

By Senator Stargel

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1 A bill to be entitled
2 An act relating to guardianship proceedings; amending
3 s. 744.108, F.S.; providing that fees and costs
4 incurred by an attorney who has rendered services to a
5 ward in compensation proceedings are payable from
6 guardianship assets; providing that expert testimony
7 is not required in proceedings to determine
8 compensation for an attorney or guardian; amending s.
9 744.3025, F.S.; providing that a court may appoint a
10 guardian ad litem to represent a minor if necessary to
11 protect the minor's interest in a settlement;
12 providing that a settlement of a minor's claim is
13 subject to certain confidentiality provisions;
14 amending s. 744.3031, F.S.; requiring notification of
15 an alleged incapacitated person and such person's
16 attorney of a petition for appointment of an emergency
17 temporary guardian before a hearing on the petition
18 commences; amending s. 744.3115, F.S.; directing the
19 court to specify authority for health care decisions
20 with respect to a ward's advance directive; amending
21 s. 744.312, F.S.; providing an additional
22 consideration for the court when appointing a
23 guardian; amending s. 744.331, F.S.; directing the
24 court to consider certain factors when determining
25 incapacity; requiring that the examining committee be
26 paid from state funds as court-appointed expert
27 witnesses if a petition for incapacity is dismissed;
28 requiring that a petitioner reimburse the state for
29 expert witness fees if the court finds the petition to

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30 have been filed in bad faith; amending s. 744.344,
31 F.S.; providing for the court to hear testimony
32 regarding the appointment of an emergency guardian;
33 providing conditions under which the court is
34 authorized to appoint an emergency guardian; amending
35 s. 744.345, F.S.; revising provisions relating to
36 letters of guardianship; creating s. 744.359, F.S.;
37 prohibiting abuse, neglect, or exploitation of a ward
38 by a guardian; requiring reporting thereof to an abuse
39 hotline; amending s. 744.361, F.S.; providing
40 additional powers and duties of a guardian; amending
41 s. 744.367, F.S.; revising the period during which a
42 guardian must file an annual guardianship plan with
43 the court; amending s. 744.369, F.S.; providing for
44 continuance of guardianship under certain
45 circumstances; amending s. 744.464, F.S.; establishing
46 the burden of proof for determining restoration of
47 capacity of a ward in pending guardianship cases;
48 providing applicability; providing an effective date.

49
50 Be It Enacted by the Legislature of the State of Florida:

51
52 Section 1. Subsections (5) and (8) of section 744.108,
53 Florida Statutes, are amended, and subsection (9) is added to
54 that section, to read:

55 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees
56 and expenses.—

57 (5) All petitions for guardian ~~guardian's~~ and attorney
58 ~~attorney's~~ fees and expenses must be accompanied by an itemized

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59 description of the services performed for the fees and expenses
60 sought to be recovered.

61 (8) When court proceedings are instituted to review or
62 determine a guardian's or an attorney's fees under subsection
63 (2), such proceedings are part of the guardianship
64 administration process and the costs, including costs and
65 attorney fees for the guardian's attorney, an attorney appointed
66 under s. 744.331(2), or an attorney who has rendered services to
67 the ward, shall be determined by the court and paid from the
68 assets of the guardianship estate unless the court finds the
69 requested compensation under subsection (2) to be substantially
70 unreasonable.

71 (9) With respect to a request for compensation by the
72 guardian, the guardian's attorney, a person employed by the
73 guardian, an attorney appointed under s. 744.331(2), or an
74 attorney who has rendered services to the ward, the court may
75 determine the compensation to be reasonable without receiving
76 expert testimony. A person or party may offer expert testimony
77 for or against a request for compensation after giving notice to
78 interested persons. A prevailing party's reasonable expert
79 witness fees shall be awarded by the court and paid from the
80 assets of the guardianship estate.

81 Section 2. Section 744.3025, Florida Statutes, is amended
82 to read:

83 744.3025 Claims of minors.—

84 (1) (a) The court may appoint a guardian ad litem to
85 represent the minor's interest before approving a settlement of
86 the minor's portion of the claim in a ~~any~~ case in which a minor
87 has a claim for personal injury, property damage, wrongful

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88 death, or other cause of action in which the gross settlement of
89 the claim exceeds \$15,000 if the court believes a guardian ad
90 litem is necessary to protect the minor's interest.

91 (b) Except as provided in paragraph (e), the court shall
92 appoint a guardian ad litem to represent the minor's interest
93 before approving a settlement of the minor's claim in a any case
94 in which the gross settlement involving a minor equals or
95 exceeds \$50,000.

96 (c) The appointment of the guardian ad litem must be
97 without the necessity of bond or notice.

98 (d) The duty of the guardian ad litem is to protect the
99 minor's interests as described in the Florida Probate Rules.

100 (e) A court need not appoint a guardian ad litem for the
101 minor if a guardian of the minor has previously been appointed
102 and that guardian has no potential adverse interest to the
103 minor. ~~A court may appoint a guardian ad litem if the court~~
104 ~~believes a guardian ad litem is necessary to protect the~~
105 ~~interests of the minor.~~

106 (2) Unless waived, the court shall award reasonable fees
107 and costs to the guardian ad litem to be paid out of the gross
108 proceeds of the settlement.

109 (3) A settlement of a claim pursuant to this section is
110 subject to the confidentiality provisions of this chapter.

111 Section 3. Subsections (2) through (8) of section 744.3031,
112 Florida Statutes, are renumbered as subsections (3) through (9),
113 respectively, and a new subsection (2) is added to that section,
114 to read:

115 744.3031 Emergency temporary guardianship.-

116 (2) Notice of filing of the petition for appointment of an

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117 emergency temporary guardian and any hearing on the petition
118 must be served on the alleged incapacitated person and on the
119 alleged incapacitated person's attorney before the hearing on
120 the petition is commenced.

121 Section 4. Section 744.3115, Florida Statutes, is amended
122 to read:

123 744.3115 Advance directives for health care.—In each
124 proceeding in which a guardian is appointed under this chapter,
125 the court shall determine whether the ward, prior to incapacity,
126 has executed any valid advance directive under chapter 765. If
127 any advance directive exists, the court shall specify in its
128 order and letters of guardianship what authority, if any, the
129 guardian shall exercise over the ward with regard to health care
130 decisions and what authority, if any, the surrogate shall
131 continue to exercise over the ward with regard to health care
132 decisions ~~surrogate~~. Pursuant to the grounds listed in s.
133 765.105, the court, upon its own motion, may, with notice to the
134 surrogate and any other appropriate parties, modify or revoke
135 the authority of the surrogate to make health care decisions for
136 the ward. If the court order provides that the guardian is
137 responsible for making health care decisions for the ward, the
138 guardian shall assume the responsibilities listed in s. 765.205.
139 For purposes of this section, the term "health care decision"
140 has the same meaning as in s. 765.101.

141 Section 5. Subsection (1) of section 744.312, Florida
142 Statutes, is amended, subsections (3) and (4) are renumbered as
143 subsections (4) and (5), respectively, and a new subsection (3)
144 is added to that section, to read:

145 744.312 Considerations in appointment of guardian.—

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146 (1) Subject to the provisions of subsection (5) ~~(4)~~, the
147 court may appoint any person who is fit and proper and qualified
148 to act as guardian, whether related to the ward or not.

149 (3) The court may not give preference to the appointment of
150 a person solely based on the fact that the person was appointed
151 to serve as an emergency temporary guardian.

152 Section 6. Subsection (6) and paragraph (c) of subsection
153 (7) of section 744.331, Florida Statutes, are amended to read:

154 744.331 Procedures to determine incapacity.—

155 (6) ORDER DETERMINING INCAPACITY.—If, after making findings
156 of fact on the basis of clear and convincing evidence, the court
157 finds that a person is incapacitated with respect to the
158 exercise of a particular right, or all rights, the court shall
159 enter a written order determining such incapacity. In making
160 this determination, the court shall consider the person's unique
161 needs and abilities and may only remove those rights that the
162 court finds the person does not have the legal capacity to
163 exercise. A person is determined to be incapacitated only with
164 respect to those rights specified in the order.

165 (a) The court shall make the following findings:

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

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175 (b) When an order determines that a person is incapable of
176 exercising delegable rights, the court must consider and find
177 whether there is an alternative to guardianship that will
178 sufficiently address the problems of the incapacitated person. A
179 guardian must be appointed to exercise the incapacitated
180 person's delegable rights unless the court finds there is an
181 alternative that sufficiently addresses the problems of the
182 incapacitated person. A guardian may not be appointed if the
183 court finds there is an alternative to guardianship which will
184 sufficiently address the problems of the incapacitated person.

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

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

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

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

200 1. That he or she has a good faith belief that the alleged
201 incapacitated person's trust, trust amendment, or durable power
202 of attorney is invalid; and

203 2. A reasonable factual basis for that belief,

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204
205 the trust, trust amendment, or durable power of attorney shall
206 not be deemed to be an alternative to the appointment of a
207 guardian. The appointment of a guardian does not limit the
208 court's power to determine that certain authority granted by a
209 durable power of attorney is to remain exercisable by the agent
210 ~~attorney in fact.~~

211 (7) FEES.—

212 (c) If the petition is dismissed:~~7~~

213 1. The fees of the examining committee shall be paid upon
214 court order as expert witness fees under s. 29.004(6).

215 2. Costs and attorney ~~attorney's~~ fees of the proceeding may
216 be assessed against the petitioner if the court finds the
217 petition to have been filed in bad faith. If the court finds bad
218 faith under this subparagraph, the petitioner shall reimburse
219 the state courts system for any amounts paid under subparagraph
220 1.

221 Section 7. Subsection (4) of section 744.344, Florida
222 Statutes, is amended to read:

223 744.344 Order of appointment.—

224 (4) If a petition for the appointment of a guardian has not
225 been filed or ruled upon at the time of the hearing on the
226 petition to determine capacity, the court may appoint an
227 emergency temporary guardian in the manner and for the purposes
228 specified in s. 744.3031.

229 Section 8. Section 744.345, Florida Statutes, is amended to
230 read:

231 744.345 Letters of guardianship.—Letters of guardianship
232 shall be issued to the guardian and shall specify whether the

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233 guardianship pertains to the person, or the property, or both,
234 of the ward. The letters must state whether the guardianship is
235 plenary or limited, and, if limited, the letters must state the
236 powers and duties of the guardian. ~~If the guardianship is~~
237 ~~limited,~~ The letters shall state whether or not and to what
238 extent the guardian is authorized to act on behalf of the ward
239 with regard to any advance directive previously executed by the
240 ward.

241 Section 9. Section 744.359, Florida Statutes, is created to
242 read:

243 744.359 Abuse, neglect, or exploitation by a guardian.-

244 (1) A guardian may not abuse, neglect, or exploit the ward.

245 (2) A guardian has committed exploitation when the
246 guardian:

247 (a) Commits fraud in obtaining appointment as a guardian.

248 (b) Abuses his or her powers.

249 (c) Wastes, embezzles, or intentionally mismanages the
250 assets of the ward.

251 (3) A person who believes that a guardian is abusing,
252 neglecting, or exploiting a ward shall report the incident to
253 the central abuse hotline of the Department of Children and
254 Families.

255 Section 10. Section 744.361, Florida Statutes, is amended
256 to read:

257 744.361 Powers and duties of guardian.-

258 (1) The guardian of an incapacitated person is a fiduciary
259 and may exercise only those rights that have been removed from
260 the ward and delegated to the guardian. The guardian of a minor
261 shall exercise the powers of a plenary guardian.

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262 (2) The guardian shall act within the scope of the
263 authority granted by the court and as provided by law.

264 (3) The guardian shall act in good faith.

265 (4) A guardian may not act in a manner that is contrary to
266 the ward's best interests under the circumstances.

267 (5) A guardian who has special skills or expertise, or is
268 appointed in reliance upon the guardian's representation that
269 the guardian has special skills or expertise, shall use those
270 special skills or expertise.

271 ~~(6)(2)~~ The guardian shall file an initial guardianship
272 report in accordance with s. 744.362.

273 ~~(7)(3)~~ The guardian shall file a guardianship report
274 annually in accordance with s. 744.367.

275 ~~(8)(4)~~ The guardian of the person shall implement the
276 guardianship plan.

277 ~~(9)(5)~~ When two or more guardians have been appointed, the
278 guardians shall consult with each other.

279 ~~(10)(6)~~ A guardian who is given authority over any property
280 of the ward shall:

281 (a) Protect and preserve the property and invest it
282 prudently as provided in chapter 518, apply it as provided in s.
283 744.397, and keep clear, distinct, and accurate records of the
284 administration of the ward's property ~~account for it faithfully.~~

285 (b) Perform all other duties required of him or her by law.

286 (c) At the termination of the guardianship, deliver the
287 property of the ward to the person lawfully entitled to it.

288 ~~(11)(7)~~ The guardian shall observe the standards in dealing
289 with the guardianship property that would be observed by a
290 prudent person dealing with the property of another, ~~and, if the~~

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291 ~~guardian has special skills or is named guardian on the basis of~~
292 ~~representations of special skills or expertise, he or she is~~
293 ~~under a duty to use those skills.~~

294 (12)~~(8)~~ The guardian, if authorized by the court, shall
295 take possession of all of the ward's property and of the rents,
296 income, issues, and profits from it, whether accruing before or
297 after the guardian's appointment, and of the proceeds arising
298 from the sale, lease, or mortgage of the property or of any
299 part. All of the property and the rents, income, issues, and
300 profits from it are assets in the hands of the guardian for the
301 payment of debts, taxes, claims, charges, and expenses of the
302 guardianship and for the care, support, maintenance, and
303 education of the ward or the ward's dependents, as provided for
304 under the terms of the guardianship plan or by law.

305 (13) Recognizing that every individual has unique needs and
306 abilities, a guardian who is given authority over a ward's
307 person shall, as appropriate under the circumstances:

308 (a) Consider the expressed desires of the ward as known by
309 the guardian when making decisions that affect the ward.

310 (b) Allow the ward to maintain contact with family and
311 friends unless the guardian believes that such contact may cause
312 harm to the ward.

313 (c) Not restrict the physical liberty of the ward more than
314 reasonably necessary to protect the ward or another person from
315 serious physical injury, illness, or disease.

316 (d) Assist the ward in developing or regaining his or her
317 own capacity, if medically possible.

318 (e) Notify the court if the guardian believes that the ward
319 has regained capacity and that one or more of the rights that

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320 have been removed should be restored.

321 (f) To the extent applicable, make provision for the
322 medical, mental, rehabilitative, or personal care services for
323 the welfare of the ward.

324 (g) To the extent applicable, acquire a clear understanding
325 of the risks and benefits of a recommended course of health care
326 treatment before making a health care decision.

327 (h) Evaluate the ward's medical and health care options,
328 financial resources, and desires when making residential
329 decisions that are best suited for the current needs of the
330 ward.

331 (i) Advocate on behalf of the ward in institutional and
332 other residential settings.

333 (14)(9) A professional guardian must ensure that each of
334 the guardian's wards is personally visited by the guardian or
335 one of the guardian's professional staff at least once each
336 calendar quarter. During the personal visit, the guardian or the
337 guardian's professional staff person shall assess:

338 (a) The ward's physical appearance and condition.

339 (b) The appropriateness of the ward's current living
340 situation.

341 (c) The need for any additional services and the necessity
342 for continuation of existing services, taking into consideration
343 all aspects of social, psychological, educational, direct
344 service, health, and personal care needs.

345 (d) The nature and extent of visitation and communication
346 with the ward's family and friends.

347
348 This subsection does not apply to a professional guardian who

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349 has been appointed only as guardian of the property.

350 Section 11. Subsection (1) of section 744.367, Florida
351 Statutes, is amended to read:

352 744.367 Duty to file annual guardianship report.—

353 (1) Unless the court requires filing on a calendar-year
354 basis, each guardian of the person shall file with the court an
355 annual guardianship plan at least 60 days, but no more than
356 within 90 days, before ~~after~~ the last day of the anniversary
357 month that the letters of guardianship were signed, and the plan
358 must cover the coming fiscal year, ending on the last day in
359 such anniversary month. If the court requires calendar-year
360 filing, the guardianship plan for the coming calendar year must
361 be filed on or after September 1 but no later than December 1 of
362 the current year ~~before April 1 of each year.~~

363 Section 12. Subsection (8) of section 744.369, Florida
364 Statutes, is amended to read:

365 744.369 Judicial review of guardianship reports.—

366 (8) The approved report constitutes the authority for the
367 guardian to act in the forthcoming year. The powers of the
368 guardian are limited by the terms of the report. The annual
369 report may not grant additional authority to the guardian
370 without a hearing, as provided for in s. 744.331, to determine
371 that the ward is incapacitated to act in that matter. Unless the
372 court orders otherwise, the guardian may continue to act under
373 authority of the preceding year's approved report until the
374 forthcoming year's report is approved.

375 Section 13. Paragraphs (a) and (b) of subsection (3) of
376 section 744.464, Florida Statutes, are amended to read:

377 744.464 Restoration to capacity.—

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378 (3) ORDER OF RESTORATION.—

379 (a) If no objections are filed, and the court is satisfied
380 that with the medical examination establishes by a preponderance
381 of the evidence that all or some restoration is appropriate, the
382 court shall enter an order of restoration of capacity, restoring
383 all or some of the rights which were removed from the ward in
384 accordance with those findings. ~~The order must be issued within~~
385 ~~30 days after the medical report is filed.~~

386 (b) At the conclusion of a hearing, conducted pursuant to
387 s. 744.1095, the court shall make specific findings of fact and,
388 based on a preponderance of the evidence, enter an order either
389 denying the suggestion of capacity or restoring all or some of
390 the rights which were removed from the ward. The ward has the
391 burden of proving by a preponderance of the evidence that the
392 restoration of capacity is warranted.

393 Section 14. The amendments made by this act to ss. 744.108,
394 744.3025, and 744.331, Florida Statutes, apply to all
395 proceedings pending on the effective date of this act.

396 Section 15. This act shall take effect upon becoming a law.