

1 A bill to be entitled
2 An act relating to guardianship proceedings; creating
3 s. 744.1065, F.S.; authorizing a court to refer
4 guardianship matters to mediation or alternative
5 dispute resolution under certain circumstances;
6 amending ss. 744.107 and 744.1075, F.S.; authorizing a
7 court to appoint the office of criminal conflict and
8 civil regional counsel as a court monitor in
9 guardianship proceedings; amending s. 744.108, F.S.;
10 providing that fees and costs incurred by an attorney
11 who has rendered services to a ward in compensation
12 proceedings are payable from guardianship assets;
13 providing that expert testimony is not required in
14 proceedings to determine compensation for an attorney
15 or guardian; requiring a person offering expert
16 testimony to provide notice to interested persons;
17 providing that expert witness fees are recoverable by
18 the prevailing party; amending s. 744.3025, F.S.;
19 providing that a court may appoint a guardian ad litem
20 to represent a minor if necessary to protect the
21 minor's interest in a settlement; providing that a
22 settlement of a minor's claim is subject to certain
23 confidentiality provisions; amending s. 744.3031,
24 F.S.; requiring notification of an alleged
25 incapacitated person and such person's attorney of a
26 petition for appointment of an emergency temporary

27 guardian before a hearing on the petition commences;
28 amending s. 744.3115, F.S.; directing the court to
29 specify authority for health care decisions with
30 respect to a ward's advance directive; amending s.
31 744.312, F.S.; prohibiting a court from giving
32 preference to the appointment of certain persons as
33 guardians; providing requirements for the appointment
34 of professional guardians; amending s. 744.331, F.S.;
35 directing the court to consider certain factors when
36 determining incapacity; requiring that the examining
37 committee be paid from state funds as court-appointed
38 expert witnesses if a petition for incapacity is
39 dismissed; requiring that a petitioner reimburse the
40 state for such expert witness fees if the court finds
41 the petition to have been filed in bad faith; amending
42 s. 744.344, F.S.; providing conditions under which the
43 court is authorized to appoint an emergency temporary
44 guardian; amending s. 744.345, F.S.; revising
45 provisions relating to letters of guardianship;
46 creating s. 744.359, F.S.; prohibiting abuse, neglect,
47 or exploitation of a ward by a guardian; requiring
48 reporting thereof to the Department of Children and
49 Families central abuse hotline; providing for
50 interpretation; amending s. 744.361, F.S.; providing
51 additional powers and duties of a guardian; amending
52 s. 744.367, F.S.; revising the period during which a

53 guardian must file an annual guardianship plan with
 54 the court; amending s. 744.369, F.S.; providing for
 55 the continuance of a guardian's authority to act under
 56 an expired annual report under certain circumstances;
 57 amending s. 744.464, F.S.; establishing the burden of
 58 proof for determining restoration of capacity of a
 59 ward in pending guardianship cases; requiring a court
 60 to advance such cases on the calendar; providing
 61 applicability; providing an effective date.

62

63 Be It Enacted by the Legislature of the State of Florida:

64

65 Section 1. Section 744.1065, Florida Statutes, is created
 66 to read:

67 744.1065 Mediation; alternative dispute resolution.—At any
 68 time, the court may, upon its own motion or the motion of an
 69 interested person, refer a matter under the jurisdiction of this
 70 chapter to mediation or alternative dispute resolution if the
 71 court finds that mediation or alternative dispute resolution is
 72 in the best interests of the alleged incapacitated person, ward,
 73 or minor.

74 Section 2. Subsection (5) is added to section 744.107,
 75 Florida Statutes, to read:

76 744.107 Court monitors.—

77 (5) The court may appoint the office of criminal conflict
 78 and civil regional counsel as monitor if the ward is indigent.

79 Section 3. Subsection (6) is added to section 744.1075,
 80 Florida Statutes, to read:

81 744.1075 Emergency court monitor.—

82 (6) The court may appoint the office of criminal conflict
 83 and civil regional counsel as monitor if the ward is indigent.

84 Section 4. Subsections (5) and (8) of section 744.108,
 85 Florida Statutes, are amended, and subsection (9) is added to
 86 that section, to read:

87 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees
 88 and expenses.—

89 (5) All petitions for guardian ~~guardian's~~ and attorney
 90 ~~attorney's~~ fees and expenses must be accompanied by an itemized
 91 description of the services performed for the fees and expenses
 92 sought to be recovered.

93 (8) When court proceedings are instituted to review or
 94 determine a guardian's or an attorney's fees under subsection
 95 (2), such proceedings are part of the guardianship
 96 administration process and the costs, including costs and
 97 attorney fees for the guardian's attorney, an attorney appointed
 98 under s. 744.331(2), or an attorney who has rendered services to
 99 the ward, shall be determined by the court and paid from the
 100 assets of the guardianship estate unless the court finds the
 101 requested compensation under subsection (2) to be substantially
 102 unreasonable.

103 (9) The court may determine that a request for
 104 compensation by the guardian, the guardian's attorney, a person

105 employed by the guardian, an attorney appointed under s.
 106 744.331(2), or an attorney who has rendered services to the
 107 ward, is reasonable without receiving expert testimony. A person
 108 or party may offer expert testimony for or against a request for
 109 compensation after giving notice to interested persons.
 110 Reasonable expert witness fees shall be awarded by the court and
 111 paid from the assets of the guardianship estate to the
 112 prevailing party.

113 Section 5. Section 744.3025, Florida Statutes, is amended
 114 to read:

115 744.3025 Claims of minors.—

116 (1) (a) The court may appoint a guardian ad litem to
 117 represent the minor's interest before approving a settlement of
 118 the minor's portion of the claim in a any case in which a minor
 119 has a claim for personal injury, property damage, wrongful
 120 death, or other cause of action in which the gross settlement of
 121 the claim exceeds \$15,000 if the court believes a guardian ad
 122 litem is necessary to protect the minor's interest.

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

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

130 (d) The duty of the guardian ad litem is to protect the

131 minor's interests as described in the Florida Probate Rules.

132 (e) A court need not appoint a guardian ad litem for the
133 minor if a guardian of the minor has previously been appointed
134 and that guardian has no potential adverse interest to the
135 minor. ~~A court may appoint a guardian ad litem if the court
136 believes a guardian ad litem is necessary to protect the
137 interests of the minor.~~

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

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

143 Section 6. Subsections (2) through (8) of section
144 744.3031, Florida Statutes, are renumbered as subsections (3)
145 through (9), respectively, and a new subsection (2) is added to
146 that section, to read:

147 744.3031 Emergency temporary guardianship.—

148 (2) Notice of filing of the petition for appointment of an
149 emergency temporary guardian and a hearing on the petition must
150 be served on the alleged incapacitated person and on the alleged
151 incapacitated person's attorney at least 24 hours before the
152 hearing on the petition is commenced, unless the petitioner
153 demonstrates that substantial harm to the alleged incapacitated
154 person would occur if the 24-hour notice is given.

155 Section 7. Section 744.3115, Florida Statutes, is amended
156 to read:

157 744.3115 Advance directives for health care.—In each
 158 proceeding in which a guardian is appointed under this chapter,
 159 the court shall determine whether the ward, prior to incapacity,
 160 has executed any valid advance directive under chapter 765. If
 161 any advance directive exists, the court shall specify in its
 162 order and letters of guardianship what authority, if any, the
 163 guardian shall exercise over the ward with regard to health care
 164 decisions and what authority, if any, the surrogate shall
 165 continue to exercise over the ward with regard to health care
 166 decisions ~~surrogate~~. Pursuant to the grounds listed in s.
 167 765.105, the court, upon its own motion, may, with notice to the
 168 surrogate and any other appropriate parties, modify or revoke
 169 the authority of the surrogate to make health care decisions for
 170 the ward. For purposes of this section, the term "health care
 171 decision" has the same meaning as in s. 765.101.

172 Section 8. Section 744.312, Florida Statutes, is reordered
 173 and amended to read:

174 744.312 Considerations in appointment of guardian.—
 175 (1)~~(4)~~ If the person designated is qualified to serve
 176 pursuant to s. 744.309, the court shall appoint any standby
 177 guardian or preneed guardian, unless the court determines that
 178 appointing such person is contrary to the best interests of the
 179 ward.

180 (2)~~(1)~~ If a guardian cannot be appointed under subsection
 181 (1) ~~Subject to the provisions of subsection (4)~~, the court may
 182 appoint any person who is fit and proper and qualified to act as

183 guardian, whether related to the ward or not.

184 ~~(2)~~ The court shall give preference to the appointment of
185 a person who:

186 (a) Is related by blood or marriage to the ward;

187 (b) Has educational, professional, or business experience
188 relevant to the nature of the services sought to be provided;

189 (c) Has the capacity to manage the financial resources
190 involved; or

191 (d) Has the ability to meet the requirements of the law
192 and the unique needs of the individual case.

193 (3) The court shall also:

194 (a) Consider the wishes expressed by an incapacitated
195 person as to who shall be appointed guardian.~~†~~

196 (b) Consider the preference of a minor who is age 14 or
197 over as to who should be appointed guardian.~~†~~

198 (c) Consider any person designated as guardian in any will
199 in which the ward is a beneficiary.

200 (4) The court may not give preference to the appointment
201 of a person under subsection (2) solely based on the fact that
202 such person was appointed by the court to serve as an emergency
203 temporary guardian.

204 (5) Appointment of professional guardians by the court
205 shall be on a rotating basis of professional guardians deemed
206 qualified by the chief judge of the circuit. However, the court
207 may appoint a professional guardian without reference to the
208 rotation where the special requirements of the guardianship

209 demand.

210 (6) An emergency temporary guardian who is a professional
211 guardian may not be appointed as the permanent guardian of the
212 ward unless such professional guardian had been designated as a
213 standby guardian or preneed guardian or the court makes specific
214 written findings that such professional guardian meets special
215 requirements of the guardianship.

216 Section 9. Subsection (6) and paragraph (c) of subsection
217 (7) of section 744.331, Florida Statutes, are amended to read:

218 744.331 Procedures to determine incapacity.—

219 (6) ORDER DETERMINING INCAPACITY.—If, after making
220 findings of fact on the basis of clear and convincing evidence,
221 the court finds that a person is incapacitated with respect to
222 the exercise of a particular right, or all rights, the court
223 shall enter a written order determining such incapacity. In
224 determining incapacity, the court shall consider the person's
225 unique needs and abilities and may only remove those rights that
226 the court finds the person is incapable of exercising. A person
227 is determined to be incapacitated only with respect to those
228 rights specified in the order.

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

230 1. The exact nature and scope of the person's
231 incapacities;

232 2. The exact areas in which the person lacks capacity to
233 make informed decisions about care and treatment services or to
234 meet the essential requirements for her or his physical or

235 mental health or safety;

236 3. The specific legal disabilities to which the person is
237 subject; and

238 4. The specific rights that the person is incapable of
239 exercising.

240 (b) When an order determines that a person is incapable of
241 exercising delegable rights, the court must consider and find
242 whether there is an alternative to guardianship that will
243 sufficiently address the problems of the incapacitated person. A
244 ~~guardian must be appointed to exercise the incapacitated~~
245 ~~person's delegable rights unless the court finds there is an~~
246 ~~alternative.~~ A guardian may not be appointed if the court finds
247 there is an alternative to guardianship which will sufficiently
248 address the problems of the incapacitated person. If the court
249 finds there is not an alternative to guardianship that
250 sufficiently addresses the problems of the incapacitated person,
251 a guardian must be appointed to exercise the incapacitated
252 person's delegable rights.

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

257 (d) An order adjudicating a person to be incapacitated
258 constitutes proof of such incapacity until further order of the
259 court.

260 (e) After the order determining that the person is

261 incapacitated has been filed with the clerk, it must be served
 262 on the incapacitated person. The person is deemed incapacitated
 263 only to the extent of the findings of the court. The filing of
 264 the order is notice of the incapacity. An incapacitated person
 265 retains all rights not specifically removed by the court.

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

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

271 2. A reasonable factual basis for that belief,

272
 273 the trust, trust amendment, or durable power of attorney shall
 274 not be deemed to be an alternative to the appointment of a
 275 guardian. The appointment of a guardian does not limit the
 276 court's power to determine that certain authority granted by a
 277 durable power of attorney is to remain exercisable by the agent
 278 ~~attorney in fact~~.

279 (7) FEES.—

280 (c) If the petition is dismissed:7

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

283 2. Costs and attorney ~~attorney's~~ fees of the proceeding
 284 may be assessed against the petitioner if the court finds the
 285 petition to have been filed in bad faith. The petitioner shall
 286 also reimburse the state courts system for any amounts paid

287 under subparagraph 1. upon such a finding.

288 Section 10. Subsection (4) of section 744.344, Florida
 289 Statutes, is amended to read:

290 744.344 Order of appointment.—

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

296 Section 11. Section 744.345, Florida Statutes, is amended
 297 to read:

298 744.345 Letters of guardianship.—Letters of guardianship
 299 shall be issued to the guardian and shall specify whether the
 300 guardianship pertains to the person, or the property, or both,
 301 of the ward. The letters must state whether the guardianship is
 302 plenary or limited, and, if limited, the letters must state the
 303 powers and duties of the guardian. ~~If the guardianship is~~
 304 ~~limited,~~ The letters shall state whether or not and to what
 305 extent the guardian is authorized to act on behalf of the ward
 306 with regard to any advance directive previously executed by the
 307 ward.

308 Section 12. Section 744.359, Florida Statutes, is created
 309 to read:

310 744.359 Abuse, neglect, or exploitation by a guardian.—

311 (1) A guardian may not abuse, neglect, or exploit a ward.

312 (2) A guardian has committed exploitation when the

313 guardian:

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

315 (b) Abuses his or her powers.

316 (c) Wastes, embezzles, or intentionally mismanages the
 317 assets of the ward.

318 (3) A person who believes that a guardian is abusing,
 319 neglecting, or exploiting a ward shall report the incident to
 320 the central abuse hotline of the Department of Children and
 321 Families.

322 (4) This section shall be interpreted in conformity with
 323 s. 825.103.

324 Section 13. Section 744.361, Florida Statutes, is amended
 325 to read:

326 744.361 Powers and duties of guardian.—

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

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

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

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

336 (5) A guardian who has special skills or expertise, or is
 337 appointed in reliance upon the guardian's representation that
 338 the guardian has special skills or expertise, shall use those

339 special skills or expertise when acting on behalf of the ward.

340 (6)~~(2)~~ The guardian shall file an initial guardianship
341 report in accordance with s. 744.362.

342 (7)~~(3)~~ The guardian shall file a guardianship report
343 annually in accordance with s. 744.367.

344 (8)~~(4)~~ The guardian of the person shall implement the
345 guardianship plan.

346 (9)~~(5)~~ When two or more guardians have been appointed, the
347 guardians shall consult with each other.

348 (10)~~(6)~~ A guardian who is given authority over any
349 property of the ward shall:

350 (a) Protect and preserve the property and invest it
351 prudently as provided in chapter 518, apply it as provided in s.
352 744.397, and keep clear, distinct, and accurate records of the
353 administration of the ward's property ~~account for it faithfully.~~

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

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

358 (11)~~(7)~~ The guardian shall observe the standards in
359 dealing with the guardianship property that would be observed by
360 a prudent person dealing with the property of another, ~~and, if~~
361 ~~the guardian has special skills or is named guardian on the~~
362 ~~basis of representations of special skills or expertise, he or~~
363 ~~she is under a duty to use those skills.~~

364 (12)~~(8)~~ The guardian, if authorized by the court, shall

365 take possession of all of the ward's property and of the rents,
366 income, issues, and profits from it, whether accruing before or
367 after the guardian's appointment, and of the proceeds arising
368 from the sale, lease, or mortgage of the property or of any
369 part. All of the property and the rents, income, issues, and
370 profits from it are assets in the hands of the guardian for the
371 payment of debts, taxes, claims, charges, and expenses of the
372 guardianship and for the care, support, maintenance, and
373 education of the ward or the ward's dependents, as provided for
374 under the terms of the guardianship plan or by law.

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

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

380 (b) Allow the ward to maintain contact with family and
381 friends unless the guardian believes that such contact may cause
382 harm to the ward. Upon petition by an interested party, the
383 court may review a decision of a guardian regarding visitation.

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

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

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

391 that have been removed should be restored to the ward.

392 (f) To the extent applicable, make provision for the
393 medical, mental, rehabilitative, or personal care services for
394 the welfare of the ward.

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

398 (h) Evaluate the ward's medical and health care options,
399 financial resources, and desires when making residential
400 decisions that are best suited for the current needs of the
401 ward.

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

404 (14)-(9) A professional guardian must ensure that each of
405 the guardian's wards is personally visited by the guardian or
406 one of the guardian's professional staff at least once each
407 calendar quarter. During the personal visit, the guardian or the
408 guardian's professional staff person shall assess:

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

410 (b) The appropriateness of the ward's current living
411 situation.

412 (c) The need for any additional services and the necessity
413 for continuation of existing services, taking into consideration
414 all aspects of social, psychological, educational, direct
415 service, health, and personal care needs.

416 (d) The nature and extent of visitation and communication

417 with the ward's family and friends.

418

419 This subsection does not apply to a professional guardian who
420 has been appointed only as guardian of the property.

421 Section 14. Subsection (1) of section 744.367, Florida
422 Statutes, is amended to read:

423 744.367 Duty to file annual guardianship report.—

424 (1) Unless the court requires filing on a calendar-year
425 basis, each guardian of the person shall file with the court an
426 annual guardianship plan at least 60 days, but no more than
427 ~~within~~ 90 days, before ~~after~~ the last day of the anniversary
428 month that the letters of guardianship were signed, and the plan
429 must cover the coming fiscal year, ending on the last day in
430 such anniversary month. If the court requires calendar-year
431 filing, the guardianship plan for the forthcoming calendar year
432 must be filed on or after September 1 but no later than December
433 1 of the current year ~~before April 1 of each year.~~

434 Section 15. Subsection (8) of section 744.369, Florida
435 Statutes, is amended to read:

436 744.369 Judicial review of guardianship reports.—

437 (8) The approved report constitutes the authority for the
438 guardian to act in the forthcoming year. The powers of the
439 guardian are limited by the terms of the report. The annual
440 report may not grant additional authority to the guardian
441 without a hearing, as provided for in s. 744.331, to determine
442 that the ward is incapacitated to act in that matter. Unless the

443 court orders otherwise, the guardian may continue to act under
444 authority of the last-approved report until the forthcoming
445 year's report is approved.

446 Section 16. Paragraphs (a) and (b) of subsection (3) of
447 section 744.464, Florida Statutes, are amended, and subsection
448 (4) is added to that section, to read:

449 744.464 Restoration to capacity.—

450 (3) ORDER OF RESTORATION.—

451 (a) If no objections are filed, and the court is satisfied
452 that with the medical examination establishes by a preponderance
453 of the evidence that restoration of all or some of the ward's
454 rights is appropriate, the court shall enter an order of
455 restoration of capacity, restoring all or some of the rights
456 which were removed from the ward in accordance with those
457 findings. ~~The order must be issued within 30 days after the~~
458 ~~medical report is filed.~~

459 (b) At the conclusion of a hearing, conducted pursuant to
460 s. 744.1095, the court shall make specific findings of fact and,
461 based on a preponderance of the evidence, enter an order either
462 denying the suggestion of capacity or restoring all or some of
463 the rights which were removed from the ward. The ward has the
464 burden of proving by a preponderance of the evidence that the
465 restoration of capacity is warranted.

466 (4) TIMELINESS OF HEARING.—The court shall give priority
467 to any suggestion of capacity and shall advance the cause on the
468 calendar.

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469 Section 17. The amendments made by this act apply to all
470 proceedings pending on the effective date of this act.

471 Section 18. This act shall take effect upon becoming a
472 law.