

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

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

115 744.3031 Emergency temporary guardianship.—

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

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  
150 of a person solely based on the fact that the person was  
151 appointed 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  
156 findings of fact on the basis of clear and convincing evidence,

157 the court finds that a person is incapacitated with respect to  
158 the exercise of a particular right, or all rights, the court  
159 shall enter a written order determining such incapacity. In  
160 making this determination, the court shall consider the person's  
161 unique needs and abilities and may only remove those rights that  
162 the 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  
167 incapacities;

168 2. The exact areas in which the person lacks capacity to  
169 make informed decisions about care and treatment services or to  
170 meet the essential requirements for her or his physical or  
171 mental health or safety;

172 3. The specific legal disabilities to which the person is  
173 subject; and

174 4. The specific rights that the person is incapable of  
175 exercising.

176 (b) When an order determines that a person is incapable of  
177 exercising delegable rights, the court must consider and find  
178 whether there is an alternative to guardianship that will  
179 sufficiently address the problems of the incapacitated person. A  
180 guardian must be appointed to exercise the incapacitated  
181 person's delegable rights unless the court finds there is an  
182 alternative that sufficiently addresses the problems of the

183 incapacitated person. A guardian may not be appointed if the  
184 court finds there is an alternative to guardianship which will  
185 sufficiently address the problems of the incapacitated person.

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

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

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

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

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

204 2. A reasonable factual basis for that belief,

205  
206 the trust, trust amendment, or durable power of attorney shall  
207 not be deemed to be an alternative to the appointment of a  
208 guardian. The appointment of a guardian does not limit the



209 court's power to determine that certain authority granted by a  
 210 durable power of attorney is to remain exercisable by the agent  
 211 ~~attorney in fact.~~

212 (7) FEES.—

213 (c) If the petition is dismissed:7

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

216 2. Costs and ~~attorney~~ attorney's fees of the proceeding  
 217 may be assessed against the petitioner if the court finds the  
 218 petition to have been filed in bad faith. ~~If the court finds bad~~  
 219 faith under this subparagraph, the petitioner shall reimburse  
 220 the state courts system for any amounts paid under subparagraph  
 221 1.

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

224 744.344 Order of appointment.—

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

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

232 744.345 Letters of guardianship.—Letters of guardianship  
 233 shall be issued to the guardian and shall specify whether the  
 234 guardianship pertains to the person, or the property, or both,

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

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

244 744.359 Abuse, neglect, or exploitation by a guardian.—

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

247 (2) A guardian has committed exploitation when the  
 248 guardian:

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

250 (b) Abuses his or her powers.

251 (c) Wastes, embezzles, or intentionally mismanages the  
 252 assets of the ward.

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

257 Section 10. Section 744.361, Florida Statutes, is amended  
 258 to read:

259 744.361 Powers and duties of guardian.—

260 (1) The guardian of an incapacitated person is a fiduciary

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261 and may exercise only those rights that have been removed from  
262 the ward and delegated to the guardian. The guardian of a minor  
263 shall exercise the powers of a plenary guardian.

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

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

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

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

273 (6)~~(2)~~ The guardian shall file an initial guardianship  
274 report in accordance with s. 744.362.

275 (7)~~(3)~~ The guardian shall file a guardianship report  
276 annually in accordance with s. 744.367.

277 (8)~~(4)~~ The guardian of the person shall implement the  
278 guardianship plan.

279 (9)~~(5)~~ When two or more guardians have been appointed, the  
280 guardians shall consult with each other.

281 (10)~~(6)~~ A guardian who is given authority over any  
282 property of the ward shall:

283 (a) Protect and preserve the property and invest it  
284 prudently as provided in chapter 518, apply it as provided in s.  
285 744.397, and keep clear, distinct, and accurate records of the  
286 administration of the ward's property ~~account for it faithfully.~~

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

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

291 ~~(11)(7)~~ The guardian shall observe the standards in  
 292 dealing with the guardianship property that would be observed by  
 293 a prudent person dealing with the property of another, ~~and, if~~  
 294 ~~the guardian has special skills or is named guardian on the~~  
 295 ~~basis of representations of special skills or expertise, he or~~  
 296 ~~she is under a duty to use those skills.~~

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

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

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

313 (b) Allow the ward to maintain contact with family and  
314 friends unless the guardian believes that such contact may cause  
315 harm to the ward.

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

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

321 (e) Notify the court if the guardian believes that the  
322 ward has regained capacity and that one or more of the rights  
323 that have been removed should be restored.

324 (f) To the extent applicable, make provision for the  
325 medical, mental, rehabilitative, or personal care services for  
326 the welfare of the ward.

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

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

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

336 (14)-(9) A professional guardian must ensure that each of  
337 the guardian's wards is personally visited by the guardian or  
338 one of the guardian's professional staff at least once each

339 | calendar quarter. During the personal visit, the guardian or the  
 340 | guardian's professional staff person shall assess:

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

342 |       (b) The appropriateness of the ward's current living  
 343 | situation.

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

348 |       (d) The nature and extent of visitation and communication  
 349 | with the ward's family and friends.

350 |

351 | This subsection does not apply to a professional guardian who  
 352 | has been appointed only as guardian of the property.

353 |       Section 11. Subsection (1) of section 744.367, Florida  
 354 | Statutes, is amended to read:

355 |       744.367 Duty to file annual guardianship report.—

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

365 the current year ~~before April 1 of each year.~~

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

368 744.369 Judicial review of guardianship reports.—

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

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

380 744.464 Restoration to capacity.—

381 (3) ORDER OF RESTORATION.—

382 (a) If no objections are filed, and the court is satisfied  
383 that with the medical examination establishes by a preponderance  
384 of the evidence that all or some restoration is appropriate, the  
385 court shall enter an order of restoration of capacity, restoring  
386 all or some of the rights which were removed from the ward in  
387 accordance with those findings. ~~The order must be issued within~~  
388 ~~30 days after the medical report is filed.~~

389 (b) At the conclusion of a hearing, conducted pursuant to  
390 s. 744.1095, the court shall make specific findings of fact and,

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391 based on a preponderance of the evidence, enter an order either  
392 denying the suggestion of capacity or restoring all or some of  
393 the rights which were removed from the ward. The ward has the  
394 burden of proving by a preponderance of the evidence that the  
395 restoration of capacity is warranted.

396 Section 14. The amendments made by this act to ss.  
397 744.108, 744.3025, and 744.331, Florida Statutes, apply to all  
398 proceedings pending on the effective date of this act.

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