

Select Year: 2019 Go

The 2019 Florida Statutes

Title XLIII
DOMESTIC RELATIONS

Chapter 744
GUARDIANSHIP

[View Entire Chapter](#)

744.108 Guardian and attorney fees and expenses.—

(1) 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 for costs incurred on behalf of the ward.

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

- (a) The time and labor required;
 - (b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;
 - (c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;
 - (d) The fee customarily charged in the locality for similar services;
 - (e) The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
 - (f) The results obtained;
 - (g) The time limits imposed by the circumstances;
 - (h) The nature and length of the relationship with the incapacitated person; and
 - (i) The experience, reputation, diligence, and ability of the person performing the service.
- (3) In awarding fees to attorney guardians, the court must clearly distinguish between fees and expenses for legal services and fees and expenses for guardian services and must have determined that no conflict of interest exists.

(4) Fees for legal services may include customary and reasonable charges for work performed by legal assistants employed by and working under the direction of the attorney.

(5) All petitions for guardian and attorney fees and expenses must be accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.

(6) A petition for fees or expenses may not be approved without prior notice to the guardian and to the ward, unless the ward is a minor or is totally incapacitated.

(7) A petition for fees shall include the period covered and the total amount of all prior fees paid or costs awarded to the petitioner in the guardianship proceeding currently before the court.

(8) When 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 costs and attorney fees for the guardian's attorney, an attorney appointed under s. [744.331\(2\)](#), or an attorney who has rendered services to the ward, 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.

(9) The court may determine that a request for compensation by the guardian, the guardian's attorney, a person employed by the guardian, an attorney appointed under s. [744.331\(2\)](#), or an attorney who has rendered services to the ward, is reasonable without receiving expert testimony. A person or party may offer expert testimony for or against a request for compensation after giving notice to interested persons. Reasonable expert witness fees shall be awarded by the court and paid from the assets of the guardianship estate using the standards in subsection (8).

History.—ss. 18, 26, ch. 75-222; s. 11, ch. 89-96; s. 5, ch. 90-271; s. 2, ch. 96-354; s. 7, ch. 2003-57; s. 4, ch. 2015-83.

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Florida Probate & Trust Litigation Blog

2d DCA: When are guardians and attorneys entitled to fees in contested guardianship proceedings?

By **Anthony Marek** on June 18, 2012

Thorpe v. Myers, — So.3d —, 2011 WL 2731937 (Fla. 2d DCA Jul 15, 2011)

In this case a 93-year-old ward had nine children who seemingly couldn't agree that the sky was blue. After lengthy litigation, the trial court appointed a plenary guardian for the ward, who suffered from dementia. In separate appeals, the emergency temporary guardian and attorneys for two of the children appealed the court's denial of their respective fee requests.

Guardian's Fees:

The 2d DCA held that the trial court's complete denial of fees to the guardian was based on a misreading of **F.S. 744.108(1)**, which requires that attorneys, **but not guardians**, demonstrate the "beneficial nature of services rendered" to the ward. Unlike those of attorneys, guardians' services are presumed to benefit the ward. However, a

circuit court may reduce the requested compensation to the extent that the guardian's services were "unnecessary or unproductive."

“ There are some exceptions to the general rule entitling a guardian to payment for services rendered, but these exceptions are limited. We briefly mention three such exceptions. First, a guardian cannot expect to be compensated for services rendered outside the scope of his or her appointment. *In re Guardianship of Jansen*, 405 So.2d 1074, 1077 (Fla. 2d DCA 1981); *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So.2d 176, 182–83 (Fla. 2d DCA 1966). Second, a guardian guilty of theft or other breach of duty may forfeit the right to compensation. See *Am. Surety Co. of N.Y. v. Hayden*, 112 Fla. 17, 150 So. 114, 121 (1933). Third, on occasion, usually when a family member is appointed, a guardian may agree to serve without compensation. Here, there is no exception to the statutory requirement that guardians be compensated for their services.

In order for an attorney to be awarded fees from the ward's estate under section 744.108(1), the attorney's services must benefit the ward or the ward's estate. See *Butler*, 898 So.2d at 1141. The clause in section 744.108(1) requiring the demonstration of the beneficial nature of the services rendered applies to attorneys, not guardians. Thus, under the statutory

language, a guardian is not required to demonstrate that his or her services conferred a benefit on the ward or the ward's estate as a prerequisite for obtaining a compensation award. The statute appears to presuppose that a guardian's services benefit the ward or the ward's estate. Cf. *Essenson v. Lutheran Servs. Fla., Inc. (In re Guardianship of King)*, 862 So.2d 869, 870 (Fla. 2d DCA 2003) ("Florida cases in which fees have been denied to court-appointed representatives appear to be only those in which he or she was found to have exceeded the scope of appointment." (citing *Jansen*, 405 So.2d at 1077)).

It follows that the circuit court reached an incorrect legal conclusion in ruling that Ms. Thorpe was required to demonstrate that her services as emergency temporary guardian were beneficial to the Ward or the Ward's estate as a condition of receiving court-awarded compensation. The statutory scheme presumes that the services of guardians provide a benefit. To the extent that the services of a guardian are unnecessary or unproductive, the circuit court may reduce the requested compensation based on the factors listed in section 744.108(2) but may not deny compensation altogether.

Not only was the legal basis for denying the guardian any compensation flawed, but so too was the factual basis, the 2d DCA found. It disagreed with the circuit court's finding

that the guardian's services "were of minimal, if any[,] benefit to the Ward, and were intended to benefit [two of the Ward's children] in the Petition for Emergency Temporary Guardianship." Instead, there was "nothing in the record suggesting that [the guardian] was working for [the two children] in disregard of her obligation to act in the best interests of the Ward. . . . The guardian works in the interest of the ward under the supervision and control of the court, not at the behest of the person or persons who sought the appointment."

As evidence to support that claim, the 2d DCA pointed out that the "circuit court actually extended [the guardian's] tenure as emergency temporary guardian for another four months." It would make little sense, the 2d DCA implied, for a guardian providing "minimal, if any, benefit" to be asked to continue her responsibilities.

Attorneys' Fees:

The 2d DCA also addressed the circuit's order denial of attorney's fees and costs requested by the attorneys of the two children of the Ward who submitted the original petition for guardianship. As alluded to above, attorneys are entitled to "reasonable compensation" only to the extent that their services demonstrably benefit the ward. Here's how the 2d DCA summarized the law on this point:

“ Under section 744.108(1), “an attorney is entitled to receive a reasonable attorney’s fee for professional services rendered and reimbursement of costs incurred for the benefit of the ward; payment of reasonable compensation is mandatory.” *Price v. Austin*, 43 So.3d 789, 790 (Fla. 1st DCA 2010). Under the statute, “the probate court is not ‘at liberty to award anything more or less than fair and reasonable compensation for the services rendered or monies expended in each individual case.’” *Lutheran Servs.*, 978 So.2d at 890

(quoting *Lewis v. Gramil Corp.*, 94 So.2d 174, 176 (Fla.1957)). However, the attorney’s entitlement to payment of reasonable fees and costs is subject to the limitation that his or her services must benefit the ward. *King v. Fergeson, Skipper, Shaw, Keyser, Baron, & Tirabassi, P.A.*, 862 So.2d 873, 874 (Fla. 2d DCA 2003) (Villanti, J., concurring specially); *Butler*, 898 So.2d at 1141.

The circuit court found that the two children’s attorneys did not provide any services for the ward. By an abuse of discretion standard, the 2d DCA acknowledged that some of the attorneys’ services amounted to “unproductive litigation over who would be appointed as guardian or other goals that did not benefit the Ward or her estate.”

But some work did make the ward better off. Were it not for the guardianship proceedings initiated by the attorneys, there would have been no determination of incapacity, and no appointment of a plenary guardian, each of which seemed to have been in the ward’s best interest. Accordingly, the 2d DCA remanded to the circuit court with instructions to “make an appropriate award of fees and costs.”

Florida Probate & Trust Litigation Blog

Published By: Juan C. Antúnez of Stokes McMillan Antúnez P.A.

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IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT FOR
DESOTO, MANATEE AND SARASOTA COUNTIES, FLORIDA

IN RE: Attorneys fees : ADMINISTRATIVE ORDER NO. 99-07
and Examining Committee :
fees in guardianship :
proceedings under :
Chapter 744, Florida :
Statutes. :
_____ :

THIS ADMINISTRATIVE ORDER WAS
RENUMBERED BY ADMINISTRATIVE
ORDER NUMBER 2001-14-2.
THE NEW NUMBER IS
99-07-5

ADMINISTRATIVE ORDER ON FEES
FOR EXAMINING COMMITTEE MEMBERS AND
ATTORNEYS FOR ALLEGED INCAPACITATED PERSONS/WARDS

Pursuant to Chapter 744, Florida Statutes, fees and procedures are to be set with regard to examining committees and attorneys representing alleged incapacitated persons. It is, therefore, Ordered as follows:

1. EXAMINING COMMITTEE - A person appointed by the Court to serve as a member of an examining committee in a proceeding to determine incapacity, or a physician appointed by the Court to examine a ward pursuant to a suggestion of capacity, shall be paid as follows:

Psychiatrist or other Physician	\$250.00
Other members of Committee (Not Psychiatrist or Physician)	\$150.00

These fees shall be paid by the guardian from the assets of the Ward. If the ward is indigent, these fees shall be paid from the general fund of the County in which the proceeding was held.

The Court may, upon Petition with notice to all interested persons, order additional fees for examining committee members and physicians in restoration proceedings where circumstances deem it

appropriate. These fees shall be paid by the guardian from the assets of the ward. If the ward is indigent, these fees shall be paid from the general fund of the County in which the proceeding was held, after notice to all interested persons, including the County responsible for such payment.

2. ATTORNEYS - The attorney appointed by the Court to represent the alleged incapacitated person in a proceeding to determine incapacity or to represent a ward with regard to a suggestion of capacity shall be entitled to reasonable fees for services rendered. A petition for fees shall be filed with the Court and served upon the guardian and any other persons entitled to notice. Any fees or costs awarded by the Court shall be paid by the guardian from the assets of the ward, unless the ward is indigent.

If the ward is indigent, the attorney appointed by the Court to represent the alleged incapacitated person in a proceeding to determine incapacity shall be paid the sum of \$250.00 for routine representation through the review of the initial guardianship reports. If extra-ordinary representation is required, the attorney shall be paid \$75.00 per hour for such extra-ordinary representation. An attorney appointed by the Court to represent an indigent ward in restoration proceedings shall be paid the sum of \$150.00 for routine representation and \$75.00 per hour for any extra-ordinary representation. The determination of the necessity for any extra-ordinary representation shall be made by the judge presiding over the proceeding. The fees awarded by the Court pursuant to this paragraph shall be paid from the general fund of

the County in which the proceeding was held after notice to all interested persons, including the County responsible for such payment.

4. All fees ordered to be paid pursuant hereto shall be paid within a reasonable time from the date of the Order.

5. This Administrative Order applies to Petitions to Determine Incapacity filed on or after the date of this Order.

DONE and ORDERED in Sarasota County, Florida, this 3rd day of March, 1999.



ANDREW D. OWENS, JR.
CHIEF JUDGE

Distribution:

Clerk of Court DeSoto County
Clerk of Court Manatee County
Clerk of Court Sarasota County

**IN THE THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA**

**ADMINISTRATIVE ORDER S-2018-021
(Supersedes Administrative Order S-2017-012)**

GUARDIANSHIP PROCEEDINGS

In light of a new cause of action for an injunction for protection against exploitation of a vulnerable adult becoming law on July 1, 2018 (Chapter 2018-100, Laws of Florida), it is necessary for the proper and efficient administration of justice in this circuit to update the administrative provisions governing guardianship proceedings in this circuit. By the power vested in the chief judge under article V, section 2(d), Florida Constitution; section 43.26, Florida Statutes; and Florida Rule of Judicial Administration 2.215(b)(2), it is ORDERED:

1. Assignment of Cases

A. Generally

All proceedings under section 393.12 (guardian advocate); chapter 744 (Florida Guardianship Law); chapter 747 (conservatorship); and section 825.1035 (injunction for protection against exploitation of a vulnerable adult), Florida Statutes (2018), will be assigned to Probate, Guardianship, Mental Health and Trust Division "A" unless the person with a developmental disability, alleged incapacitated person, or alleged vulnerable adult resides in the East Circuit Division boundaries, or the absentee was domiciled in the East Circuit Division boundaries, or the absentee's property is located in the East Circuit Division boundaries in which event the guardian advocate, guardianship, conservatorship, or injunction for protection proceedings will be assigned to East Circuit Division "U" or East Circuit Division "W" on a random equitable basis. See Administrative Order S-2013-033 or any successor administrative order for the East Division boundaries.

B. Mental Health Companion Cases

All mental health companion cases in which the subject of the case is also the subject of a pending guardianship case in the East Division will be assigned to the same East Division in which the guardianship case is pending. For purposes of this administrative order, the term "mental health companion case" means a proceeding in which a petition to determine incapacity (section 744.3201, Florida Statutes), a suggestion of capacity (section 744.464, Florida Statutes), or a petition under the Adult Protective Services Act (chapter 415, Florida Statutes) has been filed and the subject of the petition or suggestion is also the subject of a pending guardianship case.

C. Injunctions for Protection against Exploitation of a Vulnerable Adult and Pending Guardianship Proceeding

In accordance with section 825.1035(2)(f), Florida Statutes (2018), if a proceeding concerning a vulnerable adult under chapter 744 is pending at the time of a filing of a petition for an injunction for protection against exploitation of a vulnerable adult, the petition must be filed in the guardianship proceeding.

2. Applicability

A. Guardian Advocacy

Unless otherwise provided in chapter 393, Florida Statutes, or in the applicable Florida Probate Rules, any proceeding on a petition for the appointment of a guardian advocate will be governed by the provisions in this administrative order. The term “guardian” as used in this administrative order also applies to a guardian advocate. The notice required to a person with a developmental disability who is the subject of a petition filed under section 393.12, Florida Statutes, may be satisfied by filing proof of service on counsel for the person with a developmental disability and that such counsel has waived notice on behalf of his or her client.

B. Guardianship

Unless otherwise provided in chapter 744, Florida Statutes, or in the applicable Florida Probate Rules, all guardianship proceedings will be governed by the provisions in this administrative order. Minor guardianships are also addressed in Administrative Order S-2011-014 (*Child Custody Proceedings*).

C. Conservatorship

Unless otherwise provided in chapter 747, Florida Statutes, or in the applicable Florida Probate Rules, any proceeding on a conservatorship will be governed by the provisions in this administrative order. The term “guardian” as used in this administrative order also applies to a conservator.

D. Injunctions for Protection against Exploitation of a Vulnerable Adult

Unless otherwise provided in section 825.1035, Florida Statutes (2018), all petitions for injunctions for protection against exploitation of a vulnerable adult will be governed by the provisions in this administrative order.

3. Dismissal of Petition for Incapacity

A petition to determine incapacity, once filed, may not be voluntarily dismissed. A motion to dismiss filed by any person must be scheduled for hearing for the court’s consideration. The motion must state with specificity the reasons for the

dismissal and whether the petitioner stipulates to pay the costs of the examining committee and court appointed attorney for the alleged incapacitated person. Corresponding proposed orders dismissing the petition will be provided to the court at the time the motion to dismiss is heard.

4. Application for Appointment as Guardian

Every proposed guardian seeking appointment by the court must file an application for appointment as guardian that is signed by the proposed guardian under penalties of perjury. Professional guardians must update their application annually by filing either a list of current wards served by the guardian or a complete application for appointment as guardian. Professional guardians must denote any *pro bono* cases in the initial application and annual updates to their application. Nonprofit corporate guardians must file quarterly disclosure statements, in lieu of an application for appointment as guardian, denoting any *pro bono* cases.

5. Appointment of Guardian

A. Professional Guardians

Professional guardians seeking appointment must establish a professional guardian file with the Clerk of the Circuit Court (clerk) and submit documentation that the requirements of sections 744.2002, 744.2003, and 744.3135, Florida Statutes, have been satisfied.

In addition to the credit and criminal history investigation documentation contained within a professional guardian's file maintained by the clerk under section 744.3135, Florida Statutes, professional guardians must submit the following items, which the clerk will maintain in the professional guardian's file:

- (i) Application for appointment as guardian and annual updates, or quarterly disclosure statements for nonprofit corporate guardians, in accordance with section 744.3125, Florida Statutes;
- (ii) Proof of blanket fiduciary bond required by section 744.2003, Florida Statutes;
- (iii) Evidence of completion of instruction and training, including continuing education required by section 744.2003, Florida Statutes.
- (iv) Proof of registration with the Statewide Public Guardianship Office under section 744.2002, Florida Statutes; and

- (v) Evidence of passage of the approved competency examination required by section 744.2003, Florida Statutes.

Additionally, each professional guardian is responsible for maintaining individual records of attendance at continuing education programs. The records must include the date, hours, title, location, and sponsor of the course and the certificate of attendance if provided. At least 8 of the 16 hours of continuing education required by section 744.2003, Florida Statutes, every two years must be directly related to ethics, guardianship duties, or care of the ward. Verification of continuing education course attendance must be filed in the professional guardian file.

B. Nonprofessional Guardians

Prior to the hearing on the appointment of the guardian, the court will conduct a state and national criminal background investigation of all proposed nonprofessional guardians. In order to complete the criminal background investigation, the proposed nonprofessional guardian must supply his or her date of birth and social security number. Additionally, any proposed nonprofessional guardian of the property must file a full credit report taken within the last year. A copy of the entire free annual credit report from Equifax, Experian, or TransUnion is acceptable. The court may require a nonprofessional guardian to submit to a level 1 or level 2 background screening and credit check under section 744.3135, Florida Statutes. In accordance with section 744.3135, the clerk will maintain a separate file on each guardian appointed by the court and retain in the guardian file documentation of the results of any investigation conduct under the section.

6. Constructive Service - Affidavit of Diligent Search and Inquiry

To obtain constructive service in a guardianship case, all counsel and interested persons (if unrepresented) must complete and file an affidavit of diligent search and inquiry substantially similar to the affidavit designated as Florida Rule of Civil Procedure Form 1.924. A uniform Affidavit of Diligent Search and Inquiry can be found at www.fljud13.org.

7. Service of Injunctions for Protection against Exploitation of Vulnerable Adults

In accordance with section 825.1035, Florida Statutes (2018), any sworn law enforcement officer in Hillsborough County may effect service within their jurisdiction of the petition, financial affidavit, notice of hearing, and any temporary ex parte injunction, as applicable. A law enforcement officer performing service under this statutory provision must use service and verification procedures consistent with those of the sheriff.

8. Referral to General Magistrate

Administrative provisions regarding referrals to a general magistrate are memorialized in a separate administrative order that may be found online at www.fljud13.org under the section titled “Administrative Orders.” Judges should not refer petitions for injunctions for protection against exploitation of a vulnerable adult to a general magistrate.

9. Reassignment of Case upon Judge’s Disqualification

If the judge presiding in Probate, Guardianship, Mental Health and Trust Division “A” enters an order of disqualification in a guardianship case, the case will be reassigned by the clerk on a random equitable basis to one of the Tampa Family Law Divisions. If either of the judges presiding in East Circuit Division “U” or “W” enters an order of disqualification in a guardianship case, the clerk will reassign the case to the other division. If both judges assigned the East Circuit Divisions “U” and “W” enter orders of disqualification in a guardianship case, the clerk will reassign the case to Tampa Probate, Guardianship, Mental Health and Trust Division “A.”

10. Setting of Hearings

A. Obtaining Hearing Time

Attorneys may obtain available hearing times and schedule hearings on a judge’s calendar by accessing the Judicial Automated Workflow System (JAWS) at <https://jaws.fljud13.org/System/login.aspx> or by e-mailing the judge’s judicial assistant at the appropriate divisional e-mail address:

- Probate, Guardianship, Mental Health and Trust Division “A” - probatedivisiona@fljud13.org.
- East Circuit Division “U” – eastcirdivu@fljud13.org.
- East Circuit Division “W” – eastcirdivw@fljud13.org.

Unrepresented interested persons are encouraged to obtain hearing times and schedule hearings on a judge’s calendar by e-mailing the judge’s judicial assistant at the appropriate divisional e-mail address above.

B. Notice of Hearing

All notices of hearing must state the length of the time reserved on the judge’s calendar for the hearing and specify the matters to be heard. The party filing a notice of hearing must provide a copy of the notice to the presiding judge’s judicial assistant. A notice indicating that the hearing will be on “all pending motions” is not authorized. The matter to be heard must be set out with particularity. There will be no

cross-noticing on hearing times unless the opposing counsel or opposing interested person contacts the judge's office and determines whether the docket will accommodate hearing additional matters at the same time and all parties agree to including the additional matters to be heard.

C. Cancellation or Rescheduling

If any hearing is cancelled or rescheduled, the attorney or unrepresented interested person setting the hearing is responsible for notifying the judge's judicial assistant and the opposing counsel or opposing interested person as soon as possible of the cancellation. Attorneys must also cancel the hearing through JAWS if the hearing was scheduled on JAWS.

11. Hearings

Any petition, pleading, motion, or other document that is the subject of a hearing or a conference set before the court must be filed with the clerk no later than five days before the matter is to be considered. A hearing on any such petition, pleading, motion, or other document not so filed may be postponed until another hearing is scheduled. Courtesy copies of any case law, statutes, or other authority relied upon for the hearing must be provided to the judge at the hearing.

12. Court Reporters

The court will not provide court reporters for hearings, except for recordings for proceedings on petitions for injunctions for protection against exploitation of a vulnerable adult. If an attorney or unrepresented interested person wishes to have a court reporter present during any hearing, it is that attorney's or unrepresented interested person's responsibility to contact the court reporter to arrange for the presence of such reporter. *See also* Administrative Order S-2016-015 (*Civil Court Reporting*).

13. Emergencies

Application for emergency relief in a case must be made to the presiding judge. All petitions for injunctions for protection against exploitation of a vulnerable adult are considered applications for emergency relief.

If the presiding judge is the judge assigned to Probate, Guardianship, Mental Health and Trust Division "A" and is for any reason absent from the courthouse, then emergency application in any case assigned to that judge's division will be presented to the judge assigned Drug Court Division "Z" if that judge is present in the courthouse. If the judge assigned Drug Court Division "Z" is absent from the courthouse, then the case will be presented to the duty judge assigned for that

particular week. Duty judge assignments may be accessed at www.fljud13.org. The judge will review the request as soon as it is reasonably possible.

If the presiding judge is either of the judges presiding in East Circuit Division “U” or “W,” and is for any reason absent from the courthouse, then emergency application in any case assigned to that judge’s division will be presented to the judge of the other East Circuit guardianship division if that judge is present in the courthouse. If both judges assigned the East Circuit Divisions “U” and “W” are unavailable, then any emergency matter will be assigned to any other judge assigned to the East Division who is present in the courthouse. If all judges assigned to the East Division are unavailable, then the emergency matter will be presented to the judge assigned to Tampa Probate, Guardianship, Mental Health and Trust Division “A.”

“Present in the courthouse” includes being in a hearing, a jury trial, or non-jury trial.

Matters scheduled for hearing as an emergency may not be heard with less than 48 hours’ actual prior notice to an opposing interested person unless all interested persons agree.

14. Adversary Proceedings

In an adversary proceeding as defined by Florida Probate Rule 5.025, the following provisions apply:

A. Case Management Conference

All petitioners must schedule a case management conference within 60 days of commencing an adversary proceeding. All trials or final hearings of adversary proceedings must be set by the court entering a Uniform Order Setting Adversary Proceeding for Trial and Pretrial Conference (Nonjury). Uniform orders may be found at www.fljud13.org. Once scheduled, a hearing may not be cancelled unilaterally by counsel.

B. Military Service - Memorandum for Certificate of Military Service

If a petitioner does not know whether the respondent is on active duty in a branch of the military service of the United States, the petitioner must complete a memorandum for certificate of military service substantially similar to the memorandum designated as Florida Family Law Rule of Procedure Form 12.912(a).

A uniform Memorandum for Certificate of Military Service can be found at www.fljud13.org.

C. Default Judgment – Affidavit of Military Service

If a petitioner seeks a default judgment and the respondent has been properly served and has not responded to the petition, the petitioner must complete and file an affidavit of military service substantially similar to the affidavit designated as Florida Family Law Rule of Procedure Form 12.912(b). A uniform Affidavit of Military Service can be found at www.fljud13.org.

D. Motions to Compel - Order Without Hearing

When a motion to compel that complies with the good faith certification in Florida Rule of Civil Procedure 1.380(a)(2) – motion “must include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action” – alleges the absence of a response or objection to discovery and there has been no request for an extension of time to respond, the court, without a hearing, may enter an order requiring compliance with the original discovery request within 10 days of the signing of the order, provided no written showing of good cause has been filed by the non-movant.

Unless the presiding judge directs otherwise, if all parties are represented by attorneys, none of whom have been excused from e-mail service under Florida Rule of Judicial Administration 2.516, the movant’s attorneys must submit to the court a proposed order through the JAWS in searchable PDF format. If any party is unrepresented or represented by an attorney who has been excused from e-mail service under Rule 2.516, the movant or movant’s attorney must submit to the presiding judge sufficient hard copies of the proposed order along with stamped, addressed envelopes.

E. Motions to Set Case for Trial - Certificate by Attorney

All motions to set a case for trial must contain a certificate by the attorney or party filing such motion that the attorney or party has discussed the subject matter of the motion with all other attorneys or parties and has been unable to reach agreement concerning the setting of the case for trial, or that the opposing attorneys or parties have failed to respond.

15. Orders

A. Consultation with Opposing Counsel or Party

Unless the presiding judge directs otherwise, prior to submitting a proposed

order for the court's consideration after a hearing, the counsel submitting the proposed order must consult with opposing counsel or unrepresented party within five days after the court's decision and make a genuine effort to agree on the language of the proposed order.

B. Timely Submission

All proposed orders must be submitted to the court by the attorney directed to prepare the order within 10 days after the court's decision.

C. Submission of Proposed Orders

i. JAWS – All Parties Represented by Counsel None of Whom are Excused from E-Service

Unless the presiding judge directs otherwise, if all parties are represented by attorneys, none of whom have been excused from e-mail service under Florida Rule of Judicial Administration 2.516, an attorney who is requested to submit a proposed order will do so through the JAWS in searchable PDF.

All proposed orders submitted to the presiding judge must include a cover letter certifying that one of the following statements is true: (i) all parties have agreed to the content of the proposed order or (ii) opposing counsel has not responded within five business days of being provided the proposed order.

If, after consultation with opposing counsel or the appropriate interested person, the parties cannot agree on the language in the proposed order to be submitted to the court, then the attorney or interested person submitting the proposed order must document in the cover letter that the opposing counsel or opposing interested person has registered an objection and specifically state what the objection is. At the time the cover letter and proposed order is submitted to the court, a copy must simultaneously be sent to all parties and interested persons or their counsel. If an objection is registered, the court will determine if a hearing is necessary to resolve the dispute.

ii. Hard Copies and Envelopes – Unrepresented Party or Party's Attorney Excused from E-Service

If any party is unrepresented or represented by an attorney who has been excused from e-mail service under Rule 2.516, the party or attorney who is requested to submit a proposed order will do so by submitting to the presiding judge sufficient hard copies of the proposed order along with stamped, addressed envelopes.

iii. Title

The title of every proposed order submitted must contain the subject matter of the pleading or motion upon which the ruling is made and must fairly apprise the reader of the action being ordered. Phrasing such as “order granting...” or “order denying...” is preferred over “order on....”

iv. Form

In all proposed orders, the page containing the court’s signature must also contain substantive language of the proposed order so that a proposed order does not contain a signature page consisting only of the court’s signature. Each page, except for the first page, must contain a page number.

16. Substitution of Counsel and Resident Agent

Any stipulation for the substitution of counsel for a guardian must be signed by the attorneys involved and by the guardian. If the former attorney is the designated resident agent for the guardian, then the former attorney should resign, and a new resident agent should be designated. This rule will not affect the right of a guardian to change attorneys, so long as notice is given to the former attorney.

17. Mediation

The court may, on its own motion or on the motion of the guardian or other interested person, refer adversary matters to mediation. If the mediation order is entered on the motion of the guardian, conservator, or other interested person, an order with sufficient copies and stamped, addressed envelopes will be provided for the service of the copies of the mediation order.

18. Approval of Settlement of Minor and Incompetent Claims

A petition seeking court approval of the settlement of a claim on behalf of a minor or incompetent person must comply with Florida Probate Rule 5.636 and sections 744.301 and 744.387, Florida Statutes.

The court will conduct a hearing to determine if the settlement is in the best interest of the minor or incompetent person and if the attorney’s fees and costs are fair and reasonable. Unless excused by the court, the minor or incompetent person must be present at the hearing as well as the parent, next friend or guardian. The attorney must have available for the court the most recent medical report of the treating physician.

In situations where approval of a settlement for less than the actual value of the claim is requested because of policy limits, evidence indicating the amount of insurance coverage must be produced at the hearing. If a guardian ad litem report is required

based on the amount of the settlement, a courtesy copy must be provided to the court at least 48 hours prior to the hearing.

19. Mandatory Depository

A. Minor Guardianships

Unless waived or otherwise ordered by the court, in every guardianship of the property of a minor ward, a depository must be designated (in accordance with section 69.031, Florida Statutes) for deposit of all cash owned by or owed to the ward, wherever located. For good cause shown, the court may waive the necessity of a depository, in which case a bond will be required.

B. All Other Guardianships of the Property

Unless waived or otherwise ordered by the court, in every guardianship of the property, except a minor guardianship (see above), the guardian must place in a restricted depository all cash assets or cash-equivalent assets of the ward. A one-time sum of \$3,000, or any other amount specified by the court, may be maintained outside of the depository for payment of the ward's initial expenses, including costs incurred with the establishment of the guardianship proceeding and payment of the examining committee. The ward's income need not be placed in the restricted depository, unless otherwise ordered by the court.

20. Reports and Plans

A. Initial Guardianship Report and Plan

Every guardian must file an initial guardianship report and plan, as required by sections 744.362, 744.363, and 744.365 Florida Statutes, within the statutory timeframe, unless waived by the court. The reporting period for the initial report and plan will begin with the date that letters of guardianship were signed by the court and end the following year on the last day of the anniversary month in which the letters of guardianship were signed.

B. Annual Guardianship Plan

Beginning the year after the initial plan is filed, a guardian of the person must file the annual guardianship plan as required by sections 744.367 and 744.3675, Florida Statutes. The reporting period for the annual plan is prospective and will begin on the first day of the first month following the end of the reporting period for the initial plan and end the following year on the last day of the anniversary month in which the letters of guardianship were signed. If a ward is in a persistent vegetative condition and the guardian wishes to use substantially the same plan as in previous years, then the guardian must provide a reasonable basis for doing so.

C. Annual Guardianship Accounting

A guardian of the property must file the annual guardianship accounting as required by sections 744.367 and 744.3678, Florida Statutes, on a fiscal-year basis. The fiscal year will be deemed to end on the last day of the anniversary month in which the letters of guardianship were signed. Therefore, the reporting period for the first annual accounting will begin with the date that letters of guardianship were entered and end on the last day of the anniversary month in which the letters of guardianship were signed. Thereafter, the reporting period for all future accountings will begin on the first day of the first month following the month in which letters of guardianship were signed by the court and end the following year, on the last day of the anniversary month in which the letters of guardianship were signed. Accountings must include all property interests of the ward regardless of how the property is titled unless specifically exempted under section 744.3678, Florida Statutes.

D. Format

All reports must include the guardian's signature, current address, current telephone number with area code, and e-mail address. Additionally, all reports must include the signature of the attorney of record, the attorney's current address, current telephone number with area code, e-mail address, and Florida Bar number.

E. Timeliness

All reports must be signed under penalties of perjury and filed within 90 days after the last day of the anniversary month in which the letters of guardianship were signed by the court. If the reports cannot be filed in the time required by law, a motion for extension of time must be filed within the respective time period. Reports must not be filed prior to the end of the applicable reporting period.

F. Audit Fees

Audit fees must be paid to the clerk in accordance with sections 744.365 and 744.3678, Florida Statutes.

G. Simplified Accounting Procedures

Under the appropriate circumstances, the guardian may use the simplified accounting procedures under section 744.3679, Florida Statutes, or file a verified petition clearly indicating the justification for the court to allow simplified plans or waive the requirement of annual accountings. If the court grants a petition to allow simplified plans, the guardian must use the court's approved form.

21. Guardian's Fees

All petitions to the court for approval of compensation to a guardian must be

accompanied by an itemized description of the services provided for which fees are sought. This itemization of services must be provided in chronological date order and in line-item format, with each line-item entry containing a specific description of the services rendered, the date listed with the amount of time expended on each service in one-tenth (0.10) of an hour increments. This information must also state the rate charged and amount sought to be approved. Notices to, or the signed consent of, the guardian of the property or the Veterans Administration or both must be submitted with the petition for guardian's fees, if applicable. No payment of guardian fees and expenses may be made without the entry of a court order approving the fees and expenses. Fees will be awarded by the court after applying the analysis specified in section 744.108, Florida Statutes. When fees are awarded, the approved amount must be transferred in full from the ward's account.

All petitions for guardian's fees must reference all prior fees paid and the billing time period included. A petition must not exceed a billing time period of one year. The first petition for guardian's fees may be filed as early as three months after letters of guardianship are signed; however, the first fee petition will not be approved until the inventory is filed by the guardian and approved by the court. Thereafter, a petition for guardian's fees should be filed every six months and will not be approved if statutorily required reports are delinquent, without a court-ordered extension. Instances of non-compliance with statutory, administrative, or court-ordered requirements may result in a reduction of a guardian's fees. Any reductions imposed by the court for such non-compliance will not become final until the guardian has had an opportunity to be heard on the matter.

The fee structure for professional guardians will vary and be based primarily upon a guardian's years of experience as a professional guardian. For any individual serving as a nonprofessional guardian, the chief judge will approve a rate of pay for reasonable and necessary services provided to the ward or on behalf of the ward within the scope of the guardian's duties as guardian.

Guardians must not charge in a petition for guardian's fees for time spent to prepare the billing itemization or any other documentation associated with petitioning the court for guardian's fees. Additionally, time spent to discuss with court staff or to review orders or directions from the court as a result of a guardian's non-compliance with court-ordered, statutory, or administrative obligations, and time spent to produce amended documents as a result of such non-compliance, must not be charged in the petition for guardian's fees.

All petitions for guardian's fees must include the following certification

immediately before the guardian's signature:

I certify that all current reports, including, but not limited to: initial plan, annual plan, inventory, annual accounting, or final accounting, and the educational requirements, if applicable, have been filed. (Professional guardians must add the following sentence: I further certify that my professional guardian file is current and complies with all statutory and administrative requirements.)

22. Attorney's Fees

The attorney for a guardian may petition the court for approval of attorney's fees *ex parte* at any time if the guardian has executed a written consent or has joined in the petition. Any petition for attorney's fees must contain an itemized billing statement for the attorney's service with the amount of time expended on each service in one-tenth (0.10) of an hour increments. If the attorney and the guardian cannot agree upon a fee or if an objection to the attorney's fees is made by an interested person, a hearing must be set before the court. If attorney's fees are paid to the attorney by the guardian without prior court approval, the guardian must attach an itemized billing statement for the fees, in accordance with the provisions of section 744.108, Florida Statutes, to the annual accounting in which the disbursement for the attorney's fees is documented. Any written consent of the guardian to the requested fees must be filed contemporaneously with the fee petition or motion.

23. Court Reviews

The Elder Justice Center, as a court program under the auspices of the Thirteenth Judicial Circuit Court, is utilized by the court to initially review filings and documentation related to guardianship cases and report to the court based upon its reviews. The Elder Justice Center guardianship court staff will review: (a) professional guardian files for annual statutory compliance; (b) guardians' petitions for fees and compensation as requested by the court; (c) initial reports; (d) annual plans; and (e) accountings. The results of the review will be reduced to writing for the court and filed in each corresponding case file. Elder Justice Center staff will be authorized to participate in guardianship hearings, as requested by the court, to address issues related to their reviews. Staff members will also serve as court monitors when appointed by the court to report on the welfare of the ward and conditions of the guardianship.

Additionally, the court may select a number of guardianship files for a comprehensive audit of all transactions. The audit may be conducted by a court

monitor, the clerk, the Elder Justice Center, a general magistrate, or anyone else designated by the court.

24. Change of Guardian's Contact Information

All guardians must promptly advise the court, via written notice filed with the clerk, of any change of his or her name, address, telephone number, or e-mail address. The notice requirements in the Florida Probate Rules must be complied with at all times. In accordance with Florida Probate Rule 5.060, any interested person who desires notice may file a written request for notice of further proceedings. Such persons must indicate a current residence, post office address, and e-mail address. A new address designation must be filed by the requesting person when any address changes occur. Any person filing a request for notice must also provide a copy of the request to the clerk for forwarding to the guardian's attorney or the guardian, if not represented by counsel. Thereafter, the interested person must receive notice of further proceedings and must receive copies of subsequent pleadings and papers by the movant as long as such person remains an interested person.

25. Change of Ward's Residence

If the ward's residence changes to a new location within Hillsborough County or to an adjacent county, the guardian must inform the court, in writing, in accordance with section 744.1098(2), Florida Statutes. In accordance with section 744.1098(1), Florida Statutes, a guardian may not, without prior court approval, change the residence of the ward to another state or to a non-adjacent county. If a ward's permanent residence is changed to a county other than Hillsborough County, the guardian and the guardian's attorney must file all appropriate pleadings and proposed orders to have venue of the guardianship case transferred to the court in the appropriate county.

26. Death of the Ward

Within 30 days after the death of the ward, the guardian must file a notice of death. A certified copy of the ward's death certificate must be applied for within 15 days of the ward's death and filed immediately upon receipt.

The guardian of the property must file a final report in compliance with section 744.527, Florida Statutes, and Florida Probate Rule 5.680, unless waived in writing by all necessary interested persons, and petition for discharge, unless extended by court order. Any objections to the final accounting or discharge are required to be filed in accordance with Florida Probate Rule 5.680.

27. Motions to Withdraw

Any motion to withdraw as attorney for a guardian that is based upon lack of client contact must include all diligent efforts made by the attorney to locate the guardian. Any motion to withdraw as attorney for a guardian must include the name, address, and telephone number of the financial institution where the guardianship funds are located; the account number(s); and the current balance on all accounts, together with verifying account documentation. If this information is not obtainable by counsel, the motion to withdraw as attorney for guardian must detail all diligent efforts made to secure this information and documentation for the court. Termination of representation must comply with Rule 4-1.16 of the Rules Regulating The Florida Bar.

28. Dismissal Docket

The clerk will prepare an order to show cause docket in accordance with the applicable Florida Rules of Civil Procedure and the applicable Florida Probate Rules.

29. Professional Conduct and Courtroom Decorum

Counsel must adhere to The Florida Bar's Guidelines for Professional Conduct (<https://www.floridabar.org/prof/presources/presources002/>), The Florida Bar's Professionalism Expectations (<https://www.floridabar.org/wp-content/uploads/2017/04/professionalism-expectations.pdf>) and the Hillsborough County Bar Association's Standards of Professionalism (<http://hillsbar.sitem.com/?page=Professionalism>). Each judge may announce and enforce additional requirements, or may excuse compliance with any provision(s) of the Guidelines, Expectations or Standards as that judge deems appropriate.

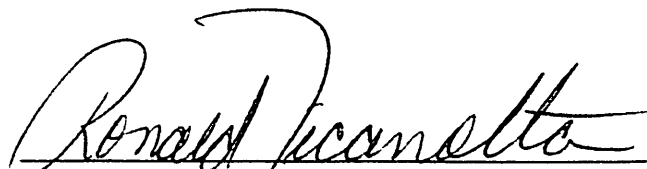
30. Previous Administrative Order Superseded

This administrative order supersedes Administrative Order S-2017-012 (*Guardianship Procedures*).

31. Effective Date

This administrative order is effective July 1, 2018.

ENTERED in Tampa, Hillsborough County, Florida on June 18, 2018.


Ronald N. Ficarrotta, Chief Judge

Original to: Pat Frank, Clerk of the Circuit Court
Copy to: All Probate, Guardianship, Mental Health and Trust Division Judges
All Family Law Division Judges
Sean O. Cadigan, General Magistrate
Vicki L. Reeves, General Magistrate

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JANA THORPE,

Appellant,

v.

M. SUZANNE MYERS, as Guardian
of the Property of Mary K. Zwayer,
and THOMAS ZWAYER, as Guardian
of the Person of Mary K. Zwayer,

Appellees.

Case No. 2D10-2977

CONSOLIDATED

MICHAEL LOVE-ZWAYER and
JOAN DUFFEE,

Appellants,

v.

M. SUZANNE MYERS, as Guardian
of the Property of Mary K. Zwayer,
and THOMAS ZWAYER, as Guardian
of the Person of Mary K. Zwayer,

Appellees.

Case No. 2D10-3402

Opinion filed July 15, 2011.

Appeals from the Circuit Court for
Highlands County; Olin W. Shinholser,
Judge.

J. Steven Southwell, II, and Eduardo F. Morrell of Morrell, Watson & Southwell, P.A., Wauchula, for Appellant Jana Thorpe.

James C. McClendon, II, of Weaver, McClendon & Penrod, LLP, Lake Wales for Appellants Michael Love-Zwayer and Joan Duffee.

James V. Loboizzo, Jr., of McClure & Loboizzo, Sebring, for Appellees.

WALLACE, Judge.

In Case No. 2D10-2977, Jana Thorpe, a professional guardian, appeals the circuit court's order denying her any compensation for her services as the emergency temporary guardian of Mary K. Zwayer (the Ward). In Case No. 2D10-3402, Michael Love-Zwayer and Joan Duffee, who successfully petitioned for the creation of a guardianship for the Ward, appeal the circuit court's order denying their attorneys any fees or reimbursement of costs. Because both Ms. Thorpe and the petitioners' attorneys are entitled to reasonable compensation under section 744.108, Florida Statutes (2009), the circuit court erred in failing to make appropriate awards to them. Accordingly, we reverse the circuit court's order in each case and remand for further proceedings.

I. THE FACTUAL AND PROCEDURAL BACKGROUND COMMON TO BOTH CASES

These consolidated cases involve two separate orders and different appellants. However, the appellees are the same in each case. The two cases also share a common core of facts. This court previously consolidated the cases on the appellees' motion.

On October 6, 2009, two of the Ward's children, Michael Love-Zwayer and Joan Duffee, filed a petition in the Highlands County Circuit Court to determine the incapacity of the Ward. In their petition, Michael and Joan alleged that the Ward, who was ninety-three years old, was suffering from dementia. Michael and Joan also filed a petition seeking the appointment of Ms. Thorpe as the plenary guardian of the person and property of the Ward. Ms. Thorpe was a professional guardian registered with the Statewide Public Guardianship Office.

The Ward had nine children living when the petitions were filed. In the months preceding the filing of the petitions, most of the Ward's nine children had substantial disagreements concerning access to the Ward and the handling of her finances. Such disagreements and concerns about these matters led Michael and Joan to file a separate petition seeking the appointment of Ms. Thorpe as the emergency temporary guardian of the Ward. In this petition, Michael and Joan alleged that some of the Ward's other children had (1) concealed the Ward's whereabouts; (2) moved the Ward from Ohio to Florida at a time when her health was at risk; (3) changed the Ward's accounts and assets into joint ownership; (4) sold some of the Ward's assets and used the proceeds to purchase things for themselves, including a boat; and (5) generally failed to account for, or to otherwise explain, their management of the Ward's affairs.

On October 7, 2009, the circuit court entered an order appointing Ms. Thorpe as the emergency temporary guardian of the Ward. This order was entered without notice to the Ward's other children. The order appointing Ms. Thorpe recited that it appeared to the circuit "court that there is an imminent danger that the physical or mental health or safety of the alleged incapacitated person will be seriously impaired or

that the property of that person is in danger of being wasted, misappropriated or lost unless immediate action is taken." Although Thomas Zwayer, one of the appellees, filed a motion to revoke Ms. Thorpe's appointment, the circuit court never revoked or vacated her appointment as emergency temporary guardian. Indeed, the circuit court later extended Ms. Thorpe's original ninety-day appointment until "April 5, 2010, or [until] such time as a plenary guardian is appointed . . . , whichever occurs first."

Meanwhile, the examining committee that was appointed as a result of the petition to determine incapacity found the Ward to be totally incapacitated. The examining committee recommended the appointment of a plenary guardian for the Ward. In a decision which disturbed some of the Ward's children, Ms. Thorpe removed the Ward from her home in Avon Park and placed her in an assisted living facility (the ALF). Jon Zwayer, one of the Ward's sons, had been living with the Ward in her Avon Park residence and acting as her caregiver.

As the guardianship proceedings progressed, the various siblings gravitated into factions, lawyers were hired, and litigation commenced. The issues in controversy revolved around the necessity for the appointment of a guardian and, if a guardianship was established, the best candidate for appointment as guardian. Thomas Zwayer initially opposed the creation of a guardianship, but he also filed a competing petition to be appointed as the plenary guardian of the person and property of the Ward.

To their credit, the Ward's children eventually realized that continued litigation over these matters was not in anyone's interest. The mounting costs of the litigation were also inconsistent with the conservation of the Ward's relatively modest

estate. At a hearing held on January 22, 2010, the nine siblings stipulated to a settlement. In accordance with the settlement agreement, the Ward was declared to be totally incapacitated. Thomas was appointed plenary guardian of the Ward's person. One of the Ward's daughters, M. Suzanne Myers, was appointed plenary guardian of the Ward's property. The boat, motor, and trailer which had been bought with over \$14,000 of the Ward's money and titled in the names of one of her sons and his wife were to be sold and the proceeds paid to the Ward's estate. And the Ward would leave the ALF and return home, spending one-half of the year at her home in Avon Park and the other one-half of the year in Ohio. Jon apparently resumed his role as the Ward's caregiver at the Avon Park residence.

Unfortunately, the settlement agreement did not address the issue of fees and costs for Ms. Thorpe or for the attorneys for the petitioners, Michael and Joan.¹ The omission to address the issue of payment of these fees and costs set the stage for the additional disputes that are the subject of these appeals.

We will discuss first the issue of Ms. Thorpe's fees for her services as emergency temporary guardian. Then we will consider Michael and Joan's petition for the payment of the fees and costs of their attorneys. But before discussing these matters, we will note the applicable standards of review.

¹The settlement agreement also omitted to address payment of the fees and costs of the attorneys for Thomas and Suzanne. Later, the circuit court ordered payment to their attorneys of \$23,936 in fees and reimbursement of costs of \$2729.23, for a total award of \$26,665.23. There was no objection to this award. The order awarding fees and costs to the attorneys who represented Thomas and Suzanne in the circuit court is not at issue on this appeal.

II. THE APPLICABLE STANDARDS OF REVIEW

Generally speaking, appellate review of orders awarding guardian's fees and attorney's fees is for abuse of discretion. See Lutheran Servs. Fla., Inc. v. McCoskey (In re Guardianship of Shell), 978 So. 2d 885, 889-90 (Fla. 2d DCA 2008) (guardian's fees); Butler v. Guardianship of Peacock, 898 So. 2d 1139, 1141 (Fla. 5th DCA 2005) (attorney's fees); Gamse v. Touby, 382 So. 2d 115, 116 (Fla. 3d DCA 1980) (guardian's fees and attorney's fees). However, in this case, the circuit court did not award any fees at all to Ms. Thorpe or to the attorneys for Michael and Joan. The circuit court's decision to deny them any fees was based both on its interpretation of section 744.108 and its findings that their services did not benefit the Ward.

We defer to the circuit court's findings of fact when they are based on competent, substantial evidence. State, Fla. Highway Patrol v. Forfeiture of Twenty Nine Thousand Nine Hundred & Eighty (29,980) in U.S. Currency, 802 So. 2d 1171 1172 (Fla. 3d DCA 2001). However, we are not required "to disregard record evidence that disproves the lower court's findings or that reveals its ruling to be an abuse of discretion." In re Doe, 932 So. 2d 278, 284 (Fla. 2d DCA 2005). To the extent that the circuit court based its rulings on its interpretation of the pertinent statute, we employ a de novo standard of review. See Ware v. Land Title Co. of Fla., Inc. 582 So. 2d 46, 46-47 (Fla. 2d DCA 1991) (applying de novo review).

III. MS. THORPE'S GUARDIAN'S FEES, CASE NO. 2D10-2977

A. *Ms. Thorpe's Fee Petition*

On March 29, 2010, Ms. Thorpe filed a petition for guardian's fees. The petition was accompanied by a detailed listing of her services rendered and the times

devoted to the various services. In her petition, Ms. Thorpe alleged that she had spent 162.6 hours on the case between October 7, 2009, and January 21, 2010. She requested payment for 162.6 hours at the rate of \$80 per hour for a total of \$13,008, in compensation. Thomas and Suzanne promptly filed an objection to the petition. In their objection, Thomas and Suzanne stated that they did not object to the number of hours for which Ms. Thorpe had billed. Instead, they objected only to her \$80-per-hour billing rate. According to Thomas and Suzanne, professional guardians in Highlands County typically charge between \$25 and \$40 per hour.

On May 4, 2010, Ms. Thorpe filed her final report. In her report, Ms. Thorpe explained that after the settlement was announced at the January 22 hearing, she anticipated the termination of the emergency temporary guardianship within thirty days. However, delays in obtaining the appointment of Thomas and Suzanne to their respective positions had unexpectedly prolonged Ms. Thorpe's service as emergency temporary guardian. On May 4, 2010, Ms. Thorpe filed a supplemental petition for guardian's fees. In the supplemental petition, Ms. Thorpe requested compensation for an additional 33.3 hours at her new billing rate of \$85 per hour, for a total of \$2830.50 in additional compensation.

The circuit court conducted a hearing on Ms. Thorpe's request for compensation. Ms. Thorpe testified in her own behalf at the hearing. The only other witnesses to testify at the hearing were Jon Zwyer and the attorney for the Ward. They each testified briefly concerning their knowledge of one or two of Ms. Thorpe's time entries. In argument, Thomas and Suzanne expanded their objections to Ms. Thorpe's fee petition from the rate charged to include (1) the number of hours claimed,

(2) the charges made after the expiration of the emergency temporary guardianship, and (3) an unfavorable assessment of the results obtained. At the conclusion of the hearing, the circuit court did not announce a ruling. Instead, the circuit court directed counsel to submit proposed orders.

B. The Circuit Court's Order

In its order, the circuit court denied Ms. Thorpe's fee petition in its entirety. The circuit court reasoned that Ms. Thorpe was not entitled to any compensation from the Ward's estate because her services "were of minimal, if any[,] benefit to the Ward, and were intended to benefit [Michael and Joan] in the Petition for Emergency Temporary Guardian." Despite this ruling, the circuit court also ruled that (1) the reasonable number of hours Ms. Thorpe had devoted to the guardianship was 84.20, (2) a reasonable hourly rate for her services was \$40, and (3) a reasonable fee for her services was \$3368. The circuit court concluded by noting that Ms. Thorpe was "not precluded by this Order from seeking payment of her fees from [Michael and Joan] who sought her appointment as Emergency Temporary Guardian herein."

C. Discussion

We conclude that the circuit court erred in denying Ms. Thorpe any compensation for the services she rendered as emergency temporary guardian. Two reasons support our conclusion. First, the circuit court's ruling is based on a misreading of the applicable statute. Second, the undisputed evidence presented at the hearing does not support the circuit court's findings of fact.

1. The Statute

Section 744.108, the applicable statute, provides, in pertinent part, as follows:

(1) 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 for costs incurred on behalf of the ward.

Section 744.108(2) continues by listing nine factors that the circuit court must consider when a petition for guardian's fees or attorney's fees is submitted for determination.

Under the statute, a guardian is entitled to a reasonable fee for services rendered.

Lucom v. Atl. Nat'l Bank of W. Palm Beach, 97 So. 2d 478, 481 (Fla. 1957); Schacter v. Guardianship of Schacter, 756 So. 2d 1075, 1076 (Fla. 4th DCA 2000); Ash v. Coconut Grove Bank, 448 So. 2d 605, 607-08 (Fla. 3d DCA 1984).

There are some exceptions to the general rule entitling a guardian to payment for services rendered, but these exceptions are limited. We briefly mention three such exceptions. First, a guardian cannot expect to be compensated for services rendered outside the scope of his or her appointment. In re Guardianship of Jansen, 405 So. 2d 1074, 1077 (Fla. 2d DCA 1981); Poling v. City Bank & Trust Co. of St. Petersburg, 189 So. 2d 176, 182-83 (Fla. 2d DCA 1966). Second, a guardian guilty of theft or other breach of duty may forfeit the right to compensation. See Am. Surety Co. of N.Y. v. Hayden, 150 So. 114, 121 (Fla. 1933). Third, on occasion, usually when a family member is appointed, a guardian may agree to serve without compensation. Here, there is no exception to the statutory requirement that guardians be compensated for their services.

In order for an attorney to be awarded fees from the ward's estate under section 744.108(1), the attorney's services must benefit the ward or the ward's estate. See Butler, 898 So. 2d at 1141. The clause in section 744.108(1) requiring the demonstration of the beneficial nature of the services rendered applies to attorneys, not guardians. Thus, under the statutory language, a guardian is not required to demonstrate that his or her services conferred a benefit on the ward or the ward's estate as a prerequisite for obtaining a compensation award. The statute appears to presuppose that a guardian's services benefit the ward or the ward's estate. Cf. Essenson v. Lutheran Servs. Fla., Inc. (In re Guardianship of King), 862 So. 2d 869, 870 (Fla. 2d DCA 2003) ("Florida cases in which fees have been denied to court-appointed representatives appear to be only those in which he or she was found to have exceeded the scope of appointment." (citing Jansen, 405 So. 2d at 1077)).

It follows that the circuit court reached an incorrect legal conclusion in ruling that Ms. Thorpe was required to demonstrate that her services as emergency temporary guardian were beneficial to the Ward or the Ward's estate as a condition of receiving court-awarded compensation. The statutory scheme presumes that the services of guardians provide a benefit. To the extent that the services of a guardian are unnecessary or unproductive, the circuit court may reduce the requested compensation based on the factors listed in section 744.108(2) but may not deny compensation altogether.

2. The Factual Findings

The circuit court based its decision to deny Ms. Thorpe any compensation in substantial part on a finding that her services "were of minimal, if any[,] benefit to the

Ward, and were intended to benefit [Michael and Joan] in the Petition for Emergency Temporary Guardianship." A review of the testimony presented at the hearing on Ms. Thorpe's fee petition reveals a lack of any evidentiary support for this finding. And the detail of Ms. Thorpe's services attached to her fee petition was replete with services performed on behalf of the Ward and her estate. Except for opposing testimony concerning the time expended on two or three tasks, this evidence was un rebutted.

The rationale for the circuit court's finding appears to be the partial restoration of the status quo ante resulting from the siblings' settlement. The Ward left the ALF, and she resumed living in her Avon Park residence with her son Jon. But the restoration of the earlier state of affairs resulting from the settlement was by no means complete. Plenary guardians of the person and property were appointed for the Ward. Thus the Ward's care and finances were placed under the court's supervision and protection, substantially reducing the possibility of her abuse or exploitation. The boat, motor, and trailer were required to be sold and the proceeds returned to the Ward's estate. Undeniably, the creation of a guardianship for the Ward was appropriate, or the circuit court would not have approved the settlement agreement.

Ms. Thorpe performed important services on behalf of the Ward while the Ward's children were battling over the necessity for the creation of a guardianship and over who would be appointed as the Ward's guardian. There is nothing in the record suggesting that Ms. Thorpe was working for Michael and Joan in disregard of her obligation to act in the best interests of the Ward. A family member or members frequently petition the court for the appointment of a guardian, but the court decides whether a guardianship is appropriate and, if so, appoints the guardian. The guardian

works in the interest of the ward under the supervision and control of the court, not at the behest of the person or persons who sought the appointment.

In addition, on December 1, 2009, almost two months after Ms. Thorpe's appointment, the circuit court actually extended Ms. Thorpe's tenure as emergency temporary guardian for another four months. The circuit court's decision to continue rather than to terminate Ms. Thorpe's appointment supports the conclusion that her services were necessary and beneficial for the Ward, not that they "were of minimal, if any[,] benefit."

The order appointing Ms. Thorpe as emergency temporary guardian placed her squarely in the middle of a complicated and contentious family quarrel. The court-appointed attorney for the Ward described the Zwayer case as "the most contentious guardianship I've seen in years." The record reflects that Ms. Thorpe did what she thought was best for the Ward under difficult and trying conditions. Granted, one might quibble with some of Ms. Thorpe's time entries and question her requested hourly rate, but her right to receive reasonable compensation was not diminished or nullified by the partial restoration of the status quo ante resulting from the settlement agreement.

D. Proceedings on Remand

For the foregoing reasons, we reverse the circuit court's order denying Ms. Thorpe any compensation. However, on remand, it will not be sufficient for the circuit court to enter an order awarding Ms. Thorpe the \$3368 that it determined to be a reasonable fee. Although the circuit court made a finding in its order concerning the number of hours it deemed reasonable, we are unable to determine from the order how

the circuit court arrived at this finding. The order does not delineate the services for which compensation was deemed permissible and the services for which compensation was disallowed. This deficiency frustrates meaningful appellate review of the order's alternative finding that \$3368 amounts to reasonable compensation for Ms. Thorpe's services.

Accordingly, on remand, the circuit court shall enter an order awarding Ms. Thorpe a reasonable fee for her services. The amount awarded shall be supported by express findings either in the order or on the record concerning the hours allowed and disallowed and the other factors considered in arriving at the amount of the award. See Valentini v. State (In re Guardianship of Sitter), 779 So. 2d 346, 348-49 (Fla. 2d DCA 2000); Jones v. Dunning, 661 So. 2d 941, 942 (Fla. 5th DCA 1995).

IV. MICHAEL AND JOAN'S PETITION FOR ATTORNEY'S FEES, CASE NO. 2D10-3402

A. The Petition and the Circuit Court's Order

After the settlement was reached, Michael and Joan, the original petitioners, filed a petition requesting fees and costs for the attorneys who had represented them in the guardianship proceedings. The circuit court entered an order on their petition denying any fees and costs to their attorneys.² The circuit court explained that "the services provided by counsel for petitioners were not on behalf of the Ward but were on behalf of the petitioners and other family members." We conclude that the

²However, as previously noted, the circuit court ordered that the fees and costs for Thomas' attorneys, amounting to more than \$26,000, be paid in full from the Ward's estate. Thus, in an ironic twist, the attorneys who unsuccessfully opposed the creation of the guardianship were paid in full; the attorneys who successfully proposed the creation of the guardianship were awarded nothing.

circuit court erred in failing to award the attorneys for Michael and Joan at least a portion of their fees and costs.

B. Discussion

Under section 744.108(1), "an attorney is entitled to receive a reasonable attorney's fee for professional services rendered and reimbursement of costs incurred for the benefit of the ward; payment of reasonable compensation is mandatory." Price v. Austin, 43 So. 3d 789, 790 (Fla. 1st DCA 2010). Under the statute, "the probate court is not 'at liberty to award anything more or less than fair and reasonable compensation for the services rendered or monies expended in each individual case.' " Lutheran Servs., 978 So. 2d at 890 (quoting Lewis v. Gramil Corp., 94 So. 2d 174, 176 (Fla. 1957)). However, the attorney's entitlement to payment of reasonable fees and costs is subject to the limitation that his or her services must benefit the ward. King v. Fergeson, Skipper, Shaw, Keyser, Barron, & Tirabassi, P.A., 862 So. 2d 873, 874 (Fla. 2d DCA 2003) (Villanti, J., concurring specially); Butler, 898 So. 2d at 1141.

We are unable to conclude that the circuit court abused its discretion in denying fees and reimbursement of costs to Michael and Joan's attorneys to the extent that they pursued unproductive litigation over who would be appointed as guardian or other goals that did not benefit the Ward or her estate. See Butler, 898 So. 2d at 1141. But the attorneys also initiated the proceedings for the determination of the Ward's incapacity and for the appointment of a guardian. As a direct result of these efforts, the Ward was determined to be totally incapacitated and the circuit court appointed plenary guardians of her person and property. Unquestionably, these services benefitted the Ward. It follows that the attorneys for Michael and Joan were entitled to their fees and

costs related to those efforts. Id. at 1141. The circuit court erred in ruling to the contrary. Accordingly, we reverse the circuit court's order to the extent that it denied Michael and Joan's petition for attorney's fees and costs related to these efforts.

C. *Proceedings on Remand*

On remand, the circuit court must reconsider the petition and make an appropriate award of fees and costs to Michael and Joan's attorneys. The circuit court's order must set forth the basis for the award, including the hours determined to be compensable, the hourly rate, and the other factors considered in arriving at the award. The order must also itemize the costs allowed. See Simhoni v. Chambliss, 843 So. 2d 1036, 1037 (Fla. 4th DCA 2003); Guardianship of Halpert v. Martin S. Rosenbloom, P.A., 698 So. 2d 938, 939 (Fla. 4th DCA 1997); Jones, 661 So. 2d at 942.

Affirmed in part, reversed in part, and remanded with directions.

NORTHCUTT and CRENSHAW, JJ., Concur.

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IN RE: GUARDIANSHIP OF Mary W. KLATTHAAR.

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IN RE: GUARDIANSHIP OF Mary W. KLATTHAAR. Marion Yazdzik, as Personal Representative of the Estate of Mary W. Klatthaar, Deceased, Appellant, v. Mark Scott; Michael J. McGarry; Virderie B. Kaminska, RN; Cora S. Taylor, Psy. S., LMHC, PA; and Douglas J. Shadle, MD, Appellees.

No. 2D12-4451.

Decided: January 08, 2014

Cynthia L. Fallon and Barry F. Spivey of Spivey & Fallon, P.A., Sarasota, for Appellant. Pamela D. Keller of Keller Law Office, P.A., Punta Gorda, for Appellee Mark Scott. Michael J. McGarry, pro se. No appearance by remaining Appellees.

This matter arises from an involuntary guardianship proceeding to determine the incapacity of Mary Klatthaar. Mark Scott, represented by Pamela Keller, filed a petition to determine incapacity and a petition for appointment of an emergency temporary guardian with respect to Ms. Klatthaar, his aunt. Thereafter, the circuit court entered an order appointing Michael McGarry to represent Ms. Klatthaar pursuant to section 744.331(2)(b), Florida Statutes (2011), and an order appointing a three-member examining committee pursuant to section 744.331(3)(a). The circuit court denied the petition for appointment of an emergency temporary guardian. Prior to a final determination of incapacity, Ms. Klatthaar died, and the petition to determine incapacity was dismissed.

Mr. McGarry and Ms. Keller petitioned the circuit court for attorney's fees and costs; Ms. Keller also petitioned for fees on behalf of the examining committee. Following a hearing, the circuit court awarded attorney's fees and costs to Mr. McGarry, Ms. Keller, and the three examining members payable from Ms. Klatthaar's estate. You agree to FindLaw.com's terms (<https://company.findlaw.com/findlaw-terms-of-service.html>). We respect your privacy (<https://www.thomsonreuters.com/en/privacy-statement.html>).

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amended orders awarding fees and costs. Ms. Yazdzik argues that the circuit court erred in awarding fees and costs and directing said fees and costs to be paid from the estate of Ms. Klatthaar because a guardianship was never established. Because sections 744.108 and 744.331 do not contemplate the payment of fees and costs from an alleged incapacitated person where a guardianship is not established, we agree and reverse. As this issue is dispositive, we withhold comment on the other issues raised by Ms. Yazdzik on appeal.

I. Discussion

Ms. Yazdzik argues that the circuit court committed legal error in its interpretation and application of sections 744.108 and 744.331 when it imposed liability for the payment of attorneys' fees and costs and examining committee's fees on the estate of Ms. Klatthaar. We review de novo the circuit court's rulings on entitlement to fees based on its interpretation of relevant statutes. See *Thorpe v. Myers*, 67 So.3d 338, 342 (Fla. 2d DCA 2011). " '[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' " *In re Guardianship of J.D.S.*, 864 So.2d 534, 538 (Fla. 5th DCA 2004) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984)). " 'Proceedings to determine the competency of a person are generally controlled by statute and where the statute prescribes a certain method of proceeding to make that determination, the statute must be strictly followed.' " *Rothman v. Rothman*, 93 So.3d 1052, 1054 (Fla. 4th DCA 2012) (quoting *In re Keene*, 343 So.2d 916, 917 (Fla. 4th DCA 1977)).

A. Section 744.331, Procedures to Determine Incapacity

Section 744.331(7)(a) entitles the examining committee and the court-appointed attorney for the alleged incapacitated person to reasonable fees once incapacity is determined and a guardian is appointed. See § 744.331(7)(b) (“The fees awarded under paragraph (a) shall be paid by the guardian from the property of the ward or, if the ward is indigent, by the state.”); see also § 744.102(9) (defining “guardian” as “a person who has been appointed by the court to act on behalf of the ward’s person or property, or both”), 744.102(22) (defining “ward” as “a person for whom a guardian has been appointed”). Furthermore, in the event that the petition for incapacity is dismissed, as it was here, section 744.331(7)(c) controls and provides that “costs and attorney’s fees of the proceeding may be assessed against the petitioner if the court finds the petition to have been filed in bad faith.” See *Ehrlich v. Allen*, 10 So.3d 1210, 1211 (Fla. 4th DCA 2009) (holding that where the petition for incapacity is dismissed, “any award of fees incurred by counsel appointed to represent the subject must come, if at all, from the petitioner”); *Ehrlich v. Severson*, 985 So.2d 639, 640 (Fla. 4th DCA 2008) (“[T]he procedural statute for determining incapacity does not make the potential ward responsible for examining committee fees where the guardianship petition is dismissed and the ward is not the petitioner.”). The circuit court did not find that the petitioner filed the petition in bad faith.

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As the First, Fourth, and Fifth Districts have noted in prior opinions, there is a gap in section 744.33(1)(7) as

to the delegation of responsibility for the payment of fees of the court-appointed attorney and the

examining committee when a good faith petition is dismissed. See *Faulkner v. Faulkner*, 65 So.3d 1167, 1169 (Fla. 1st DCA 2011); *Allen*, 10 So.3d at 1211; *Levine v. Levine*, 4 So.3d 730, 731 (Fla. 5th DCA 2009); *Severson*, 985 So.2d at 640. Though section 744.331(7)(a) specifically entitles court-appointed attorneys and examining committee members to reasonable fees, said fees cannot be paid by the guardian from the ward's property pursuant to section 744.331(7)(b) if a guardian is never appointed.

We recognize the same concern raised by the First District in *Faulkner*, that practitioners would be less inclined to offer their services to the court if there was a possibility that they would not be paid or if payment otherwise depended upon the outcome of the proceeding. See 65 So.3d at 1169 (quoting *Severson*, 985 So.2d at 640 ("[P]ayment of the examining committee's fees should not be contingent on the outcome of the competency determination.")). Nonetheless, we agree with our sister courts that it is for the legislature to determine who is responsible for the payment of fees for the court-appointed attorney and examining committee in this situation. See *Holly*, 450 So.2d at 219 ("[C]ourts of this state are 'without power to construe an unambiguous statute in a way which would extend . its express terms. To do so would be an abrogation of legislative power.' " (quoting *Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So.2d 777, 778 (Fla. 1st DCA 1968))). This does not appear to be a situation where a departure from the strict reading of the statute, namely, determining that the alleged incapacitated person or the estate thereof is responsible for these fees, would be sanctioned. See *id.*; *Rothman*, 93 So.3d at 1054. It seems inappropriate to assess Ms. Klatthaar's estate with attorneys' fees and examining committee's fees, especially since she contested the petition.

Unlike in the cases cited above, this case involved the dismissal of a petition for incapacity due to the death of the alleged incapacitated person. Cf. *Allen*, 10 So.3d at 1211; *Levine*, 4 So.3d at 731; *Severson*, 985 So.2d at 640. However, we see no distinction in the statute for cases where the petition was dismissed due to the death of the alleged incapacitated person prior to a determination of incapacity. See § 744.331(7)(c) (addressing the responsibility of fee payments in situations where a petition is dismissed without further clarification as to the nature of the dismissal). As such, the attorneys and the examining committee are not entitled to fees and costs under section 744.331(7).

B. Section 744.108, Guardian's and Attorney's Fees and Expenses

We next turn our attention to section 744.108. Section 744.108(1) entitles "[a] guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, . to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward." Based upon a strict reading of the statute, see *Rothman*, 93 So.3d at 1054, an attorney is only entitled to fees under section 744.108 in situations where a guardian has been appointed to a ward, see generally *Severson*, 985 So.2d at 640 (noting that section 744.331(7) is "the procedural statute for determining incapacity") a guardian has never established and a guardian was thus not appointed, section 744.108 does not trigger the law. See *State Farm Fire & Cas. Co. v. Palm Beach 629 So.2d 830, 832 (Fla. 1993)* ("This Court has followed the 'American Rule' that attorneys' fees may be awarded by a court only when authorized by

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We find further support for the contention that such fee awards are not permitted in the language of section 744.108 itself. Namely, in various subsections of section 744.108, the term “incapacitated person” is used; not once is the term “alleged incapacitated person” referenced. See, e.g., § 744.108(2)(e), (h). Additionally, section 744.108(6) provides that “[a] petition for fees or expenses may not be approved without prior notice to the guardian and to the ward, unless the ward is a minor or is totally incapacitated.” The attorneys clearly could not provide notice as required because there was never a ward or a guardian. Further, the one underlying consistency in the case law pertaining to fee awards under section 744.108 is that the alleged incapacitated person was adjudicated as such, thus becoming a ward, and a guardian was appointed to the ward. See, e.g., In re Guardianship of Kesish, 98 So.3d 183 (Fla. 2d DCA 2012); In re Guardianship of Ansley, 94 So.3d 711 (Fla. 2d DCA 2012); Thorpe, 67 So.3d 338; King v. Fergeson, Shaw, Keyser, Baron, & Tirabassi, P.A., 862 So.2d 873 (Fla. 2d DCA 2003); In re Guardianship of Dean, 319 So.2d 589 (Fla. 2d DCA 1975). In his special concurrence in King, Judge Villanti noted:

As a general proposition, if an interested party hires an attorney to contest any aspect of an incapacity proceeding, . he or she does so with no assurance that the fees will be reimbursed if a guardianship is ultimately established. This is especially true in an involuntary guardianship proceeding, in which the ward usually does not consent to the hiring of attorneys for any purpose.

King, 862 So.2d at 875. It is apparent that for reimbursement of fees even to be contemplated under section 744.108, a guardianship must ultimately be established.

II. Conclusion

In sum, section 744.108 clearly applies only to circumstances where a guardianship has been established. Section 744.331 appears to be the only applicable section to this case as it governs procedures to determine incapacity. As the law currently stands, when a petition is dismissed for any reason, fees and costs may be assessed against the petitioner under section 744.331(7) if the petition was filed in bad faith. See § 744.331(7)(c). There is otherwise no provision made regarding the liability for fees and costs in the event a petition is dismissed. Chapter 744 simply does not contemplate the payment of fees and costs from an alleged incapacitated person absent the establishment of a guardianship.

The circuit court's amended orders awarding fees and costs to be paid from the alleged incapacitated person's estate are reversed. We join our sister courts and urge the legislature to address the gap in the statute by specifying who pays the attorney's fees and the examining committee's fees in this situation.

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BLACK, Judge.
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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

In re Guardianship of William Ansley, a/k/a)
Willie Ansley, an incapacitated person.)
_____)

BRAD SANFORD and CANDICE FAGER,)
as former Co-Guardians of William Ansley,)
an incapacitated person; STEPHEN M.)
MARTIN; and STEPHEN M. MARTIN, P.A.,)

Appellants,)

v.)

Case No. 2D11-3138

FAY HOWARD, as Guardian of William)
Ansley, an incapacitated person,)
_____)

Appellee.)
_____)

Opinion filed August 17, 2012.

Appeal from the Circuit Court for Polk
County; John F. Laurent, Judge.

Stephen M. Martin, pro se, and for Appellants
Brad Sanford, Candice Fager, and Stephen
M. Martin, P.A.

No appearance for Appellee.

WALLACE, Judge.

Brad Sanford and Candice Fager (the former Co-Guardians of William
Ansley, an incapacitated person) and Stephen M. Martin and Stephen M. Martin, P.A.

(the attorney and law firm representing the former Co-Guardians—collectively, Mr. Martin), challenge an order authorizing the payment of \$16,520 in attorney's fees and costs to Mr. Martin as attorney for the former Co-Guardians. The order under review reduces the amount sought by Mr. Martin in his petition for attorney's fees and costs. Because the order is internally inconsistent and lacks sufficient findings of fact to support the award, we reverse the order and remand for the entry of a new order on the petition.

I. THE FACTUAL BACKGROUND

Mr. Martin filed a petition seeking payment for services performed and expenses incurred on behalf of the former Co-Guardians between September 3, 2010, and April 25, 2011. He attached to his petition an itemized report detailing the tasks performed, the time and rate associated with each of the tasks, and the expenses incurred. Specifically, Mr. Martin sought payment for 54.48 hours of attorney time at \$350 per hour, 20.33 hours of paralegal time at \$125 per hour, and expenses in the amount of \$114.64, for an asserted total of \$21,694.52.¹ We note that the amount that Mr. Martin requested for approximately seven months' work on this guardianship was substantial. However, a review of the record reveals that complications caused by various disputes and disagreements among the interested parties marked the administration of the guardianship. These complications required the performance of many services that otherwise would not have been necessary.

¹The amounts sought for attorney's fees, paralegal fees, and expenses actually total \$21,723.89. This figure is \$29.37 more than the total that Mr. Martin requested.

The circuit court held an evidentiary hearing on Mr. Martin's petition. Mr. Martin testified that the court had previously accepted his hourly rate as reasonable. He testified further that the tasks he performed were necessary and reasonable. The attorney for the ward also testified to the reasonableness of Mr. Martin's hourly rate. The attorney for the ward also observed that many of the services Mr. Martin had performed would not be necessary "in a normal functional guardianship." She added that the services performed were required in this guardianship because the matter was unusually contentious.

Counsel for the successor guardian objected to the amount of the fees requested and cross-examined both Mr. Martin and the attorney for the ward. In cross-examination, counsel for the successor guardian questioned the necessity of several of the tasks for which Mr. Martin had billed and suggested that some of Mr. Martin's services were of no benefit, and possibly detrimental, to the ward.

At the conclusion of the hearing, Mr. Martin submitted a proposed order to the circuit court. The circuit court did not rule immediately but took the matter under advisement. Later, the circuit court entered a written order granting the petition. The order entered was apparently the one submitted by Mr. Martin. The order recited, "[t]he Court finds that the amount of time set forth in the petition and the hourly rate are reasonable under the circumstances and hereby approves each." Specifically, the order finds "54.48 attorney hours at a rate of \$350.00 per hour, 20.33 paralegal hours at the rate of \$125.00 per hour, and expenses in the amount of \$114.64" to be reasonable. By multiplying the hours approved by the applicable hourly rates and adding the expenses,

we calculate a total of \$21,723.89. However, the amount the court authorized the guardian to pay Mr. Martin is only \$16,520.²

The amount that the circuit court authorized the guardian to pay Mr. Martin is obviously less than the sum supported by the findings in the order concerning the reasonable hourly rates, the time expended, and the expenses incurred. Undeniably, there is an internal inconsistency in the order; the amount of fees and expenses awarded does not equal the amount of fees and expenses that the circuit court found were reasonable.

II. THE LEGAL BACKGROUND

Section 744.108(1), Florida Statutes (2010), provides that "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 for costs incurred on behalf of the ward." However, an attorney's entitlement to payment of reasonable fees and costs is subject to the limitation that his or her services must benefit the ward or the ward's estate. King v. Fergeson, Skipper, Shaw, Keyser, Baron, & Tirabassi, P.A., 862 So. 2d 873, 874 (Fla. 2d DCA 2003) (Villanti, J., concurring specially); Butler v. Guardianship of Peacock, 898 So. 2d 1139, 1141 (Fla. 5th DCA 2005).

Section 744.108(2) lists a number of factors that the circuit court must consider in determining a reasonable fee, and section 744.108(5) requires that "[a]ll petitions for . . . attorney's fees and expenses must be accompanied by an itemized

²The provision of the order authorizing the guardian to pay an amount to Stephen M. Martin, P.A. reflects the typewritten amount of \$21,694.52 (which is different than the total we calculated by multiplying the amount of hours claimed by the claimed hourly rates). But the circuit court crossed out the typewritten total requested by Mr. Martin and printed the amount of \$16,520 above it.

description of the services performed for the fees and expenses sought to be recovered." See Anderson v. Sun Trust Bank/North, 679 So. 2d 307, 308-09 (Fla. 5th DCA 1996) (reversing an order for guardian's fees based upon a petition that did not include an itemized description of the services performed for the fees and expenses sought to be recovered). Significantly, "[i]n order to provide for meaningful appellate review[,] the order awarding fees and expenses in all such cases . . . should specifically set out the record basis for the award and otherwise comply with the intent of Rowe,³ Platt,⁴ and the statute." Jones v. Dunning, 661 So. 2d 941, 942 (Fla. 5th DCA 1995). Generally, we review an award of fees for an attorney's services in a guardianship for abuse of discretion. Butler, 898 So. 2d at 1141; Gamse v. Touby, 382 So. 2d 115, 116 (Fla. 3d DCA 1980). We defer to the circuit court's findings of fact when they are based on competent, substantial evidence. State, Fla. Highway Patrol v. Forfeiture of Twenty Nine Thousand Nine Hundred & Eighty (29,980.00) in U.S. Currency, 802 So. 2d 1171, 1172 (Fla. 3d DCA 2001).

III. THE ARGUMENTS ON APPEAL

On appeal, Mr. Martin argues that the circuit court abused its discretion in entering the order under review. He points out that the evidence he submitted supported an award of the amount that he requested. Mr. Martin also points to the absence of any expert opinion testimony in the record upon which the circuit court could have relied in reducing the amount that he sought in his petition. Neither the attorney

³Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

⁴In re Estate of Platt, 586 So. 2d 328 (Fla. 1991).

for the ward nor the successor guardian has filed a brief in support of the circuit court's order.

IV. DISCUSSION

We note that Mr. Martin bore the burden of proving that the services he had performed benefitted the ward or the ward's estate. See Butler, 898 So. 2d at 1141. After the presentation of the evidence, the circuit court had discretion to determine the amount of fees to which Mr. Martin was reasonably entitled as long as the amount of the award was based on competent, substantial evidence. See id.; Gamse, 382 So. 2d at 116. As noted above, the cross-examination of Mr. Martin and the attorney for the ward by the attorney for the successor guardian suggested that some of the services performed by Mr. Martin might not have benefitted the ward or the ward's estate.

A comparison of the amount of the actual award in the order under review and the amount requested by Mr. Martin indicates that the circuit court intended to award less than the full amount sought in the petition. However, we do not know what led to the circuit court's ruling. The above-noted internal inconsistency in the order results in the lack of any meaningful findings concerning the reasonable hourly rates and the number of hours compensated. The order also omits any statement of other factors that the circuit court considered in reducing the amount requested. These deficiencies make it impossible for this court to engage in meaningful appellate review of the order on appeal. See Jones, 661 So. 2d at 941-42 (noting that an internal conflict in the circuit court's order between its finding of the amount of reasonable fees for

services rendered and the amount the court authorized to be paid for the guardian's services prevented meaningful appellate review and required the entry of a new order).

V. CONCLUSION

In short, we are unable to determine the basis for the circuit court's award. It follows that we also cannot determine whether there is competent, substantial evidence in the record to support the award. Accordingly, we reverse the order under review. See id.; see also Schneider v. Schneider, 32 So. 3d 151, 155 (Fla. 4th DCA 2010) ("Absent . . . factual findings [about the number of hours spent and a reasonable hourly rate], reversal is required even where evidence is contained in the record from which the Rowe factors . . . can be determined."). We remand for the circuit court to enter a new order that sets forth the basis for the award, including the hours determined to be compensable, the hourly rate, and the other factors considered in arriving at the award. See Simhoni v. Chambliss, 843 So. 2d 1036, 1037 (Fla. 4th DCA 2003); Guardianship of Halpert v. Martin S. Rosenbloom, P.A., 698 So. 2d 938, 939 (Fla. 4th DCA 1997). The order must also itemize the costs allowed. Jones, 661 So. 2d at 942.

Reversed and remanded with directions.

NORTHCUTT, J., Concur.
VILLANTI, J., Concur specially.

VILLANTI, Judge, Specially concurring.

Although I concur in the analysis and conclusions of the majority, Mr. Martin would be wise to recognize that the trial court apparently made an intentional

decision to reduce his requested fees based upon the evidence presented. Since the order on fees is not being reversed for the entry of an order granting the fees requested but only for further findings of fact to support the reduction, additional litigation concerning these fees will do nothing but add to the contentiousness of these proceedings. The trial court took the fee request under advisement, made a thoughtful review of the time sheets and tasks performed, and then used its discretion to award fees in an amount it believed to be reasonable. While Mr. Martin is entitled to ask the court to specify exactly why it chose the amount it did, what is really to be gained in so asking? In my view, a request for an order that identifies how Mr. Martin overcharged the ward's estate in the hopes that the trial court will suddenly agree that it abused its discretion in not awarding the full amount requested in the first instance is simply fodder for further litigation and a second appeal.

Florida Probate & Trust Litigation Blog

2d DCA: Can a judge cut your attorney's fees in a contested guardianship proceeding without explaining why?

By **Juan C. Antúnez** on March 13, 2013

In re Guardianship of Ansley, 94 So.3d 711 (Fla. 2d DCA August 17, 2012)

As I recently wrote **here**, a judge's attorney's fee order is automatically subject to reversal if it doesn't contain detailed findings of fact explaining *why* and *how* the judge arrived at his or her final fee-award conclusions.

Transparency in this context is not a luxury; it's the bare minimum we have a right to expect of our judiciary. Here's how our supreme court articulated this crucially important point in *Fla. Patient's Comp. Fund v. Rowe*, 472 So.2d 1145 (Fla.1985):



[G]reat concern has been focused on a perceived lack of objectivity and

uniformity in court-determined reasonable attorney fees. Some time ago, this Court recognized the impact of attorneys' fees on the credibility of the court system and the legal profession when we stated:

There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of **social malpractice** that undermines the confidence of the public in the bench and bar. It does more than that. **It brings the court into disrepute and destroys its power to perform adequately the function of its creation.**

Baruch v. Giblin, 122 Fla. 59, 63, 164 So. 831, 833 (1935).

Can a judge cut your attorney's fees in a contested guardianship proceeding without explaining why? NO

Turning now to the linked-to case above. In this contested guardianship proceeding the former guardian's attorney's fees were contested. As explained by the 2d DCA, at the end of the fee hearing the petitioning attorney submitted a proposed fee order containing the kind of detailed findings of fact necessary for a properly drafted fee order. **In other words, the petitioning attorney did his job.** The trial judge then simply crossed out the \$21,694.52 figure reflected at the end of the proposed fee order and wrote the amount of \$16,520 above it. The trial judge gave no explanation for why he reduced the fee request by almost 1/4 or \$5,174. **In other words, as explained by the 2d DCA, the trial judge did not do his job.**

“ The amount that the circuit court authorized the guardian to pay Mr. Martin is obviously less than the

sum supported by the findings in the order concerning the reasonable hourly rates, the time expended, and the expenses incurred. Undeniably, there is an internal inconsistency in the order; the amount of fees and expenses awarded does not equal the amount of fees and expenses that the circuit court found were reasonable.

. . .

A comparison of the amount of the actual award in the order under review and the amount requested by Mr. Martin indicates that the circuit court intended to award less than the full amount sought in the petition. However, we do not know what led to the circuit court's ruling. The above-noted internal inconsistency in the order results in the lack of any meaningful findings concerning the reasonable hourly rates and the number of hours compensated. The order also omits any statement of other factors that the circuit court considered in reducing the amount requested. These deficiencies make it impossible for this court to engage in meaningful appellate review of the order on appeal. . . .

In short, we are unable to determine the basis for the circuit court's award. It follows that we also cannot determine whether there is competent, substantial

evidence in the record to support the award.

Accordingly, we reverse the order under review. . . . We remand for the circuit court to enter a new order that sets forth the basis for the award, including the hours determined to be compensable, the hourly rate, and the other factors considered in arriving at the award. . . . The order must also itemize the costs allowed.

The 2d DCA obviously reached the right conclusion; all they're doing is telling the trial judge to explain his ruling. Which is why it was disappointing to read **Judge Villanti's** special concurrence in which he makes clear he doesn't really understand why it's so important for judge's to explain their fee rulings.

“ While Mr. Martin is entitled to ask the court to specify exactly why it chose the amount it did, what is really to be gained in so asking? In my view, a request for an order that identifies how Mr. Martin overcharged the ward's estate in the hopes that the trial court will suddenly agree that it abused its discretion in not awarding the full amount requested in the first instance is simply fodder for further litigation and a second appeal.

Respectfully, does Judge Villanti not understand that the *amount* of the fee ruling isn't the point of the majority's opinion (if properly drafted, the *amount* of a fee order is almost untouchable on appeal); what really matters in terms of this appellate decision is the message it sends to trial judges: *how* you explain your fee rulings is just as important as *what* your final rulings are. In fact, as stated by our supreme court, *not* explaining yourself in a fee order is “a species of social malpractice” that “brings the

court into disrepute and destroys its power to perform adequately the function of its creation.” So yes, there is much to be gained by sending this case back to the trial judge and ordering him to please explain the basis of his ruling.

Florida Probate & Trust Litigation Blog

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