

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

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

53 the court; amending s. 744.369, F.S.; providing for
 54 the continuance of a guardian's authority to act under
 55 an expired annual report under certain circumstances;
 56 amending s. 744.3701, F.S.; allowing a clerk to
 57 provide access to confidential portions of
 58 guardianship files in certain circumstances;
 59 authorizing a clerk of court to refer certain matters
 60 to law enforcement; amending s. 744.464, F.S.;
 61 establishing the burden of proof for determining
 62 restoration of capacity of a ward in pending
 63 guardianship cases; requiring a court to advance such
 64 cases on the calendar; providing applicability;
 65 providing an effective date.

66
 67 Be It Enacted by the Legislature of the State of Florida:

68
 69 Section 1. Section 744.1065, Florida Statutes, is created
 70 to read:

71 744.1065 Mediation.—At any time, the court may, upon its
 72 own motion or the motion of any interested person, refer any
 73 matter under the jurisdiction of this chapter to mediation if
 74 the court finds that mediation is in the best interests of the
 75 alleged incapacitated person, ward, or minor.

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

78 744.107 Court monitors.—

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

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

83 744.1075 Emergency court monitor.—

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

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

89 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees
 90 and expenses.—

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

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

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

115 Section 5. Section 744.3025, Florida Statutes, is amended
 116 to read:

117 744.3025 Claims of minors.—

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

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

130 (c) The appointment of the guardian ad litem must be

131 without the necessity of bond or notice.

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

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

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

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

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

149 744.3031 Emergency temporary guardianship.—

150 (2) Notice of filing of the petition for appointment of an
151 emergency temporary guardian and any hearing on the petition
152 must be served on the alleged incapacitated person and on the
153 alleged incapacitated person's attorney at least 24 hours before
154 the hearing on the petition is commenced.

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 ~~(2)~~ (1) If a guardian cannot be appointed under subsection
 176 (1) ~~Subject to the provisions of subsection (4)~~, the court may
 177 appoint any person who is fit and proper and qualified to act as
 178 guardian, whether related to the ward or not.

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

- 181 (a) Is related by blood or marriage to the ward;
- 182 (b) Has educational, professional, or business experience

183 relevant to the nature of the services sought to be provided;

184 (c) Has the capacity to manage the financial resources
185 involved; or

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

188 (3) The court shall also:

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

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

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

195 (1)~~(4)~~ If the person designated is qualified to serve
196 pursuant to s. 744.309, the court shall appoint any standby
197 guardian or preneed guardian, unless the court determines that
198 appointing such person is contrary to the best interests of the
199 ward.

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.

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

216 744.331 Procedures to determine incapacity.—

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

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

228 1. The exact nature and scope of the person's
 229 incapacities;

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

234 3. The specific legal disabilities to which the person is

235 subject; and

236 4. The specific rights that the person is incapable of
 237 exercising.

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

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

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

258 (e) After the order determining that the person is
 259 incapacitated has been filed with the clerk, it must be served
 260 on the incapacitated person. The person is deemed incapacitated

261 only to the extent of the findings of the court. The filing of
 262 the order is notice of the incapacity. An incapacitated person
 263 retains all rights not specifically removed by the court.

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

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

269 2. A reasonable factual basis for that belief,

270

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

277 (7) FEES.—

278 (c) If the petition is dismissed:7

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

281 2. Costs and attorney ~~attorney's~~ fees of the proceeding
 282 may be assessed against the petitioner if the court finds the
 283 petition to have been filed in bad faith. The petitioner shall
 284 also reimburse the state courts system for any amounts paid
 285 under subparagraph 1. upon such a finding.

286 Section 10. Subsection (4) of section 744.344, Florida

287 Statutes, is amended to read:

288 744.344 Order of appointment.—

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

294 Section 11. Section 744.345, Florida Statutes, is amended
 295 to read:

296 744.345 Letters of guardianship.—Letters of guardianship
 297 shall be issued to the guardian and shall specify whether the
 298 guardianship pertains to the person, or the property, or both,
 299 of the ward. The letters must state whether the guardianship is
 300 plenary or limited, and, if limited, the letters must state the
 301 powers and duties of the guardian. ~~If the guardianship is~~
 302 ~~limited,~~ The letters shall state whether or not and to what
 303 extent the guardian is authorized to act on behalf of the ward
 304 with regard to any advance directive previously executed by the
 305 ward.

306 Section 12. Section 744.359, Florida Statutes, is created
 307 to read:

308 744.359 Abuse, neglect, or exploitation by a guardian.—

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

311 (2) A guardian has committed exploitation when the
 312 guardian:

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

314 (b) Abuses his or her powers.

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

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

321 Section 13. Section 744.361, Florida Statutes, is amended
 322 to read:

323 744.361 Powers and duties of guardian.—

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

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

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

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

333 (5) A guardian who has special skills or expertise, or is
 334 appointed in reliance upon the guardian's representation that
 335 the guardian has special skills or expertise, shall use those
 336 special skills or expertise when acting on behalf of the ward.

337 (6)~~(2)~~ The guardian shall file an initial guardianship
 338 report in accordance with s. 744.362.

339 (7)~~(3)~~ The guardian shall file a guardianship report
 340 annually in accordance with s. 744.367.

341 (8)~~(4)~~ The guardian of the person shall implement the
 342 guardianship plan.

343 (9)~~(5)~~ When two or more guardians have been appointed, the
 344 guardians shall consult with each other.

345 (10)~~(6)~~ A guardian who is given authority over any
 346 property of the ward shall:

347 (a) Protect and preserve the property and invest it
 348 prudently as provided in chapter 518, apply it as provided in s.
 349 744.397, and keep clear, distinct, and accurate records of the
 350 administration of the ward's property ~~account for it faithfully.~~

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

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

355 (11)~~(7)~~ The guardian shall observe the standards in
 356 dealing with the guardianship property that would be observed by
 357 a prudent person dealing with the property of another, ~~and, if~~
 358 ~~the guardian has special skills or is named guardian on the~~
 359 ~~basis of representations of special skills or expertise, he or~~
 360 ~~she is under a duty to use those skills.~~

361 (12)~~(8)~~ The guardian, if authorized by the court, shall
 362 take possession of all of the ward's property and of the rents,
 363 income, issues, and profits from it, whether accruing before or
 364 after the guardian's appointment, and of the proceeds arising

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

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

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

377 (b) Allow the ward to maintain contact with family and
378 friends unless the guardian believes that such contact may cause
379 harm to the ward.

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

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

385 (e) Notify the court if the guardian believes that the
386 ward has regained capacity and that one or more of the rights
387 that have been removed should be restored to the ward.

388 (f) To the extent applicable, make provision for the
389 medical, mental, rehabilitative, or personal care services for
390 the welfare of the ward.

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

394 (h) Evaluate the ward's medical and health care options,
 395 financial resources, and desires when making residential
 396 decisions that are best suited for the current needs of the
 397 ward.

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

400 ~~(14)-(9)~~ A professional guardian must ensure that each of
 401 the guardian's wards is personally visited by the guardian or
 402 one of the guardian's professional staff at least once each
 403 calendar quarter. During the personal visit, the guardian or the
 404 guardian's professional staff person shall assess:

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

406 (b) The appropriateness of the ward's current living
 407 situation.

408 (c) The need for any additional services and the necessity
 409 for continuation of existing services, taking into consideration
 410 all aspects of social, psychological, educational, direct
 411 service, health, and personal care needs.

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

414

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

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

419 744.367 Duty to file annual guardianship report.—

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

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

432 744.369 Judicial review of guardianship reports.—

433 (8) The approved report constitutes the authority for the
 434 guardian to act in the forthcoming year. The powers of the
 435 guardian are limited by the terms of the report. The annual
 436 report may not grant additional authority to the guardian
 437 without a hearing, as provided for in s. 744.331, to determine
 438 that the ward is incapacitated to act in that matter. Unless the
 439 court orders otherwise, the guardian may continue to act under
 440 authority of the last approved report until the forthcoming
 441 year's report is approved.

442 Section 16. Subsections (3) and (4) are added to section

443 744.3701, Florida Statutes, to read:

444 744.3701 Inspection of report.—

445 (3) The court or the clerk may share confidential
 446 information with a court or a clerk in another jurisdiction
 447 regarding a guardian, attorney, caregiver or other service
 448 provider for the purpose of protecting the public. All
 449 information shared shall remain confidential.

450 (4) The clerk may refer alleged criminal matters for
 451 prosecution or investigation to an appropriate law enforcement
 452 agency on his or her own initiative and with notification to the
 453 court. The clerk may allow an appropriate law enforcement
 454 agency or state agency with jurisdiction to access the
 455 guardianship file for purposes of criminal or agency
 456 investigation with notification to the court. All information
 457 accessed or shared shall remain confidential by the law
 458 enforcement agency or state agency unless disclosure is required
 459 after a finding of probable cause.

460 Section 17. Paragraphs (a) and (b) of subsection (3) of
 461 section 744.464, Florida Statutes, are amended, and subsection
 462 (4) is added to that section, to read:

463 744.464 Restoration to capacity.—

464 (3) ORDER OF RESTORATION.—

465 (a) If no objections are filed, and the court is satisfied
 466 that ~~with~~ the medical examination establishes by a preponderance
 467 of the evidence that restoration of all or some of the ward's
 468 rights is appropriate, the court shall enter an order of

469 restoration of capacity, restoring all or some of the rights
 470 which were removed from the ward in accordance with those
 471 findings. ~~The order must be issued within 30 days after the~~
 472 ~~medical report is filed.~~

473 (b) At the conclusion of a hearing, conducted pursuant to
 474 s. 744.1095, the court shall make specific findings of fact and,
 475 based on a preponderance of the evidence, enter an order either
 476 denying the suggestion of capacity or restoring all or some of
 477 the rights which were removed from the ward. The ward has the
 478 burden of proving by a preponderance of the evidence that the
 479 restoration of capacity is warranted.

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

483 Section 18. The amendments made by this act apply to all
 484 proceedings pending on the effective date of this act.

485 Section 19. This act shall take effect upon becoming a
 486 law.