

# EXAMINING COMMITTEE REPORTS AS A BASIS TO DISMISS PETITIONS TO DETERMINE INCAPACITY: A QUESTION OF ADMISSIBILITY AND EVIDENTIARY RELEVANCY

ENRIQUE ZAMORA, ESQ.<sup>\*</sup> AND ANDRES VASQUEZ<sup>\*\*</sup>

## INTRODUCTION

*“In our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights.”*<sup>1</sup> Society continues to struggle with the concerns that arise with the person or property of adults who are incapacitated.<sup>2</sup> The Associated Press has published literature on guardianship abuses and this series of articles has prompted Congress to form a committee to look into abusive guardianship

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<sup>\*</sup> Adjunct Professor of Elder Law, St. Thomas University School of Law; Founding Partner, Zamora & Hillman; Chair of the Elder Law Section of The Florida Bar (2011–2012); Florida Bar Board certified in Elder Law. I would like to thank Maria Michaels for her contributions to this article. I would also like to thank Alex Cuello and Steven Schwartz for their advice on this article.

<sup>\*\*</sup> Juris Doctor, 2013, St. Thomas University School of Law; Second Lieutenant, United States Marine Corps. I would like to thank my family and friends for supporting all of my educational endeavors. I would like to thank the *St. Thomas Intercultural Human Rights Law Review* (specifically Sarah Strickland) for teaching me the foundation of the New Haven (Policy Oriented) writing approach.

1. *In re Maynes-Turner*, 746 So. 2d 564, 565 (Fla. 3d DCA 1999) (quoting *In re McDonnell*, 266 So. 2d 87, 88 (Fla. 4th DCA 1972)) (emphasis added).

2. See Joan L. O’Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 STETSON L. REV. 687, 689 (2002).

The effects of a judicial appointment of a guardian on the individual rights of the alleged incapacitated person are substantial. A previously competent adult may no longer have the right to decide where and how to live, how or whether to spend his or her funds, with whom to associate, or whether to accept or reject health care.

*Id.* at 693.

practices.<sup>3</sup> The congressional guardianship committee concluded that the “typical ward has fewer rights than the typical convicted felon.”<sup>4</sup>

(2) Rights that may be removed from a person by an order determining incapacity include the right:

- (a) To marry.
- (b) To vote.
- (c) To personally apply for government benefits.
- (d) To have a driver’s license.
- (e) To travel.
- (f) To seek or retain employment.

(3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right:

- (a) To contract.
- (b) To sue and defend lawsuits.
- (c) To apply for government benefits.
- (d) To manage property or to make any gift or disposition of property.
- (e) To determine his or her residence.
- (f) To consent to medical and mental health treatment.
- (g) To make decisions about his or her social environment or other social aspects of his or her life.<sup>5</sup>

In 2003, the Florida Legislature created a Guardianship Task Force (“Task Force”) to examine guardianship and incapacity for the purpose of recommending specific statutory changes.<sup>6</sup> This resulted in modifications to Chapter 744 of the Florida Statutes.<sup>7</sup> Section 744.331(3)(f) states:

The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be filed by each examining committee member as part of his or her written report. The comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision. The comprehensive examination must include, if indicated:

1. A physical examination;
2. A mental health examination; and
3. A functional assessment.

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3. *Id.* at 694.

4. *Id.* (quoting H.R. Rpt. 100-639, at 4 (Sept. 25, 1987)) (internal quotation marks omitted).

5. FLA. STAT. § 744.3215(2)–(3) (2012).

6. See FLA. DEP’T OF ELDER AFFAIRS, GUARDIANSHIP TASK FORCE, PRELIMINARY REPORT (2004), available at <http://elderaffairs.state.fl.us/doea/pubguard/guardianship%20taskforce%20Report.pdf> (“To examine guardianship and incapacity; Identify best practices in Florida Law; Recommend specific statutory change; Achieve citizen access to quality guardianship services.”).

7. See § 744.101 (establishing Chapter 744 of the Florida Statutes as the “Florida Guardianship Law”).

In 2004, section 744.331(4) was added, creating the subsection entitled “Dismissal of petition.” This provision states that if a majority of the examining committee members conclude the Alleged Incapacitated Person (“AIP”) “is not incapacitated in any respect, the court *shall* dismiss the petition.”<sup>8</sup> Nearly a decade later, the changes made by the Task Force are beginning to encounter unforeseen consequences. The Task Force examined the legislative intent of Chapter 744 of the Florida Statutes, specifically the language that states, “[T]o make available the least restrictive form of guardianship,” and, “[T]hat adjudicating a person totally incapacitated and in need of a guardian deprives such person of all of her or his civil and legal rights.”<sup>9</sup> With this language in mind, the Task Force determined that the opinion of two examining committee members<sup>10</sup> reporting against the need for a guardianship<sup>11</sup> would warrant dismissal of the petition.<sup>12</sup>

Even before the addition of section 744.331(4), Chapter 744 required the court to appoint an examining committee of three members. Such committee members must be appointed within five days of the filing of a petition to determine incapacity.<sup>13</sup> Each individual in the examining committee is required to submit a report within fifteen days of being appointed to the committee.<sup>14</sup> “[T]he statutorily required examining committee members’ reports are material to the factual determination of capacity.”<sup>15</sup> However, without the live testimony of the committee

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8. § 744.331(4) (emphasis added).

9. § 744.1012.

10. *See* § 744.331(3)(a). The examining committee members must meet the following requirements:

One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion. One of three members of the committee must have knowledge of the type of incapacity alleged in the petition.

*Id.*

11. *See What is Guardianship?*, FLA. ST. CTS., [http://www.flcourts.org/gen\\_public/family/seIf\\_help/guardianship/index.shtml](http://www.flcourts.org/gen_public/family/seIf_help/guardianship/index.shtml) (last visited Mar. 23, 2013). Guardianship is defined as the process by which the court finds that an individual’s ability to make decisions is impaired, and therefore the court gives the right to make decisions to another person or entity. *Id.*

12. *See* § 744.331(4) (“If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition”).

13. *Id.* § 744.331(3)(a).

14. *Id.*

15. Alex Cuello, *Statutorily Required Committee Members Reports are Subject to Hearsay Exceptions*, THE ELDER LAW ADVOC. (Elder Law Section of The Florida Bar), Winter 2012, at 7.

members, the reports are insufficient to warrant the overruling of hearsay objections to the admission of the examining members' reports.<sup>16</sup>

This article will focus on answering two issues that play an important role in the determination of the need of establishing a guardianship for an AIP. Specifically, (1) whether the requirement that a petition to determine incapacity be dismissed if two examining committee members opine there is no incapacity, in violation of Florida's Evidence Code as well as Chapter 744's requirements; and (2) whether examining committee reports, without testimony, are hearsay under Florida's Evidence Code, section 90.803 of the Florida Statutes, and usurp judicial discretion under section 90.703.<sup>17</sup> Part I will delineate the problem associated with section 744.331(4) of the Florida Statutes and hearsay objections to the examining committee reports. Part II will discuss the conflicting claims that can be raised by the petitioner,<sup>18</sup> the attorney for the AIP, and the Florida Legislature. Part III will detail the past trends and decisions with regard to the requirement that a Petition to Determine Incapacity be dismissed if two examining committee members opine there is no incapacity. Part III will also outline possible violations of Florida's Evidence Code, violations of the requirements of Chapter 744, as well as the conditioning factors behind examining committee reports qualifying as hearsay under Florida's Evidence Code, section 90.803. Part IV will set its sights on projections for future decisions in light of changed and changing conditioning factors. Part V will pose potential recommendations for amending the current statutes in order to solve the guardianship issues addressed in this article.

## I. DELINEATION OF THE PROBLEM

### A. SECTION 744.331(4)

"A state's power to intervene in the private lives of its incapacitated citizens for their protection arises principally from its role as *parens patriae*."<sup>19</sup> There is a subsection in the Florida guardianship statute providing that when "a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any

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16. Shen v. Parkes, 100 So. 3d 1189, 1191 (Fla. 4th DCA 2012).

17. FLA. STAT. § 90.703 (2012).

18. See Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide Through the Maze*, 31 STETSON L. REV. 757, 758–59 (2002) (describing four different types of guardianship available in California). A petitioner may file for guardianship of the person or of that person's property. *Id.* at 758–59. This could give the guardian total control over the alleged incapacitated person and his or her property. *Id.* at 758.

19. RALPH C. BRASHIER, *MASTERING ELDER LAW* 30 (2010).

respect, the court shall dismiss the petition.”<sup>20</sup> This rule takes the discretion of determining incapacity out of the hands of the judge and instead bestows it upon the examining committee. The burden of proof required for a finding of incapacity is clear and convincing evidence.<sup>21</sup> Clear and convincing evidence has been defined as “evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.”<sup>22</sup> Whether someone is incapacitated is a legal question that can only be determined by a judge.<sup>23</sup> It has been argued that section 744.331(4) deprives the judge of his or her ability to determine the capacity, or lack thereof, of an AIP because of the weight placed on the examining committee’s reports.<sup>24</sup> This occurs because the judge is required to dismiss the petition based solely on the examining committee’s reports without considering all of the available evidence.<sup>25</sup> By requiring the judge to deny the petition and use only the examining committee’s reports, section 744.331(4) runs afoul of section 744.331(3)(f).<sup>26</sup> Section 744.331(3)(f) states, “The comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision.”<sup>27</sup> By obligating the judge to dismiss the Petition to Determine Incapacity based on two of the examining committee’s reports, the judge is required to use only the reports in making the capacity and guardianship decision.<sup>28</sup> Thus, the judge is no longer afforded the discretion to weigh additional evidence that may be relevant in making his or her decision—evidence such as testimony from various family members, friends, and the AIP’s treating physicians. This exclusion of additional evidence “creates a situation where the judge must use said reports as the only evidence in making a capacity decision.”<sup>29</sup> This situation raises the question of whether the opinions of two of the three committee members are sufficient to rise to the level of clear and convincing evidence without including additional evidence that can be presented in order to aid in making incapacity and

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20. FLA. STAT. § 744.331(4) (2012).

21. § 744.331(6).

22. FLA. STAT. ANN. STD. CRIM. JURY INSTR. § 2.03 (West 2013).

23. See BRASHIER, *supra* note 19, at 30 (discussing how state law almost exclusively governs guardianship proceedings).

24. Enrique Zamora, *Two Out of Three Reports and You’re Out—But Should You Be? A Revisit of § 744.331(4)*, THE ELDER LAW ADVOC. (Elder Law Section of The Florida Bar), Winter 2012, at 13 (citing *Rothman v. Rothman*, 93 So. 3d 1052, 1053–54 (Fla. 4th DCA 2012)).

25. See *Rothman*, 93 So. 3d at 1053–54.

26. § 744.331(3)(f).

27. *Id.*

28. Zamora, *supra* note 24, at 13.

29. *Id.*

guardianship decisions.

#### B. EXAMINING COMMITTEE REPORT

Every petition for incapacity must have an examining committee evaluate the AIP, and every member of this committee must make a report of the examination detailing his or her findings.<sup>30</sup> Each committee member's written report must include:

1. To the extent possible, a diagnosis, prognosis, and recommended course of treatment.
2. An evaluation of the alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver's license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.
3. The results of the comprehensive examination and the committee member's assessment of information provided by the attending or family physician, if any.
4. A description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.
5. The names of all persons present during the time the committee member conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.
6. The signature of the committee member and the date and time the member conducted his or her examination.<sup>31</sup>

Notwithstanding the fact that the committee members' reports are statutorily required for adjudicating incapacity, the rules of evidence in civil actions are applicable.<sup>32</sup> The weight afforded to the probative value of the committee members' reports has been enhanced by the statutory prescription that judges use them as an "essential element" in making a determination of incapacity.<sup>33</sup> In following the statutory directive, courts routinely afford the examining committee's opinion and diagnosis greater weight than any other evidence. This raises the question of whether the

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30. § 744.331(3)(e).

31. *Id.* § 744.331(3)(g).

32. *Id.* § 744.331(3)(f); FLA. PROB. R. 5.170; *see* *Shen v. Parkes*, 100 So. 3d 1189, 1191 (Fla. 4th DCA 2012).

33. *See* § 744.331(3)(f).

court is ignoring section 90.403 of the Florida Statutes, which requires the judge to determine whether relevant evidence should be excluded because of its prejudicial nature.<sup>34</sup>

In order for evidence to be *relevant*, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action. . . . The concept of “relevancy” has historically referred to whether the evidence has any logical tendency to prove or disprove a fact. . . . In order to determine whether evidence has *probative value*, the fact for which it is offered to prove must be identified. . . . Whether the evidence has probative value is an issue for the *discretion of the court*.<sup>35</sup>

The main concept at issue is procedural due process, parts of which are expressed through the evidence code. For example, within the hearsay rule is the policy of a right to cross-examine adverse witnesses.<sup>36</sup> The only way to test a committee member’s opinion and diagnosis is to have him or her testify directly. Examining committee reports, unlike a treating physician’s report, are compulsory reports prepared in anticipation of litigation by non-treating experts.<sup>37</sup> Absent direct testimony from the person whose opinion and diagnosis is recorded, the committee member’s report is inadmissible hearsay under section 90.803(6)(b).<sup>38</sup> This is the basis for finding that the probative value of the court-appointed expert opinions and diagnoses, without direct testimony from the person whose opinion is recorded, is outweighed by the danger of unfair prejudice to the AIP.<sup>39</sup> The finder of fact could be misled to give greater weight than is warranted to the opinions and diagnosis contained in the expert’s report, without affording the parties an opportunity to *voir dire* and cross-examine the committee member.

Historically, incapacity proceedings have not addressed the issue of whether committee members’ reports, without direct testimony, are inadmissible hearsay. Statutory language requires that “[i]f a majority of the examining committee members conclude that the AIP is not

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34. FLA. STAT. § 90.403 (2012).

35. CHARLES W. EHRHARDT, EHRHARDT’S FLORIDA EVIDENCE §401.1 (2012) (footnotes omitted) (emphasis added); *see* § 90.401.

36. *See generally* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

37. FLA. R. CIV. P. 1.360(b)(1).

38. *See* § 90.803(6)(b).

39. *See* § 90.403.

incapacitated in any respect, the court *shall* dismiss the petition.”<sup>40</sup> Previous cases relied upon *In re Keene*, which stands for the proposition that “[p]roceedings to determine the competency of a person are generally controlled by statute and where a statute prescribes a certain method of proceeding to make that determination, the statute must be strictly followed.”<sup>41</sup> It is important to note that the statute might imply the need for a hearing before a dismissal based on two examining committee reports. This implication stems from the language in the statute, which grants the judge the discretion to declare individuals incapacitated.<sup>42</sup> However, even if such an implication exists, courts have not applied this particular approach.

### C. THE JUDICIARY

Determination of incapacity in guardianship proceedings is within the special powers of a judge.<sup>43</sup> “Courts have identified a level of due process appropriate to actions that are of a[n] . . . adversarial character.”<sup>44</sup> In the majority of guardianship hearings, a bench trial is normally conducted to determine incapacity.<sup>45</sup> When determining an appropriate level of procedural due process, it is important to look at notice, as well as the rights to counsel and a hearing.<sup>46</sup> These procedural due process rights validate testing the evidence through cross-examination of witnesses, specified burdens of proof, and application of the rules of evidence.<sup>47</sup> All the components of procedural due process should be available and routinely used in guardianship actions.<sup>48</sup> In guardianship proceedings, the ward’s fundamental liberty interests are restricted by the informal nature of the proceedings.<sup>49</sup> Direct expert testimony cannot serve as a substitute for

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40. FLA. STAT. § 744.331(4) (2012) (emphasis added).

41. *In re Keene*, 343 So. 2d 916, 917 (Fla. 4th DCA 1977) (citations omitted).

42. § 744.331(6).

43. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 735 (2002).

44. Alison Patrucco Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance*, 40 U. FLA. L. REV. 949, 975 (1988).

45. Frolik, *supra* note 43, at 735.

46. Barnes, *supra* note 44, at 974.

47. *Id.*

48. See *Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 MENTAL AND PHYSICAL DISABILITY LAW REP. 271 (1989), available at <http://www.jstor.org/stable/20784353>.

49. Compare FLA. STAT. § 744.331(4) (1987), amended by FLA. STAT. § 744.331(4) (2012) (“The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure . . . .”), with FLA. STAT. § 744.331(4) (2012) (“If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any

legislative mandates to the court's legal conclusions because the judicial system is accountable for the severe legal consequences associated with guardianship proceedings. The judge who presides over the hearing is the arbiter and decides if the AIP has met the legal standard of incapacity and whether the AIP can benefit from the appointment of a guardian. As written, section 744.331(4) restricts the judiciary's discretion to protect the ward's procedural due process. Florida's Fifth District Court of Appeal has affirmed the requirement that the court consider the examining committee reports before dismissing the petition for incapacity.<sup>50</sup> However, it is difficult for the court to consider those reports without a formal hearing on the merits. This begs the question of the appropriate application of section 744.331(4), which circumvents the judiciary's discretion by mandating dismissal of the petition upon receipt of a majority of the examining committee members' reports opining that the AIP is capacitated. It is not implied that all judges dismiss a petition to determine incapacity upon the filing of two clear committee member reports without conducting a hearing. However, section 744.331(4) does not require such a hearing. It is also important to note that dismissing a petition to determine incapacity for an AIP, who in fact needs a guardian, is a violation of the *parents patria*.

## II. CONFLICTING CLAIMS

### A. PETITIONER

In a hearing to determine incapacity, the petitioner is the person who files the Petition to Determine Incapacity.<sup>51</sup> A court may decide, upon the petition of an adult, that a person is incapacitated.<sup>52</sup> Even after the petition is filed, establishing a guardianship regularly takes between thirty to forty-five days.<sup>53</sup> The addition of section 744.331(4) has accelerated the process by denying petitions when the majority of the committee reports conclude the AIP is not incapacitated. However, incapacity is not necessarily a

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respect, the court shall dismiss the petition.”).

50. Borden v. Guardianship of Borden-Moore, 818 So. 2d 604, 608–09 (Fla. 5th DCA 2002).

51. See, e.g., Ross, *supra* note 18, at 758–59 (describing four different types of guardianship available in California).

52. § 744.3201(1).

53. Ben A. Neiburger & Shay Jacobson, *HIPAA and Emergency Guardianships: How to Disclose Protected Health Information Without Violating the Law*, LCIUS.COM (March 2010), <http://www.lcius.com/wpcontent/uploads/2009/11/HIPAAandEmergencyGuardianshipsMarch2010.pdf> (explaining the pertinent and realistic timeframes for establishing guardianship).

permanent or fulltime condition.<sup>54</sup> The AIP could be experiencing a “lucid interval” when evaluated by the examining committee.<sup>55</sup> Assuming the committee members did not conduct the examination in accordance with the requirements of Chapter 744, the petitioner or AIP may challenge the examining committee’s reports or ask for a re-evaluation. The petitioner or AIP may object to the reports without direct testimony, especially if the reports will be used as an “essential element” in determining incapacity. However, with judicial discretion, judges are able to make a range of decisions that do not run afoul of either legal or ethical standards.<sup>56</sup> Previously, regardless of the judge’s decision, few appeals resulted in overturning the judge’s final ruling.<sup>57</sup> Ultimately, parties seek to have a fair hearing conducted by a neutral decision maker.

#### B. ATTORNEY FOR AIP

Florida law requires the court to appoint legal counsel to represent persons alleged to be mentally incapacitated.<sup>58</sup> Court-appointed counsel for an AIP has many responsibilities, such as conducting meetings with the AIP and people who are in contact with the AIP to determine the AIP’s circumstances, ownership of any property, and further inquiries beyond mental and physical state. A written response on behalf of the AIP is usually filed with the court before the incapacity hearing. Both state and federal courts have found that due process of law entitles an AIP to counsel who will advocate for him or her.<sup>59</sup> The attorney for the AIP is “an attorney who represents the alleged incapacitated person.”<sup>60</sup> The American Bar Association has stated that the role of counsel for the AIP should be to act as an advocate.<sup>61</sup> By providing the AIP zealous representation, the

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54. O’Sullivan, *supra* note 2, at 687–92 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294 (1765)).

55. *Am. Red Cross v. Haynsworth*, 708 So. 2d 602, 606 (Fla. 3d DCA 1998) (“The terms ‘lucid moment’ or ‘lucid interval’ do not describe a moment when the testator was not patently delusional. A ‘lucid moment’ is a period of time during which the testator returned to a state of comprehension and possessed actual testamentary capacity.”).

56. Frolik, *supra* note 43, at 735.

57. *Id.*

58. FLA. STAT. § 744.102 (2012).

59. *See, e.g., In re Gault*, 387 U.S. 1 (1967); *Conservatorship of Gilbuena v. Moore*, 209 Cal. Rptr. 556 (Ct. App. 1985); *Estate of Thompson*, 542 N.E.2d 949 (Ill. App. Ct. 1989) (citing Dean Timothy Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from their Zealous Protectors*, 56 CHI.-KENT L. REV. 1087 (1980)).

60. § 744.102 (“The attorney shall represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar.”).

61. COMM’N ON MENTALLY DISABLED & COMM’N ON LEGAL PROBLEMS OF ELDERLY, ABA, *GUARDIANSHIP: AN AGENDA FOR REFORM: RECOMMENDATIONS OF THE NATIONAL*

attorney for the AIP benefits from section 744.331(4) because it eliminates the need for further representation if two of the three committee reports deem the AIP to have capacity. By deeming the committee reports as admissible evidence, the attorney for the AIP, as well as the AIP, have valuable evidence that was obtained via government funding.

### C. THE LEGISLATURE

The Legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary. The Legislature further finds that it is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.<sup>62</sup>

In addition to the legislative intent stated above, the Florida legislature will have to consider budgetary issues revolving around the Florida guardianship statute when making modifications to address the current issues addressed in this article. Budgetary issues such as the affordability of having committee members testify in court and the costs associated with prolonging otherwise dismissible petitions, should be considered when making changes to the statute. However, “the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right.”<sup>63</sup>

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GUARDIANSHIP SYMPOSIUM 11 (1989), available at <http://www.guardianshipsummit.org/wp-content/uploads/2011/03/Agenda-for-Reform.pdf>.

62. § 744.1012.

63. *Fuentes v. Shevin*, 407 U.S. 67, 93 n.29 (1972).

### III. PAST TRENDS

#### A. CLEAR AND CONVINCING EVIDENCE

“Clear and convincing” is the evidentiary standard applied under Chapter 744 to determine incapacity<sup>64</sup> and is defined as:

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. “Clear and convincing evidence” is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue.<sup>65</sup>

The Florida Supreme Court defined this standard as “an intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.”<sup>66</sup> It is more than a simple preponderance and less than the standard applied in criminal cases of beyond a reasonable doubt, in that it is evidence free of substantial doubts or inconsistencies.<sup>67</sup> In *Reid v. Estate of Edgar Sonder*,<sup>68</sup> an appellate court defined clear and convincing evidence as

an intermediate standard of proof between the “preponderance of the evidence” standard used in most civil cases, and the “beyond a reasonable doubt standard” of criminal cases, requiring the evidence “[to] be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.”<sup>69</sup>

In order to find incapacity, the court must find:

1. The exact nature and scope of the person’s incapacities;
2. The exact areas in which the person lacks capacity to make informed decisions about care and treatment services or to meet the essential requirements for her or his physical or mental health or safety;
3. The specific legal disabilities to which the person is subject; and
4. The specific rights that the person is incapable of exercising.<sup>70</sup>

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64. § 744.331(6).

65. *Standard Jury Instructions – Civil Cases*, FLA. SUP. CT., [http://www.floridasupremecourt.org/civ\\_jury\\_instructions/instructions.shtml#411](http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#411).

66. *See Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486 n.4 (Fla. 1999) (quoting *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995)).

67. *See The Florida Bar v. Rayman*, 238 So. 2d 594, 596 (Fla. 1970).

68. *Reid v. Estate of Edgar Sonder*, 63 So. 3d 7 (Fla. 3d DCA 2011).

69. *Id.* at 10 (quoting *Dieguez v. Dep’t of Law Enforcement, Criminal Justice Standards and Training Comm’n*, 947 So. 2d 591, 595 (Fla. 3d DCA 2007)).

70. FLA. STAT. § 744.331(6)(a) (2012).

These findings of fact must be supported by evidence that meets the “clear and convincing” burden of proof in order to assure the party is afforded its constitutional protection.

## B. CASE LAW

Case law is now emerging holding that section 744.331(4) should be read literally to require dismissal based solely on two of three examining committee reports without requiring judicial review. This interpretation of section 744.331(4) “would violate not only basic tenets of statutory construction, but also the constitutional tenants [sic] of judicial power, procedural due process, substantive due process, and access to courts.”<sup>71</sup> In *Rothman*, the trial court concluded that section 744.331(4) was unconstitutional because “as worded, [it] results in abdication of judicial authority to two individuals of the examining committee and removes the right of the court to make the appropriate decisions for the benefit of the Alleged Incapacitated Person.”<sup>72</sup> The trial court further concluded this statute “cannot delegate the Court’s authority and responsibility for decision-making to a non-judicial entity and thereby summarily deny without further judicial review the rights of litigants.”<sup>73</sup> The appellate court in *Rothman* agreed with the AIP, granted a writ of mandamus, and directed the trial court to dismiss the petition of incapacity if a majority of the examining committee members found the person not to be incapacitated. The court stated that “the statute is clear on its face,”<sup>74</sup> and if two of the three members of the examining committee deemed the AIP to be incapacitated, the trial court “shall” dismiss the petition.<sup>75</sup> Further, the court held that the act of dismissing the petition based on the examining committee’s reports is a ministerial action, rejecting the separation of powers argument.<sup>76</sup> The opinion in *Rothman* is conditioned by prior cases holding that section 744.331(4) should be strictly construed.<sup>77</sup> Other

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71. *Rothman v. Rothman*, 93 So. 3d 1052, 1054 (Fla. 4th DCA 2012).

72. *Id.* at 1053 n.1.

73. *Id.*

74. *Id.* at 1054.

75. *Id.*; § 744.331(4).

76. *Rothman*, 93 So. 3d at 1053–54.

77. *See In re Keene*, 343 So. 2d 916, 917 (Fla. 4th DCA 1977) (finding no error in the trial court’s dismissal of the petition based solely on the examining committee’s report without consideration of other evidence). “Proceedings to determine the competency of a person are generally controlled by statute and where a statute prescribes a certain method of proceeding to make that determination, the statute must be strictly followed.” *Id.*

district courts of appeal have also held that the trial court need only consider the reports of the examining committee.<sup>78</sup>

Other cases have raised the issue of whether the right to an evidentiary hearing to challenge the opinions of the examining committee members, either individually or collectively, should be allowed.<sup>79</sup> The Fourth District Court of Appeal stated, “In addition to § 744.331(5) (a), Fla. Stat., other Florida Statutes similarly provide and protect the right to cross examination . . . .”<sup>80</sup> The Fifth District Court of Appeal has held that “the language of the statute is clear and unambiguous.”<sup>81</sup> “Once a majority of the examining committee conclude[s] that [an AIP] [is] not incapacitated, the trial court [is] correct in dismissing the petition to determine incapacity and the petition for the appointment of a guardian.”<sup>82</sup> Additionally, the issue of whether the examining committees’ reports qualify as hearsay has recently been raised. In a contested hearing, the AIP can assert a hearsay objection to the admission of the reports where there is no direct testimony by the committee member.<sup>83</sup> The Fourth District Court of Appeal has reversed a petition “based on the court’s reliance on inadmissible hearsay,”<sup>84</sup> however, it “decline[d] to address [the] argument that the statute provides a right to confront witnesses, which [would] require[] live testimony of the committee members.”<sup>85</sup>

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

79. *See Mathes*, 743 So. 2d at 627 (holding that, once the examining committee concluded the alleged incapacitated person had full capacity, the trial court was required to dismiss the petition to determine incapacity); *see also In re Keene*, 343 So. 2d at 916 (reiterating that if the examiner’s report does not find that the individual is incompetent then the court must dismiss the petition).

80. Reply Brief in Support of Petitioner/Appellant at 4, *Roland v. Roland*, 109 So. 3d 256 (Fla. 4th DCA 2013) (No. 4D12-474). “[Section] 90.801 and § 90.802 (defining out of court statements not subject to cross-examination as inadmissible hearsay); § 90.605 (requiring testimony to be given under oath); § 90.615 (allowing parties to cross-examine witnesses called by the court); § 90.705 (allowing the opposing party to voir dire before an expert gives an opinion).” *Id.*

81. *Levine*, 4 So. 3d at 731.

82. *Id.*

83. FLA. STAT. § 90.803(6)(b) (2003).

84. *Shen v. Parkes*, 100 So. 3d 1189, 1192 (Fla. 4th DCA 2012).

85. *Id.*

#### IV. FUTURE DECISIONS

If the examining committees' reports are deemed hearsay, there are arguably two potential exceptions, namely the Records of Regularly Conducted Business Activity and the Statements for Purposes of Medical Diagnosis or Treatment. Thus far, none of these exceptions have been ruled a successful defense against hearsay objections.<sup>86</sup> The reports without live testimony are hearsay, and the reports do not fall within Records of Regularly Conducted Business Activity under section 90.803(6)(b)<sup>87</sup> or within Statements for Purposes of Medical Diagnosis or Treatment under section 90.803(4).

**RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY:** Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.<sup>88</sup>

**STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT:** Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.<sup>89</sup>

The Real Property, Probate and Trust Law Section of the Florida Bar has convened a new task force to review and revise Chapter 744. Issues that should be addressed by the new task force include rewording the guardianship statute along with the inclusion of potential hearsay exceptions to the statute.

#### V. RECOMMENDATION

Our proposed remedy to this problem is an amendment of section 744.331(4) which currently states: "If a majority of the examining committee members conclude that the alleged incapacitated is not

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86. Cuello, *supra* note 15, at 7. Identifying records of regularly conducted business and public records and reports are arguable exceptions to committee reports being deemed hearsay. *Id.*

87. *See* McElroy v. Perry, 753 So. 2d 121, 125–26 (Fla. 2d DCA 2000); *see also* Fernandez v. Union Carbide Corp., 937 So. 2d 750, 752 (Fla. 3d DCA 2006) (proposing that expert opinions are not admissible in the absence of an expert testifying and being subject to cross-examination).

88. § 90.803(6)(b).

89. *Id.* § 90.803(4).

incapacitated in any respect, the court shall dismiss the petition.”<sup>90</sup> We propose to strike “the court shall dismiss the petition” and replace it with the idea that the court shall have a rebuttable presumption that the AIP is not incapacitated, and the burden will shift to the petitioner to either prove or produce evidence to the contrary of the committee’s conclusions. If the petitioner does not fulfill this burden then the court shall deny the petition. If amended, section 744.331(4) would read:

If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall have a rebuttable presumption that the alleged incapacitated person is not incapacitated, and the burden will shift to the petitioner to either prove or produce evidence to the contrary of the committee’s conclusions. If the petitioner does not fulfill this burden then the court shall dismiss the petition.

This proposed amendment now paves the way for the judge to keep control of the question since he or she has now afforded the availability of due process to the parties. Only after deciding whether the burden has been met, on the basis that the party is found to have capacity by clear and convincing evidence, can the judge exercise judicial discretion and provide the necessary due process to the parties.

This amendment also leads us to our second issue at hand: If the statute is amended then what evidence will the parties be allowed to present and what issues may be argued during the adjudicatory hearing? One of the recurring issues is whether a party may present evidence to corroborate or challenge a majority of the committee members’ conclusion that the AIP is not incapacitated. This would require the committee members to conduct their examination, write their reports, and testify in court. There are instances where the examining committee may be unavailable or it would be too costly to have them provide direct testimony. However, “the Court has made clear that the avoidance of ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right.”<sup>91</sup> Therefore, we recommend that the requirement that the examining committee testify during incapacity proceedings be incorporated into the statute.

Additionally, we propose an “Admission of Report” statute. The court may receive into evidence, without testimony, any written report of the committee members who examined an AIP, provided that a copy of the report is filed with the court five days before the hearing and that the report

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90. FLA. STAT. § 744.331(4) (2012).

91. *Fuentes v. Shevin*, 407 U.S. 67, 71 n.29 (1972).

is substantially in the form required by the state court administrator. A party offering a report must promptly inform the parties that the report is filed and available. The court may issue, on its own initiative, or any party may secure, a subpoena to compel the preparer of the report to testify. The issues of potential hearsay objections would not be corrected. In our proposed statute, the reports will come in under two potential exceptions to hearsay that have not been previously allowed: (1) Records of Regularly Conducted Business Activity; and (2) Statements for Purposes of Medical Diagnosis or Treatment.

The mission of guardianship monitoring is to collect, provide, and evaluate information about the well-being and property of all persons adjudicated of having a legal incapacity so that the court can fulfill its legal obligation to protect and preserve the interests of the ward, and thereby promote confidence in the judicial process.<sup>92</sup>

This quote reinforces the responsibility the legal community has in preserving the integrity of the judicial process in Florida's guardianship statute. The time has come to address the issues discussed in this article. This article was written to provide a starting point to address the shortcomings of the incapacity proceedings under Chapter 744. It is our hope that this article will appropriately inform and encourage those who can implement the necessary changes to Chapter 744 that will ultimately benefit our families, legal community, and all citizens of the state of Florida.

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92. SUPREME COURT COMM'N ON FAIRNESS, COMM. ON GUARDIANSHIP MONITORING, GUARDIANSHIP MONITORING IN FLORIDA, FULFILLING THE COURT'S DUTY TO PROTECT WARDS 2 (2003), available at [http://www.floridasupremecourt.org/pub\\_info/documents/guardianshipmonitoring.pdf#xml=http://199.242.69.43/texis/search/pdf](http://www.floridasupremecourt.org/pub_info/documents/guardianshipmonitoring.pdf#xml=http://199.242.69.43/texis/search/pdf).