

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 123 Fees and Costs in Guardianship Proceedings

**SPONSOR(S):** Schwartz

**TIED BILLS:** HB 125      **IDEN./SIM. BILLS:** SB 120

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Ward	Bond
2) Healthy Families Subcommittee	11 Y, 0 N	McElroy	Brazzell
3) Judiciary Committee			

### SUMMARY ANALYSIS

Guardianships may be established for both adults and minors:

- For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own estate. If the adult is mentally competent this can be accomplished voluntarily. However, in situations where an individual's mental competence is in question, an involuntary guardianship may be required. The involuntary guardianship is established through an adjudication of incompetence, which is based upon the determination of the examination committee.
- For a minor child, the parents are the natural guardians and can generally act on minor's behalf. There are however exceptions, including settlement of claims, which require the appointment of a guardian ad litem for the minor.

The bill:

- Allows a court to authorize payments to experts and professionals acting on behalf of the guardianship without the need for expert testimony regarding whether the billed amounts are reasonable.
- Requires the state to pay the fees of an examining committee in the event that the court finds that an adult is not incapacitated. In such case, if the court finds the petitioner acted in bad faith, the court may require the petitioner to reimburse these fees.
- Establishes the standard to be utilized by the court in its determination of the need for the appointment of a guardian ad litem for the settlement of a minor's claim.
- Makes technical, grammatical, clarifying and style changes to guardianship statutes.

The bill appears to have a minimal negative fiscal impact on state government. The bill does not appear to have a fiscal impact on local governments.

The bill takes effect upon becoming law and applies to all pending proceedings.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Guardianships may be established for both adults and minors. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own estate. If the adult is mentally competent this can be accomplished voluntarily. However, in situations where an individual's mental competence is in question, an involuntary guardianship may be required. The involuntary guardianship is established through an adjudication of incompetence, which is based upon the determination of the examination committee. For a minor child, the parents are the natural guardians and can generally act on minor's behalf. There are however exceptions, including settlement of claims, which require the appointment of a guardian ad litem for the minor.

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

##### **Current Situation**

Section 744.108, F.S., governs awards of compensation to a guardian or attorney in connection with a guardianship. It 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."<sup>1</sup> Similarly, s. 744.311(7), F.S.,<sup>2</sup> provides that any attorney appointed under s. 744.311(2), F.S., is entitled to a reasonable fee to be determined by the court.

Under s. 744.108(8), F.S., 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>3</sup> It is unclear whether the scope of this subsection covers all requests for attorney's fees or is limited to only fees for the guardian's attorney. Specifically, the statute does not address whether an attorney who has rendered services to a ward, such as court-appointed counsel for the ward, is entitled to recover attorney fees and costs associated with proceedings to review and determine compensation.

Further, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108, F.S., is silent on the subject. Practitioners report that many attorneys and judges interpret the current law as requiring testimony from an expert witness to establish a reasonable attorney's fee unless a statute dispenses with that requirement.<sup>4</sup> If this is a correct interpretation of existing law, then expert testimony is presently required in all guardianship proceedings for an award of attorney's fees.

Cost considerations are a significant factor in many guardianships. Requiring expert testimony at every hearing for determination of interim guardian's fees or attorney's fees adds a layer of costs that deplete the ward's estate. Practitioners report that the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases. In those cases where expert testimony would be necessary, the interested party may present such testimony.

##### **Effect of Proposed Changes**

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

<sup>2</sup> This section provides that an attorney will be provided for the alleged incompetent.

<sup>3</sup> Section 744.108(8), F.S.

<sup>4</sup> See, *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So.2d 1044 (Fla. 4th DCA 1989); *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).

The bill adds subsection (9) to s. 744.108, F.S., dispensing with any requirement for expert testimony to support an award of fees unless requested. Expert testimony may be offered at the option of either party after giving notice to interested parties. 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>5</sup>

The bill amends s. 744.108(8), F.S., to provide that the court may award attorneys' fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel.

## **Claims of Minors**

### **Current Situation**

Pursuant to s. 744.3025(1)(a), F.S., the court may appoint a guardian ad litem before approving a settlement of a minor's claim in any case in which the gross settlement of the claim exceeds \$15,000.<sup>6</sup> The statute is silent as to the specific criteria to be utilized by the court in its determination of the need for the appointment of a guardian ad litem.

### **Effect of Proposed Changes**

The bill amends s. 744.3025(1)(a), F.S., to provide the standard to be utilized by the court in its determination of the need for the appointment of a guardian ad litem. Specifically, the bill provides that the court may appoint a guardian ad litem "if the court believes that a guardian ad litem is necessary to protect the minor's interest."

## **Costs and Fees Associated with Adjudication**

### **Current Situation**

When a petition for incapacity is filed, the court is required to appoint an examining committee consisting of three members, at least one of which must be a psychiatrist or other physician.<sup>7</sup> The remaining members must be either a psychologist or gerontologist, another psychiatrist or physician, a registered nurse, nurse practitioner, licensed social worker 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>8</sup>

Each member of the examining committee is charged with examining the alleged incapacitated person, making a comprehensive assessment, and rendering to the court a professional opinion as to a diagnosis, a prognosis and a recommended course of treatment. This evaluation includes an assessment of the capacity of the individual to exercise enumerated rights in s. 744.3215, F.S.

Compensation of examining committee members is governed by s. 744.331(7), F.S., which provides generally that the examining committee and any attorney appointed to represent the alleged incapacitated person are entitled to reasonable fees to be determined by the court. Under current law, the fees awarded are to be paid by the guardian from the property of the ward or if the ward is indigent, "by the state."<sup>9</sup> If the court finds the petition was brought in bad faith, the costs may be assessed against the petitioner.<sup>10</sup>

The statute is silent, however, with respect to how the examining committee members are to be compensated in the event the petition is dismissed and the court finds no bad faith in the filing of the

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<sup>5</sup> This provision is derived from and similar to s. 733.6175(4), F.S., of the Florida Probate Code.

<sup>6</sup> Under current law, parents as natural guardians may settle a claim of less than \$15,000 without appointment of a guardian ad litem. Sections 744.301, 744.3025, F.S.

<sup>7</sup> Section 744.331(3)(a), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 744.331(7)(b), F.S.

<sup>10</sup> Section 744.331(7)(c), F.S.

petition to determine incapacity. Under such circumstances, no guardian is appointed and no property ever comes into the hands of a guardian or under the authority of the court. Likewise, there is no authority for assessing such fees against the petitioner or against the alleged incapacitated person.

This “gap” in s. 744.331(7), F.S., as to who is responsible for the payment of such fees has been recognized in several reported decisions, all of which have recognized the need for remedy by the Legislature.<sup>11</sup>

### **Effect of Proposed Changes**

This bill amends s. 744.331(7)(c), F.S., to provide that if the petition is dismissed, the fees of the examining committee are paid upon court order as “expert witness” fees under s. 29.004(6), F.S. This change implements the provisions of s. 29.004(6), F.S., which awards fees to court appointed experts generally, and provides a secure source of funding to insure that the members of the examining committee are reasonably compensated as contemplated by s. 744.331, F.S., without incentive to find incompetency.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 744.108, F.S., regarding guardian's and attorney's fees and expenses.

Section 2 amends s. 744.3025, F.S., regarding claims of minors.

Section 3 amends s. 744.331, F.S., regarding procedures to determine incapacity.

Section 4 provides that the bill applies to all proceedings pending on the effective date

Section 5 provides an effective date upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

##### **2. Expenditures:**

The bill appears to create an unknown minimal negative fiscal impact. See Fiscal Comments.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill appears to lower the cost to individuals for maintenance of a guardianship case. In the majority of guardianship cases the cost of presenting expert testimony will be avoided and the situations where expert testimony is used will be minimized.

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<sup>11</sup> See, *Ehrlich v. Severinson*, 985 So.2d 639 (Fla. 4th DCA 2008); *Levine v. Levine*, 4 So.3d 730 (Fla. 5th DCA 2009); and *Faulkner v. Faulkner*, 65 So.3d 1167 (Fla. 1st DCA 2011).

#### D. FISCAL COMMENTS:

The Real Property, Probate, and Trust Law Section of the Florida Bar reports that compensation awarded to an examining committee is modest, generally \$600 or less per appointment.

The Office of State Courts Administration (OSCA) reports an anticipated fiscal impact because the bill will require the State Courts System to pay examining committee fees in situations in which it is not currently required by statute to do so (i.e., when the petition is dismissed and there is no "ward," indigent or otherwise). Information from the circuits indicates that some currently pay examining committee fees only when the ward/alleged incapacitated person is indigent. Other circuits report that they also pay the fees in those situations in which the alleged incapacitated person is not indigent and a good faith petition is dismissed (e.g., to ensure that the examining committee members do not go uncompensated for their services). Thus, in some cases circuits are already paying the fees in situations contemplated by the bill.

The feedback from the circuits suggests that these situations arise infrequently. In addition, the bill requires the petitioner to reimburse the state if the court concludes that the petition was filed in bad faith. To the extent such reimbursements are indeed made, some of the fiscal impact will be reduced. OSCA does not expect the fiscal impact from the legislation to be significant.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

A search for the word, 'confidential' throughout the whole of ch. 744, F.S., does not produce a definitive duty of confidentiality that would apply directly to the new provision in s. 744.3025(3), F.S, which provides, at lines 81 and 82, "Any settlement of a claim pursuant to this section is subject to the confidentiality provisions of this chapter." If the tied bill, HB 125 passes, this language will be rendered unnecessary.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.