

1 A bill to be entitled

2 An act relating to guardians and wards; amending s.  
3 744.108, F.S.; providing that a guardian or attorney  
4 is entitled to a reasonable fee for services and costs  
5 if there is a proven benefit to the ward by the  
6 actions of the guardian or the attorney; revising  
7 criteria for award of fees for a guardian or attorney;  
8 prohibiting fee awards when a conflict of interest  
9 exists; providing that fees for legal services may  
10 include reasonable charges for work performed by  
11 paralegals; revising requirements for petitions for  
12 guardian fees and attorney fees; amending s. 744.331,  
13 F.S.; deleting obsolete language; revising the  
14 requirements for the composition and appointment of an  
15 examining committee; providing that the attending or  
16 family physician may be appointed to the committee  
17 unless good cause is shown; revising the requirements  
18 for examinations and reports; authorizing family  
19 members and caregivers to observe and record  
20 evaluations; requiring that the court dismiss a  
21 petition if an examining committee member concludes  
22 that the alleged incapacitated person is not  
23 incapacitated; revising provisions relating to  
24 suspension of a trust, trust amendment, or durable  
25 power of attorney in certain circumstances; creating  
26 s. 744.4461, F.S.; defining the term "undue

27 influence"; prohibiting financial exploitation of a  
 28 ward; providing criminal penalties; amending s.  
 29 932.701, F.S.; redefining the term "contraband  
 30 article" to include the forfeiture of personal  
 31 property used in connection with the financial  
 32 exploitation of a ward; providing an effective date.  
 33

34 Be It Enacted by the Legislature of the State of Florida:  
 35

36 Section 1. Section 744.108, Florida Statutes, is amended  
 37 to read:

38 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees  
 39 and expenses.—

40 (1) A guardian, or an attorney who has rendered services  
 41 to the ward or to the guardian on the ward's behalf, is entitled  
 42 to a reasonable fee for services rendered and reimbursement for  
 43 costs incurred on behalf of the ward if there is a monetary  
 44 benefit accrued to the ward by the actions of the guardian or  
 45 attorney.

46 (2) When fees for a guardian or an attorney are submitted  
 47 to the court for determination, the court shall consider the  
 48 following criteria:

- 49 (a) The time and labor required;
- 50 (b) The novelty and difficulty of the questions involved
- 51 and the skill required to perform the services properly;
- 52 ~~(c) The likelihood that the acceptance of the particular~~

53 ~~employment will preclude other employment of the person;~~  
 54        ~~(c)~~(d) The fee customarily charged in the locality for  
 55 similar services;  
 56        ~~(c)~~ ~~The nature and value of the incapacitated person's~~  
 57 ~~property, the amount of income earned by the estate, and the~~  
 58 ~~responsibilities and potential liabilities assumed by the~~  
 59 ~~person;~~  
 60        ~~(d)~~(f) The results obtained;  
 61        ~~(g)~~ ~~The time limits imposed by the circumstances;~~  
 62        ~~(h)~~ ~~The nature and length of the relationship with the~~  
 63 ~~incapacitated person; and~~  
 64        ~~(e)~~(i) The experience, reputation, diligence, and ability  
 65 of the person performing the service.  
 66        (3) In awarding fees to ~~attorney~~ guardians or attorneys,  
 67 the court must clearly distinguish between fees and expenses for  
 68 legal services and fees and expenses for guardian services and  
 69 must have determined that no conflict of interest exists. If a  
 70 conflict of interest exists, the guardian fees and attorney fees  
 71 may not be awarded.  
 72        (4) Fees for legal services may include customary and  
 73 reasonable charges for work performed by legal assistants or  
 74 paralegals employed by or ~~and~~ working under the direction of the  
 75 attorney.  
 76        (5) All petitions for guardian ~~guardian's~~ and attorney  
 77 ~~attorney's~~ fees and expenses must be accompanied by an itemized  
 78 description of the services performed for the fees and expenses

79 | sought to be recovered and an accounting of the monetary benefit  
80 | accrued to the ward by the actions of the person requesting the  
81 | fees and expenses.

82 | (6) A petition for fees or expenses may not be approved by  
83 | the court without 20 days' ~~prior~~ notice to the guardian and to  
84 | all family members, or next of kin, of the ward who are listed  
85 | in the petition to initiate the proceedings ~~the ward, unless the~~  
86 | ~~ward is a minor or is totally incapacitated.~~ Other family  
87 | members of the ward or next of kin not listed in the petition to  
88 | initiate proceedings or other interested parties may submit  
89 | instructions to be placed on the notice and may provide a  
90 | mailing address or an e-mail address to which the notice shall  
91 | be sent.

92 | (7) A petition for fees must ~~shall~~ include the period  
93 | covered and the total amount of all prior fees paid or costs  
94 | awarded to all parties ~~the petitioner~~ in the guardianship  
95 | proceeding currently before the court.

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

105 Section 2. Paragraph (d) of subsection (2), paragraphs  
 106 (a), (c), (d), (e), (f), and (g) of subsection (3), subsection  
 107 (4), and paragraph (f) of subsection (6) of section 744.331,  
 108 Florida Statutes, are amended to read:

109 744.331 Procedures to determine incapacity.—

110 (2) ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON.—

111 (d) ~~Effective January 1, 2007,~~ An attorney seeking to be  
 112 appointed by a court for incapacity and guardianship proceedings  
 113 must have completed a minimum of 8 hours of education in  
 114 guardianship. A court may waive the initial training requirement  
 115 for an attorney who has served as a court-appointed attorney in  
 116 incapacity proceedings or as an attorney of record for guardians  
 117 for at least ~~not less than~~ 3 years. ~~The education requirement of~~  
 118 ~~this paragraph does not apply to the office of criminal conflict~~  
 119 ~~and civil regional counsel until July 1, 2008.~~

120 (3) EXAMINING COMMITTEE.—

121 (a) Within 5 days after a petition for determination of  
 122 incapacity has been filed, the court shall appoint an examining  
 123 committee consisting of three members. The appointments shall be  
 124 made from a list of persons qualified to be members of the  
 125 examining committee prepared and published by the chief judge of  
 126 the circuit. One member must be a board-certified psychiatrist  
 127 or other physician-specialist, and each of ~~physician.~~ the  
 128 remaining members must be ~~either~~ a clinical psychologist, a  
 129 board-certified gerontologist, an advanced registered nurse  
 130 practitioner, a board-certified ~~another~~ psychiatrist, or other

131 board-certified physician, ~~a registered nurse, nurse~~  
132 ~~practitioner, licensed social worker, a person with an advanced~~  
133 ~~degree in gerontology from an accredited institution of higher~~  
134 ~~education, or other person who by knowledge, skill, experience,~~  
135 ~~training, or education may, in the court's discretion, advise~~  
136 ~~the court in the form of an expert opinion. Each member One of~~  
137 ~~the examining ~~three members of the~~ committee must have~~  
138 professional knowledge and experience in evaluating ~~of~~ the type  
139 of incapacity alleged in the petition. Unless good cause is  
140 shown, the attending or family physician may ~~not~~ be appointed to  
141 the committee. If the attending or family physician is not  
142 appointed to the committee, but available for consultation, the  
143 committee must consult with the physician and review pertinent  
144 findings. Each committee member must include such review in his  
145 or her individual report. Members of the examining committee may  
146 not be related to or associated with one another, with the  
147 petitioner, with counsel for the petitioner or the proposed  
148 guardian, or with the person alleged to be totally or partially  
149 incapacitated. A member may not be employed by any private or  
150 governmental agency that has custody of, or furnishes, services  
151 or subsidies, directly or indirectly, to the person or the  
152 family of the person alleged to be incapacitated or for whom a  
153 guardianship is sought. A petitioner may not serve as a member  
154 of the examining committee. Members of the examining committee  
155 must be able to communicate, ~~either~~ directly or through an  
156 interpreter, in the language that the alleged incapacitated

HB 1157

2014

157 person speaks or to communicate in a medium understandable to  
158 the alleged incapacitated person if she or he is able to  
159 communicate. The clerk of the court shall send notice of the  
160 appointment to each person appointed no later than 3 days after  
161 the court's appointment.

162 (c) Each person appointed to an examining committee must  
163 file an affidavit with the court every 12 months stating that he  
164 or she has completed all the required courses and holds a  
165 current, valid license to practice in this state ~~or will do so~~  
166 ~~no later than 4 months after his or her initial appointment.~~  
167 Each year, the chief judge of the circuit must prepare a list of  
168 persons qualified to be members of an examining committee.

169 (d) A member of an examining committee must complete a  
170 minimum of 4 hours of initial training. The person must complete  
171 2 hours of continuing education during each 2-year period after  
172 the initial training. The initial training and continuing  
173 education program must be developed under the supervision of the  
174 Statewide Public Guardianship Office, in consultation with the  
175 Florida Conference of Circuit ~~Court~~ Judges; the Elder Law and  
176 the Real Property, Probate and Trust Law sections of The Florida  
177 Bar; the Florida State Guardianship Association; ~~and~~ the Florida  
178 Guardian Ad Litem Guardianship Foundation; and the Florida  
179 Medical Association. The court may waive the initial training  
180 requirement for a person who has served for at least ~~not less~~  
181 ~~than~~ 5 years on examining committees. If a person wishes to  
182 obtain his or her continuing education on the Internet or by

HB 1157

2014

183 watching a video course, the person must first obtain the  
184 approval of the chief judge before taking an Internet or video  
185 course.

186 (e) Each member of the examining committee shall perform a  
187 comprehensive evaluation, including a physical examination, of  
188 the alleged incapacitated person ~~examine the person~~. Each  
189 examining committee member must determine the alleged  
190 incapacitated person's ability to exercise those rights  
191 specified in s. 744.3215. In addition to the evaluation  
192 ~~examination~~, each examining committee member must have access  
193 to, and ~~may~~ consider the person's health status at the time of  
194 the evaluation, the appropriateness of the timing of the  
195 evaluation, previous evaluations ~~examinations~~ of the person,  
196 including, but not limited to, habilitation plans, school  
197 records, and psychological and psychosocial reports voluntarily  
198 offered for use by the alleged incapacitated person or his or  
199 her attorney. Each member of the examining committee must submit  
200 an independent ~~a~~ report within 15 days after appointment without  
201 consultation with the other committee members.

202 (f) The examination of the alleged incapacitated person  
203 must include a comprehensive evaluation ~~examination~~, a report of  
204 which shall be filed by each examining committee member as part  
205 of his or her written report. The comprehensive evaluation  
206 ~~examination~~ report should be an essential element, but not  
207 necessarily the only element, used in making a capacity and  
208 guardianship decision. The comprehensive evaluation ~~examination~~



209 must include, ~~if indicated~~:

- 210 1. A physical examination, including neurologic findings;
- 211 2. A comprehensive, objective mental health examination;
- 212 ~~and~~
- 213 3. A functional assessment; and
- 214 4. A neurological imaging study, if required.

215

216 If any aspect of these three aspects of the evaluation  
 217 ~~examination is not indicated or~~ cannot be accomplished for any  
 218 reason, the written report must explain the reasons for its  
 219 omission, or the report is null and void.

220 (g) Each committee member's written report must include:

- 221 1. To the extent possible, a clinical diagnosis ~~and~~  
 222 prognosis for recovery, ~~and recommended course of treatment.~~
- 223 2. An evaluation of the alleged incapacitated person's  
 224 ability to retain his or her ~~her or his~~ rights, including,  
 225 without limitation, the rights to marry, ~~+~~ vote, ~~+~~ contract, ~~+~~  
 226 manage or dispose of property, ~~+~~ have a driver ~~driver's~~ license, ~~+~~  
 227 determine his or her ~~her or his~~ residence, ~~+~~ consent to medical  
 228 treatment, ~~+~~ and make decisions affecting his or her ~~her or his~~  
 229 social environment.
- 230 3. The results of the comprehensive evaluation ~~examination~~  
 231 and the committee member's assessment of information provided by  
 232 the attending or family physician or the alleged incapacitated  
 233 person's attorney, if any.
- 234 4. A description of any matters with respect to which the

235 person lacks the capacity to exercise rights, the extent and  
236 expected duration of that incapacity, and the objective factual  
237 basis for the determination that the person lacks that capacity.

238 5. The names of all persons present during the time the  
239 committee member conducted his or her evaluation ~~examination~~. If  
240 a person other than the person who is the subject of the  
241 evaluation ~~examination~~ supplies answers posed to the alleged  
242 incapacitated person, the report must include the response and  
243 the name of the person supplying the answer. Absent objection  
244 from the alleged incapacitated person, a family member or  
245 caregiver may not be barred from observing the evaluation. Video  
246 or other recordings of the evaluation may be made by family  
247 members and interested parties without limitation.

248 6. The signature of the committee member and the date and  
249 time the member conducted his or her evaluation ~~examination~~.

250 (4) RULING ON DISMISSAL OF PETITION.—If any ~~a~~ majority of  
251 the examining committee members concludes ~~conclude~~ that the  
252 alleged incapacitated person is not incapacitated in any  
253 respect, the court shall dismiss the petition.

254 (6) ORDER DETERMINING INCAPACITY.—If, after making  
255 findings of fact on the basis of clear and convincing evidence,  
256 the court finds that a person is incapacitated with respect to  
257 the exercise of a particular right, or all rights, the court  
258 shall enter a written order determining such incapacity. A  
259 person is determined to be incapacitated only with respect to  
260 those rights specified in the order.

261 (f) Upon the filing of a verified sworn statement by an  
 262 interested person stating:

- 263 1. That he or she has sworn evidence ~~a good faith belief~~  
 264 that the alleged incapacitated person's trust, trust amendment,  
 265 or durable power of attorney is invalid; ~~and~~  
 266 2. A reasonable factual basis for that belief; and  
 267 3. That there exists an imminent danger of physical or  
 268 financial harm to the alleged incapacitated person and that such  
 269 person has reported the danger to the Department of Children and  
 270 Families or the state attorney,

271  
 272 the trust, trust amendment, or durable power of attorney is  
 273 suspended until such time as a court hearing can be held, at  
 274 which time such documents may be reinstated at the discretion of  
 275 the court ~~shall not be deemed to be an alternative to the~~  
 276 ~~appointment of a guardian.~~ The appointment of a guardian does  
 277 not limit the court's power to determine that certain authority  
 278 granted by a durable power of attorney remains ~~is to remain~~  
 279 exercisable by the attorney in fact.

280 Section 3. Section 744.4461, Florida Statutes, is created  
 281 to read:

282 744.4461 Financial exploitation of wards; penalties.—  
 283 (1) As used in this section, the term "undue influence"  
 284 means domination, intimidation, force, coercion, or legal  
 285 manipulation exercised by another person to the extent that a  
 286 ward is harmed.

287       (2) A guardian or his or her agent or an attorney or his  
 288 or her agent may not knowingly, from the date the incapacity is  
 289 adjudicated, dissipate, use, obtain, convert, or take control of  
 290 or endeavor to dissipate, use, obtain, convert, or take control  
 291 of any of a ward's property by improper billing, fraud upon the  
 292 court, deception, intimidation, undue influence, coercion,  
 293 harassment, duress, or misrepresentation with the intent or  
 294 result of permanently depriving the ward of the use, benefit, or  
 295 possession of the property.

296       (3) A person who violates this section commits a felony of  
 297 the third degree, punishable as provided in s. 775.082, s.  
 298 775.083, or s. 775.084.

299       Section 4. Paragraph (a) of subsection (2) of section  
 300 932.701, Florida Statutes, is amended to read:

301       932.701 Short title; definitions.—

302       (2) As used in the Florida Contraband Forfeiture Act:

303       (a) "Contraband article" means:

304       1. Any controlled substance as defined in chapter 893 or  
 305 any substance, device, paraphernalia, or currency or other means  
 306 of exchange that was used, was attempted to be used, or was  
 307 intended to be used in violation of ~~any provision of~~ chapter  
 308 893, if the totality of the facts presented by the state is  
 309 clearly sufficient to meet the state's burden of establishing  
 310 probable cause to believe that a nexus exists between the  
 311 article seized and the narcotics activity, regardless of whether  
 312 ~~or not~~ the use of the contraband article can be traced to a

313 specific narcotics transaction.

314 2. Any gambling paraphernalia, lottery tickets, money,  
315 currency, or other means of exchange that ~~which~~ was used or,  
316 attempted, or intended to be used in violation of the gambling  
317 laws of the state.

318 3. Any ~~equipment,~~ liquid or solid equipment that, ~~which~~  
319 was or is being used or, ~~is being used,~~ was attempted to be  
320 used, or intended to be used in violation of the beverage or  
321 tobacco laws of the state.

322 4. Any motor fuel upon which the motor fuel tax has not  
323 been paid as required by law.

324 5. Any personal property, including, but not limited to,  
325 any vessel, aircraft, item, object, tool, substance, device,  
326 weapon, machine, vehicle of any kind, money, securities, books,  
327 records, research, negotiable instruments, or currency, which  
328 was used or was attempted to be used as an instrumentality in  
329 the commission of, or in aiding or abetting in the commission  
330 of, any felony, regardless of whether ~~or not~~ comprising an  
331 element of the felony, or which is acquired by proceeds obtained  
332 as a result of a violation of the Florida Contraband Forfeiture  
333 Act.

334 6. Any real property, including any right, title,  
335 leasehold, or other interest in the whole of any lot or tract of  
336 land, which was or is being used, ~~is being used,~~ or was  
337 attempted to be used as an instrumentality in the commission of,  
338 or in aiding or abetting in the commission of, any felony, or

339 | which is acquired by proceeds obtained as a result of a  
 340 | violation of the Florida Contraband Forfeiture Act.

341 |         7. Any personal property, including, but not limited to,  
 342 | equipment, money, securities, books, records, research,  
 343 | negotiable instruments, currency, or any vessel, aircraft, item,  
 344 | object, tool, substance, device, weapon, machine, or vehicle of  
 345 | any kind in the possession of or belonging to any person who  
 346 | takes aquaculture products in violation of s. 812.014(2)(c).

347 |         8. Any motor vehicle offered for sale in violation of s.  
 348 | 320.28.

349 |         9. Any motor vehicle used during the course of committing  
 350 | an offense in violation of s. 322.34(9)(a).

351 |         10. Any photograph, film, or other recorded image,  
 352 | including an image recorded on videotape, a compact disc,  
 353 | digital tape, or fixed disk, which ~~that~~ is recorded in violation  
 354 | of s. 810.145 and ~~is~~ possessed for the purpose of amusement,  
 355 | entertainment, sexual arousal, gratification, or profit, or for  
 356 | the purpose of degrading or abusing another person.

357 |         11. Any real property, including any right, title,  
 358 | leasehold, or other interest in the whole of any lot or tract of  
 359 | land, which is acquired by proceeds obtained as a result of  
 360 | Medicaid fraud under s. 409.920 or s. 409.9201; any personal  
 361 | property, including, but not limited to, equipment, money,  
 362 | securities, books, records, research, negotiable instruments, or  
 363 | currency; or any vessel, aircraft, item, object, tool,  
 364 | substance, device, weapon, machine, or vehicle of any kind in

HB 1157

2014

365 the possession of or belonging to any person which is acquired  
366 by proceeds obtained as a result of Medicaid fraud under s.  
367 409.920 or s. 409.9201.

368 12. Any personal property, including, but not limited to,  
369 any vehicle, item, object, tool, device, weapon, machine, money,  
370 security, book, or record, which ~~that~~ is used or attempted to be  
371 used as an instrumentality in the commission of, or in aiding  
372 and abetting in the commission of, a person's third or  
373 subsequent violation of s. 509.144, whether or not comprising an  
374 element of the offense.

375 13. Any vehicle, machinery, equipment, or other item of  
376 personal property used in connection with the financial  
377 exploitation of a ward in violation of s. 744.4461.

378 Section 5. This act shall take effect October 1, 2014.