of attorney in certain circumstances; creating
26 s. 744.4461, F.S.; defining the term "undue
27 influence"; prohibiting financial exploitation of a
28 ward; providing criminal penalties; amending s.
29 932.701, F.S.; redefining the term "contraband

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30 article" to include the forfeiture of personal
 31 property used in connection with the financial
 32 exploitation of a ward; providing an effective date.
 33

34 Be It Enacted by the Legislature of the State of Florida:
 35

36 Section 1. Section 744.108, Florida Statutes, is amended to
 37 read:

38 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees
 39 and expenses.—

40 (1) A guardian, or an attorney who has rendered services to
 41 the ward or to the guardian on the ward's behalf, is entitled to
 42 a reasonable fee for services rendered and reimbursement for
 43 costs incurred on behalf of the ward if there is a monetary
 44 benefit accrued to the ward by the actions of the guardian or
 45 attorney.

46 (2) When fees for a guardian or an attorney are submitted
 47 to the court for determination, the court shall consider the
 48 following criteria:

49 (a) The time and labor required;

50 (b) The novelty and difficulty of the questions involved
 51 and the skill required to perform the services properly;

52 ~~(c) The likelihood that the acceptance of the particular~~
 53 ~~employment will preclude other employment of the person;~~

54 (c) ~~(d)~~ The fee customarily charged in the locality for
 55 similar services;

56 ~~(e) The nature and value of the incapacitated person's~~
 57 ~~property, the amount of income earned by the estate, and the~~
 58 ~~responsibilities and potential liabilities assumed by the~~

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59 ~~person;~~

60 ~~(d)-(f)~~ The results obtained;

61 ~~(g) The time limits imposed by the circumstances;~~

62 ~~(h) The nature and length of the relationship with the~~
63 ~~incapacitated person;~~ and

64 ~~(e)-(i)~~ The experience, reputation, diligence, and ability
65 of the person performing the service.

66 (3) In awarding fees to attorney guardians or attorneys,
67 the court must clearly distinguish between fees and expenses for
68 legal services and fees and expenses for guardian services and
69 must have determined that no conflict of interest exists. If a
70 conflict of interest exists, the guardian fees and attorney fees
71 may not be awarded.

72 (4) Fees for legal services may include customary and
73 reasonable charges for work performed by legal assistants or
74 paralegals employed by or ~~and~~ working under the direction of the
75 attorney.

76 (5) All petitions for guardian ~~guardian's~~ and attorney
77 ~~attorney's~~ fees and expenses must be accompanied by an itemized
78 description of the services performed for the fees and expenses
79 sought to be recovered and an accounting of the monetary benefit
80 accrued to the ward by the actions of the person requesting the
81 fees and expenses.

82 (6) A petition for fees or expenses may not be approved by
83 the court without 20 days' ~~prior~~ notice to the guardian and to
84 all family members, or next of kin, of the ward who are listed
85 in the petition to initiate the proceedings ~~the ward, unless the~~
86 ~~ward is a minor or is totally incapacitated.~~ Other family
87 members of the ward or next of kin not listed in the petition to

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88 initiate proceedings or other interested parties may submit
89 instructions to be placed on the notice and may provide a
90 mailing address or an e-mail address to which the notice shall
91 be sent.

92 (7) A petition for fees must ~~shall~~ include the period
93 covered and the total amount of all prior fees paid or costs
94 awarded to all parties ~~the petitioner~~ in the guardianship
95 proceeding currently before the court.

96 (8) When court proceedings are instituted to review or
97 determine guardian fees ~~a guardian's~~ or attorney ~~an attorney's~~
98 fees under subsection (2), such proceedings are part of the
99 guardianship administration process and the costs, including
100 fees for the guardian's attorney, shall be determined by the
101 court and paid from the assets of the guardianship estate unless
102 the court finds the requested compensation under subsection (2)
103 to be substantially unreasonable or ineffective in protecting
104 the assets of the ward.

105 Section 2. Paragraph (d) of subsection (2), paragraphs (a),
106 (c), (d), (e), (f), and (g) of subsection (3), subsection (4),
107 and paragraph (f) of subsection (6) of section 744.331, Florida
108 Statutes, are amended to read:

109 744.331 Procedures to determine incapacity.—

110 (2) ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON.—

111 (d) ~~Effective January 1, 2007,~~ An attorney seeking to be
112 appointed by a court for incapacity and guardianship proceedings
113 must have completed a minimum of 8 hours of education in
114 guardianship. A court may waive the initial training requirement
115 for an attorney who has served as a court-appointed attorney in
116 incapacity proceedings or as an attorney of record for guardians

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117 for at least ~~not less than~~ 3 years. ~~The education requirement of~~
118 ~~this paragraph does not apply to the office of criminal conflict~~
119 ~~and civil regional counsel until July 1, 2008.~~

120 (3) EXAMINING COMMITTEE.—

121 (a) Within 5 days after a petition for determination of
122 incapacity has been filed, the court shall appoint an examining
123 committee consisting of three members. The appointments shall be
124 made from a list of persons qualified to be members of the
125 examining committee prepared and published by the chief judge of
126 the circuit. One member must be a board-certified psychiatrist
127 or other physician-specialist, and each of ~~physician.~~ the
128 remaining members must be ~~either~~ a clinical psychologist, a
129 board-certified gerontologist, an advanced registered nurse
130 practitioner, a board-certified ~~another~~ psychiatrist, or other
131 board-certified physician, ~~a registered nurse, nurse~~
132 ~~practitioner, licensed social worker, a person with an advanced~~
133 ~~degree in gerontology from an accredited institution of higher~~
134 ~~education, or other person who by knowledge, skill, experience,~~
135 ~~training, or education may, in the court's discretion, advise~~
136 ~~the court in the form of an expert opinion.~~ Each member One of
137 the examining ~~three members of the~~ committee must have
138 professional knowledge and experience in evaluating ~~of~~ the type
139 of incapacity alleged in the petition. Unless good cause is
140 shown, the attending or family physician may ~~not~~ be appointed to
141 the committee. If the attending or family physician is not
142 appointed to the committee, but available for consultation, the
143 committee must consult with the physician and review pertinent
144 findings. Each committee member must include such review in his
145 or her individual report. Members of the examining committee may

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146 not be related to or associated with one another, with the
147 petitioner, with counsel for the petitioner or the proposed
148 guardian, or with the person alleged to be totally or partially
149 incapacitated. A member may not be employed by any private or
150 governmental agency that has custody of, or furnishes, services
151 or subsidies, directly or indirectly, to the person or the
152 family of the person alleged to be incapacitated or for whom a
153 guardianship is sought. A petitioner may not serve as a member
154 of the examining committee. Members of the examining committee
155 must be able to communicate, ~~either~~ directly or through an
156 interpreter, in the language that the alleged incapacitated
157 person speaks or to communicate in a medium understandable to
158 the alleged incapacitated person if she or he is able to
159 communicate. The clerk of the court shall send notice of the
160 appointment to each person appointed no later than 3 days after
161 the court's appointment.

162 (c) Each person appointed to an examining committee must
163 file an affidavit with the court every 12 months stating that he
164 or she has completed all the required courses and holds a
165 current, valid license to practice in this state ~~or will do so~~
166 ~~no later than 4 months after his or her initial appointment.~~
167 Each year, the chief judge of the circuit must prepare a list of
168 persons qualified to be members of an examining committee.

169 (d) A member of an examining committee must complete a
170 minimum of 4 hours of initial training. The person must complete
171 2 hours of continuing education during each 2-year period after
172 the initial training. The initial training and continuing
173 education program must be developed under the supervision of the
174 Statewide Public Guardianship Office, in consultation with the

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175 Florida Conference of Circuit ~~Court~~ Judges; the Elder Law and
176 the Real Property, Probate and Trust Law sections of The Florida
177 Bar; the Florida State Guardianship Association; ~~and~~ the Florida
178 Guardian Ad Litem Guardianship Foundation; and the Florida
179 Medical Association. The court may waive the initial training
180 requirement for a person who has served for at least ~~not less~~
181 ~~than~~ 5 years on examining committees. If a person wishes to
182 obtain his or her continuing education on the Internet or by
183 watching a video course, the person must first obtain the
184 approval of the chief judge before taking an Internet or video
185 course.

186 (e) Each member of the examining committee shall perform a
187 comprehensive evaluation, including a physical examination, of
188 the alleged incapacitated person ~~examine the person~~. Each
189 examining committee member must determine the alleged
190 incapacitated person's ability to exercise those rights
191 specified in s. 744.3215. In addition to the evaluation
192 ~~examination~~, each examining committee member must have access
193 to, ~~and may~~ consider the person's health status at the time of
194 the evaluation, the appropriateness of the timing of the
195 evaluation, previous evaluations ~~examinations~~ of the person,
196 including, but not limited to, habilitation plans, school
197 records, and psychological and psychosocial reports voluntarily
198 offered for use by the alleged incapacitated person or his or
199 her attorney. Each member of the examining committee must submit
200 an independent ~~a~~ report within 15 days after appointment without
201 consultation with the other committee members.

202 (f) The examination of the alleged incapacitated person
203 must include a comprehensive evaluation ~~examination~~, a report of

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204 which shall be filed by each examining committee member as part
 205 of his or her written report. The comprehensive evaluation
 206 ~~examination~~ report should be an essential element, but not
 207 necessarily the only element, used in making a capacity and
 208 guardianship decision. The comprehensive evaluation ~~examination~~
 209 must include, ~~if indicated~~:

- 210 1. A physical examination, including neurologic findings;
- 211 2. A comprehensive, objective mental health examination;
- 212 and
- 213 3. A functional assessment; and
- 214 4. A neurological imaging study, if required.

215
 216 If any aspect ~~of these three aspects~~ of the evaluation
 217 ~~examination is not indicated or~~ cannot be accomplished for any
 218 reason, the written report must explain the reasons for its
 219 omission, or the report is null and void.

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

- 221 1. To the extent possible, a clinical diagnosis and
 222 prognosis for recovery, ~~and recommended course of treatment.~~
- 223 2. An evaluation of the alleged incapacitated person's
 224 ability to retain his or her ~~her or his~~ rights, including,
 225 without limitation, the rights to marry, † vote, † contract, †
 226 manage or dispose of property, † have a driver ~~driver's~~ license, †
 227 determine his or her ~~her or his~~ residence, † consent to medical
 228 treatment, † and make decisions affecting his or her ~~her or his~~
 229 social environment.
- 230 3. The results of the comprehensive evaluation ~~examination~~
 231 and the committee member's assessment of information provided by
 232 the attending or family physician or the alleged incapacitated

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233 person's attorney, if any.

234 4. A description of any matters with respect to which the
235 person lacks the capacity to exercise rights, the extent and
236 expected duration of that incapacity, and the objective factual
237 basis for the determination that the person lacks that capacity.

238 5. The names of all persons present during the time the
239 committee member conducted his or her evaluation ~~examination~~. If
240 a person other than the person who is the subject of the
241 evaluation ~~examination~~ supplies answers posed to the alleged
242 incapacitated person, the report must include the response and
243 the name of the person supplying the answer. Absent objection
244 from the alleged incapacitated person, a family member or
245 caregiver may not be barred from observing the evaluation. Video
246 or other recordings of the evaluation may be made by family
247 members and interested parties without limitation.

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

250 (4) RULING ON DISMISSAL OF PETITION.—If any ~~a majority~~ of
251 the examining committee members concludes ~~conclude~~ that the
252 alleged incapacitated person is not incapacitated in any
253 respect, the court shall dismiss the petition.

254 (6) ORDER DETERMINING INCAPACITY.—If, after making findings
255 of fact on the basis of clear and convincing evidence, the court
256 finds that a person is incapacitated with respect to the
257 exercise of a particular right, or all rights, the court shall
258 enter a written order determining such incapacity. A person is
259 determined to be incapacitated only with respect to those rights
260 specified in the order.

261 (f) Upon the filing of a verified sworn statement by an

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262 interested person stating:

263 1. That he or she has sworn evidence ~~a good faith belief~~
264 that the alleged incapacitated person's trust, trust amendment,
265 or durable power of attorney is invalid; ~~and~~

266 2. A reasonable factual basis for that belief; and

267 3. That there exists an imminent danger of physical or
268 financial harm to the alleged incapacitated person and that such
269 person has reported the danger to the Department of Children and
270 Families or the state attorney,

271
272 the trust, trust amendment, or durable power of attorney is
273 suspended until such time as a court hearing can be held, at
274 which time such documents may be reinstated at the discretion of
275 the court ~~shall not be deemed to be an alternative to the~~
276 ~~appointment of a guardian.~~ The appointment of a guardian does
277 not limit the court's power to determine that certain authority
278 granted by a durable power of attorney remains ~~is to remain~~
279 exercisable by the attorney in fact.

280 Section 3. Section 744.4461, Florida Statutes, is created
281 to read:

282 744.4461 Financial exploitation of wards; penalties.-

283 (1) As used in this section, the term "undue influence"
284 means domination, intimidation, force, coercion, or legal
285 manipulation exercised by another person to the extent that a
286 ward is harmed.

287 (2) A guardian or his or her agent or an attorney or his or
288 her agent may not knowingly, from the date the incapacity is
289 adjudicated, dissipate, use, obtain, convert, or take control of
290 or endeavor to dissipate, use, obtain, convert, or take control

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291 of any of a ward's property by improper billing, fraud upon the
292 court, deception, intimidation, undue influence, coercion,
293 harassment, duress, or misrepresentation with the intent or
294 result of permanently depriving the ward of the use, benefit, or
295 possession of the property.

296 (3) A person who violates this section commits a felony of
297 the third degree, punishable as provided in s. 775.082, s.
298 775.083, or s. 775.084.

299 Section 4. Paragraph (a) of subsection (2) of section
300 932.701, Florida Statutes, is amended to read:

301 932.701 Short title; definitions.—

302 (2) As used in the Florida Contraband Forfeiture Act:

303 (a) "Contraband article" means:

304 1. Any controlled substance as defined in chapter 893 or
305 any substance, device, paraphernalia, or currency or other means
306 of exchange that was used, was attempted to be used, or was
307 intended to be used in violation of ~~any provision of~~ chapter
308 893, if the totality of the facts presented by the state is
309 clearly sufficient to meet the state's burden of establishing
310 probable cause to believe that a nexus exists between the
311 article seized and the narcotics activity, regardless of whether
312 ~~or not~~ the use of the contraband article can be traced to a
313 specific narcotics transaction.

314 2. Any gambling paraphernalia, lottery tickets, money,
315 currency, or other means of exchange that ~~which~~ was used or, ~~was~~
316 attempted, ~~or~~ intended to be used in violation of the gambling
317 laws of the state.

318 3. Any ~~equipment,~~ liquid or solid equipment that, ~~which~~ was
319 or is being used or, ~~is being used,~~ was attempted ~~to be used,~~ or

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320 intended to be used in violation of the beverage or tobacco laws
321 of the state.

322 4. Any motor fuel upon which the motor fuel tax has not
323 been paid as required by law.

324 5. Any personal property, including, but not limited to,
325 any vessel, aircraft, item, object, tool, substance, device,
326 weapon, machine, vehicle of any kind, money, securities, books,
327 records, research, negotiable instruments, or currency, which
328 was used or was attempted to be used as an instrumentality in
329 the commission of, or in aiding or abetting in the commission
330 of, any felony, regardless of whether ~~or not~~ comprising an
331 element of the felony, or which is acquired by proceeds obtained
332 as a result of a violation of the Florida Contraband Forfeiture
333 Act.

334 6. Any real property, including any right, title,
335 leasehold, or other interest in the whole of any lot or tract of
336 land, which was or is being used, ~~is being used~~, or was
337 attempted to be used as an instrumentality in the commission of,
338 or in aiding or abetting in the commission of, any felony, or
339 which is acquired by proceeds obtained as a result of a
340 violation of the Florida Contraband Forfeiture Act.

341 7. Any personal property, including, but not limited to,
342 equipment, money, securities, books, records, research,
343 negotiable instruments, currency, or any vessel, aircraft, item,
344 object, tool, substance, device, weapon, machine, or vehicle of
345 any kind in the possession of or belonging to any person who
346 takes aquaculture products in violation of s. 812.014(2)(c).

347 8. Any motor vehicle offered for sale in violation of s.
348 320.28.

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349 9. Any motor vehicle used during the course of committing
350 an offense in violation of s. 322.34(9)(a).

351 10. Any photograph, film, or other recorded image,
352 including an image recorded on videotape, a compact disc,
353 digital tape, or fixed disk, which ~~that~~ is recorded in violation
354 of s. 810.145 and ~~is~~ possessed for the purpose of amusement,
355 entertainment, sexual arousal, gratification, or profit, or for
356 the purpose of degrading or abusing another person.

357 11. Any real property, including any right, title,
358 leasehold, or other interest in the whole of any lot or tract of
359 land, which is acquired by proceeds obtained as a result of
360 Medicaid fraud under s. 409.920 or s. 409.9201; any personal
361 property, including, but not limited to, equipment, money,
362 securities, books, records, research, negotiable instruments, or
363 currency; or any vessel, aircraft, item, object, tool,
364 substance, device, weapon, machine, or vehicle of any kind in
365 the possession of or belonging to any person which is acquired
366 by proceeds obtained as a result of Medicaid fraud under s.
367 409.920 or s. 409.9201.

368 12. Any personal property, including, but not limited to,
369 any vehicle, item, object, tool, device, weapon, machine, money,
370 security, book, or record, which ~~that~~ is used or attempted to be
371 used as an instrumentality in the commission of, or in aiding
372 and abetting in the commission of, a person's third or
373 subsequent violation of s. 509.144, whether or not comprising an
374 element of the offense.

375 13. Any vehicle, machinery, equipment, or other item of
376 personal property used in connection with the financial
377 exploitation of a ward in violation of s. 744.4461.

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Section 5. This act shall take effect October 1, 2014.