

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

BILL: SB 590

INTRODUCER: Senator Joyner

SUBJECT: Fees and Costs Incurred in Guardianship Proceedings

DATE: April 11, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	<b>Favorable</b>
2.	Preston	Hendon	CF	<b>Favorable</b>
3.			ACJ	
4.			AP	
5.				
6.				

**I. Summary:**

SB 590 revises various provisions relating to Florida’s guardianship law. The bill:

- Allows courts, without the admission of expert witness testimony, to determine reasonable compensation for the guardian, guardian’s attorney, a person employed by the guardian, or an attorney appointed to represent an alleged incapacitated person. However, expert testimony may be offered at the option of a person or party after giving notice to interested persons. If expert testimony is offered, a reasonable expert witness fee must be awarded by the court and paid from the assets of the ward.
- Grants the court discretion to appoint a guardian ad litem in any case in which a minor has a claim or settlement that exceeds \$15,000, if it is necessary to protect the interests of the minor.
- Makes any settlement of a claim of a minor that exceeds \$15,000 subject to the confidentiality provisions of Florida Guardianship Law.<sup>1</sup>
- Requires that the fees of a guardianship examining committee be paid upon court order as expert witness fees under s. 29.004(6), F.S., if the petition alleging incapacity is dismissed Section 29.004(6), F.S., authorizes courts to pay the fees of court-appointed experts from funds appropriated by the Legislature.
- Requires a petitioner found by a court to have filed a guardianship proceeding in bad faith to reimburse the state courts system for any amounts paid by a court to a committee.

<sup>1</sup> Chapter 744, F.S.

The bill is anticipated to have an insignificant fiscal impact on state government and has an effective date of upon becoming law. The provisions of the bill shall apply to all proceedings pending on that date.

This bill substantially amends the following sections of the Florida Statutes: 744.108, 744.3025, and 744.331.

## II. Present Situation:

### Guardianship

Guardianships serve as a mechanism to protect vulnerable individuals in our society who do not have a family or loved one who is willing and able to manage their property or other personal matters. A guardian may be a court-appointed, surrogate decision-maker who makes personal or financial decisions for a minor or for an adult with mental or physical disabilities. A guardian may be described as a person “who has the legal authority and duty to care for another’s person or property, esp[ecially] because of the other’s infancy, incapacity, or disability.”<sup>2</sup> Guardianships are governed completely and exclusively under statutes in Florida.<sup>3</sup>

Any adult may petition a court to initiate guardianship proceedings to determine the incapacity of any person.<sup>4</sup> An “incapacitated person” is a “person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.”<sup>5</sup>

A guardian is a surrogate decision-maker appointed by the court to make personal or financial decisions for a minor or an adult having mental or physical disabilities.<sup>6</sup> Under Florida law, a ward is defined as a person for whom a guardian has been appointed.<sup>7</sup>

The procedure to determine an alleged person’s incapacity is prescribed by statute.<sup>8</sup> Any person may file, under oath, a petition in circuit court for determination of incapacity alleging that a person is incapacitated.<sup>9</sup> After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.<sup>10</sup> If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.<sup>11</sup> If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing, the court determines that a person is incapacitated, the court must also find that

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<sup>2</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>3</sup> *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So. 2d 176, 182 (Fla 2d DCA 1966).

<sup>4</sup> Section 744.3201, F.S.

<sup>5</sup> Section 744.102(12), F.S.

<sup>6</sup> *See e.g.*, s. 744.102(9), F.S.

<sup>7</sup> Section 744.102(22), F.S.

<sup>8</sup> Section 744.331, F.S.

<sup>9</sup> *Id.* In Florida, circuit courts have exclusive jurisdiction of proceedings relating to the determination of incompetency. Section 26.012(2)(b), F.S.

<sup>10</sup> Section 744.331(3), F.S.

<sup>11</sup> Section 744.331(4), F.S.

alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.<sup>12</sup>

### **Attorney Fees and Costs Associated with Guardianship Administration**

Section 744.108, F.S., outlines requirements for awarding of compensation to a guardian or attorney in connection with a guardianship. “A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward’s behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward.”<sup>13</sup> Similarly, s. 744.311(7), F.S., provides that any attorney appointed under s. 744.311(2), F.S., is entitled to a reasonable fee to be determined by the court.

Fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>14</sup> The statute does not specifically address whether an attorney who has rendered services to a ward, a court-appointed counsel for the ward, is entitled to recover attorney fees and costs associated with proceedings to review and determine compensation.<sup>15</sup>

Additionally, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108, is silent on the subject.<sup>16</sup> Practitioners report that many attorneys and judges interpret the current law as requiring testimony from an expert witness to establish a reasonable attorney fee unless a statute dispenses with that requirement.<sup>17</sup>

Cost considerations are a significant factor in many guardianships.<sup>18</sup> The requirement for expert testimony to be rendered at every hearing for a determination of interim guardian’s fees or attorney fees adds a layer of costs that depletes the ward’s estate.<sup>19</sup> Practitioners report that the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases.<sup>20</sup>

### **Settlements**

Florida’s public policy favors settlement.<sup>21</sup> A settlement agreement is a contract.<sup>22</sup> As a contract between bargaining parties, “[s]ettlements are highly favored and will be enforced whenever

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<sup>12</sup> See s. 744.331(6)(b), F.S.

<sup>13</sup> Section 744.108(1), F.S.

<sup>14</sup> Section 744.108(8), F.S.

<sup>15</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposed Revisions to Section 744.108, F.S., Relating to Expert Testimony in Determining Attorney Fees and Guardian’s Fees*. (2013) (on file with the Senate Committee on Judiciary).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (citing *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So. 2d 1044 (Fla. 4th DCA 1989); *In re Estate of Cordiner v. Evans*, 497 So. 2d 920 (Fla. 2d DCA 1986); *Clark v. Squire, Sanders & Dempsey*, 495 So. 2d 264 (Fla. 3d DCA 1986).

<sup>18</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* at note 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009).

<sup>22</sup> *Lazzaro v. Miller & Solomon General Contractors, Inc.*, 48 So. 3d 974 (Fla. 4th DCA 2010).

possible.”<sup>23</sup> Generally, an adult who has not been found to lack capacity or any entity may settle a legal claim and may keep the settlement confidential. In situations where parties settle their disputes based on a filed civil action, generally, the agreement is not required to be filed with the court, and therefore does not become a public record.<sup>24</sup> In contrast, a *minor or ward under a guardianship* may not bring or settle a personal injury claim or other legal action without court approval.<sup>25</sup> If a minor or incapacitated person has a guardian or other legal representative, that guardian or legal representative may sue or defend any legal action.<sup>26</sup> If the minor needs a guardian of the person, the guardian will be appointed as a plenary guardian without an adjudication of incapacity.<sup>27</sup> A minor’s parent or guardian ad litem may bring an action on behalf of the minor, depending on the amount of the claim.<sup>28</sup> On behalf of a ward, a natural guardian may settle and consummate any settlement claim or cause of action that does not exceed \$15,000.<sup>29</sup> Section 744.387(3)(a), F.S., provides that:

[n]o settlement after an action has been commenced by or on behalf of a [minor] ward shall be effective unless approved by the court having jurisdiction of the action.<sup>30</sup>

A court may disapprove a settlement if it finds that it is not in the best interests of the minor. Under s. 744.3025, F.S., the guardian of a minor who is negotiating a settlement in excess of \$15,000 with other parties must appear first before the court and obtain the court’s approval of the settlement. Under s. 744.3025(1)(b), F.S., the courts are required to appoint a guardian ad litem for settlements exceeding \$50,000; unless a guardian ad litem having no potential interest adverse to the minor has previously been appointed. The duty of the guardian is to protect the minor’s interests as described in the Florida Probate Rules.<sup>31</sup>

### Examining Committee

Within 5 days after a petition for determination of incapacity has been filed, a court must appoint a three-member examining committee.<sup>32</sup> One member must be a psychiatrist or other physician. The remaining members must be either a psychologist; gerontologist; another psychiatrist or other physician; a registered nurse; nurse practitioner; licensed social worker; a person with an advanced degree in gerontology from an accredited institution of higher education; or other person who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion.<sup>33</sup> One of the members of the committee must

<sup>23</sup> *Hanson v. Maxfield*, 23 So. 3d 736, 739 (1st DCA 2009) (quoting *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985)).

<sup>24</sup> Correspondence with attorneys in the Real Property, Probate, and Trust Law Section of The Florida Bar. *Also see*, Rule 1.442(d) Fla. R.Civ.P. (“A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.”)

<sup>25</sup> Sections 744.301 and 744.387(2), F.S.

<sup>26</sup> Henry P. Trawick Jr., *Trawick’s Florida Practice and Procedure*, s. 4:5 (2007 edition).

<sup>27</sup> Section 744.361(1), F.S.

<sup>28</sup> Sections 744.301 and 744.387(2), F.S.

<sup>29</sup> Sections 744.387(2) and (3), F.S.

<sup>30</sup> See also s. 768.23 and s. 768.25.

<sup>31</sup> Section 744.3025(1)(d), F.S.

<sup>32</sup> Section 744.331(3)(a), F.S.

<sup>33</sup> *Id.*

have knowledge of the type of incapacity alleged in the petition.<sup>34</sup> The clerk of the court must send notice of appointment to each person appointed to the examining committee no later than 3 days after the court's appointment.<sup>35</sup> Examining committee members must also complete 4 hours of initial training and 2 hours of continuing education during each 2-year period after the initial training.<sup>36</sup>

The written report of each member of the examining committee is "an essential element, but not necessarily the only element used [by a court] in making a capacity or guardianship decision."<sup>37</sup> Each committee member's written report must among other items include an evaluation of the alleged incapacitated person's ability to retain his or her rights.<sup>38</sup>

Each member of the examining committee must examine the person and determine the alleged incapacitated person's ability to exercise rights specified in s. 744.3215, F.S.<sup>39</sup>

Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:

- To vote.
- To personally apply for governmental benefits.
- To have a driver's license.
- To travel.
- To seek or retain employment.<sup>40</sup>

Because the law presumes one has capacity, the guardian of the person may exercise only those rights which have been removed by a court.<sup>41</sup> Rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right:

- To contract.
- To sue and defend lawsuits.
- To apply for governmental benefits.
- To manage property or to make any gift or disposition of property.
- To determine his or her residence.
- To consent to medical and mental health treatment.
- To make decisions about his or her social environment or other social aspects of his or her life.<sup>42</sup>

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<sup>34</sup> *Id*

<sup>35</sup> *Id*.

<sup>36</sup> Section 744.331(3)(d), F.S.

<sup>37</sup> Section 744.331(3)(f), F.S.

<sup>38</sup> Section 744.331(3)(g), F.S. Such rights include " the rights to marry; vote; contract; manage or dispose of property; have a driver's license; determine his or her residence; consent to medical treatment; and make decisions affecting her or his social environment." *Id*.

<sup>39</sup> Section 744.331(3)(e), F.S.

<sup>40</sup> Section 744.3215(2), F.S.

<sup>41</sup> See s. 744.3215(3), F.S.

<sup>42</sup> Section 744.3215(3), F.S.

Section 744.3215(4), F.S., also outlines certain rights that may not be delegated to a guardian without first obtaining specific authority from a court.

The written report of each member of the examining committee must also describe any matters “with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.”<sup>43</sup> Additionally, there is no right to an evidentiary hearing to challenge the opinions of the examining committee findings when the committee has concluded that the subject of the incapacity hearing is not incapacitated.<sup>44</sup> A copy of each committee member’s report must be served on the petitioner and the attorney for the alleged incapacitated person within 3 days after the report is filed with the court.<sup>45</sup>

In construing the provisions regarding the examining committee’s reports, Florida district courts of appeal have held that trial courts need only consider the reports of the examining committee.<sup>46</sup> If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated, the court must dismiss the petition.<sup>47</sup> Florida courts have held that “where a statute prescribes a certain method of [determining a person’s competency], the statute must be strictly followed.”<sup>48</sup>

Section 744.331(7), F.S., states that the examining committee and any attorney appointed to represent the person who is facing an incapacity petition is entitled to reasonable fees to be determined by the court.<sup>49</sup> Section 744.331(7)(b), F.S., provides that the examining committee fees are paid from the property of the incapacitated ward or if the ward is indigent from the state. If the alleged incapacitated person, who is subject to the examination pursuant to a petition for incapacity, is found to have capacity or the petition is dismissed, it is unclear which party is responsible for the payment of the examining committee fees.<sup>50</sup> Section 744.331(7)(c), F.S., specifies that if the court finds the petition to have been filed in bad faith, the court may, in its discretion assess court costs and attorney fees against the petitioner.

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<sup>43</sup> Section 744.331(3)(g)4., F.S.

<sup>44</sup> *Levine v. Levine*, 4 So. 3d 730, 731 (Fla. 5th DCA 2009).

<sup>45</sup> Section 744.331(3)(h), F.S.

<sup>46</sup> See *Rothman v. Rothman*, 93 So. 3d 1052, 1054 (Fla. 4th DCA) (citing *Faulkner v. Faulkner*, 65 So. 3d 1167, 1168 (Fla. 1st DCA 2011) (“If the majority of the committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition to determine incapacity.”); *Levine v. Levine*, 4 So. 3d 730, 731 (Fla. 5th DCA 2009) (rejecting a request for an evidentiary hearing to challenge the opinion of the examining committee); and *Mathes v. Huelsman*, 743 So. 2d 626, 627 (Fla. 2d DCA 1999) (“[O]nce the examining committee concluded that Mathes [the alleged incapacitated person] had full capacity, the trial court should have dismissed the petition to determine incapacity and the petition for appointment of a guardian.”).

<sup>47</sup> Section 744.331(4), F.S.

<sup>48</sup> *Rothman* 93 So. 3d 1052, 1054 (Fla. 4th DCA 2012). See also *In re Keene*, 343 So. 2d 916 (Fla. 4th DCA 1977).

<sup>49</sup> See also s. 744.108(1), F.S., which provides that “a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward’s behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward.” Section 744.108(8), F.S., states that “[w]hen court proceedings are instituted to review or determine a guardian’s or an attorney’s fees under subsection (2), such proceedings are part of the guardianship administration process and the costs, including fees for the guardian’s attorney, shall be determined by the court and paid from the assets of the guardianship estate unless the court finds the requested compensation under subsection (2) to be substantially unreasonable.

<sup>50</sup> See section 744.331(7), F.S.

Courts acknowledge that a gap exists in s.744.331(7), F.S., as to who should be responsible for payment of the examining committee fees where the guardianship petition is dismissed or denied.<sup>51</sup> Many courts are already using another funding source to address the issue and it is also unknown how many proceedings result in a dismissal of the guardianship petition.<sup>52</sup> Court-appointed attorney fees and examining committee fees are paid from a ward's assets unless the ward is indigent or a party is found to have bad faith in bringing the petition to determine incapacity.<sup>53</sup> There is anecdotal information that the number of guardianship petitions that are dismissed is relatively small.<sup>54</sup> Some legal scholars argue that the examining committee should be paid from expert witness fees under s. 29.004(6), F.S., which awards fees to court appointed experts.<sup>55</sup>

### III. Effect of Proposed Changes:

#### Attorney Fees and Costs Associated with Guardianship Administration

The bill amends s. 744.108, F.S., to allow courts to determine reasonable compensation for the guardian, guardian's attorney, a person employed by the guardian, or an attorney appointed to represent an alleged incapacitated person without the assistance of expert testimony.<sup>56</sup> However, expert testimony may be offered by any person or party after giving notice to interested persons. If expert testimony is offered, a reasonable expert witness fee must be awarded by the court and paid from the assets of the ward.<sup>57</sup>

#### Claims of Minors

The bill amends s. 744.3025(1), F.S., to grant the court discretion to appoint a guardian ad litem in any case in which a minor has a claim or settlement that exceeds \$15,000.

The bill additionally provides that any settlement of a claim of a minor that exceeds \$15,000 is subject to the confidentiality provisions of ch. 744, F.S.<sup>58</sup>

<sup>51</sup> *Faulkner v. Faulkner*, 65 So.3d 1167, 1169 (Fla. 1st DCA 2011) (citing *Ehrlich v. Severson*, 985 So. 2d 639, 640 (Fla. 4th DCA 2008); and *Levine v. Levine*, 4 So. 3d 730, 731 (Fla. 5th DCA 2009)).

<sup>52</sup> Office of the State Courts Administrator, *2013 Judicial Impact Statement, SB 590* (Mar. 12, 2013) (on file with the Senate Committee on Judiciary).

<sup>53</sup> Section 744.331(7), F.S.

<sup>54</sup> Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper on Proposed Revisions to Section 744.337(7), F.S., Relating to Compensation of the Examining Committee in Incapacity Proceedings*, (2013).

<sup>55</sup> *Id.*

<sup>56</sup> An attorney appointed under s. 744.331(2), F.S.

<sup>57</sup> This provision is derived from and similar to s. 733.6175(4), F.S., which reads: "The court may determine reasonable compensation for the personal representative or any person employed by the personal representative without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the estate. The court shall direct from what part of the estate the fee shall be paid."

<sup>58</sup> The effect of this provision may not be clear because no provision exists in ch. 744, F.S., which provides for the confidentiality of a settlement of a minor. Senate Bill 590 appears to be related to SB 610, which would create a public records exemption for certain court records relating to the settlement of a ward's or minor's claim.

### **Fees of the Examining Committee**

The bill provides that the fees of the examining committee shall be paid upon court order as expert witness fees under s. 29.004(6), F.S. Section 29.004(6), F.S., authorizes a court to pay court-appointed experts from funds appropriated by the Legislature. Additionally, the bill provides that if the court finds that a petitioner has filed a guardianship proceeding in bad faith, the petitioners must reimburse the state courts system for any amounts paid by court for the committee through the expert witness fees.

The bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The costs to guardianship estates may be reduced to the extent that fees may be determined by a court without the admission of expert witness testimony for the guardian, the guardian's attorneys, persons employed by the guardian, or an appointed attorney.

C. Government Sector Impact:

The Office of the State Courts Administrator completed a judicial impact statement for the bill. The office estimates that the bill will have a fiscal impact for the payment by the state courts system of examining committee fees for non-indigent wards upon the dismissal of a proceeding to determine incapacity. Due to the lack of data on the number of such dismissals the actual fiscal impact is not known.<sup>59</sup> The Office of the State Courts Administrator, however, does not expect the fiscal impact from the legislation to be significant.

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<sup>59</sup> Office of the State Courts Administrator, *2013 Judicial Impact Statement, SB 590* (Mar. 12, 2013) *supra* at note 52.



The Office of the State Courts Administrator reports that any new requirement to pay expenses from the due process funds of the state courts system, absent an increase in due process appropriations, could place additional pressure on the availability of such funds.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.