

PROBATE CORNER

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ARTICLE: Entitlement To Attorneys Fees For Litigating The Appointment Of A Guardian

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 or his estate. *See* Price v. Austin, 43 So. 3d 789 (Fla. 1st DCA 2010) and §744.108(1), Fla. Stat. Litigation over the appointment of a guardian may not be considered a benefit to the ward or his estate.

In *Butler v. Guardianship of Peacock*, 898 So.2d 1139 (Fla. 5th DCA 2005), the Ward's daughter and designated pre-need guardian unsuccessfully petitioned to be appointed guardian. Butler thereafter petitioned the trial court for an award of all the attorney's fees and costs incurred by her in these proceedings. The trial court awarded Butler fees up to the date that the dispute arose over who should be appointed the ward's permanent guardian, concluding that after that date Butler's attorney was rendering services on behalf of Butler, not on behalf of the ward. The appellate court, in affirming the lower court, reasoned:

Under section 744.108, in order to be entitled to receive attorney fees' the attorney services must benefit the ward. Here, no evidence was presented regarding how the litigation over who would be appointed Peacock's [ward's] guardian could be considered services rendered on Peacock's behalf, especially when all the parties except Butler agreed that Wood was doing an excellent job overseeing Peacock's care. Therefore, the trial court did not abuse its discretion by awarding Butler only a portion of her attorney's fees.

In *King v. Fergeson, et al*, 862 So.2d 873 (Fla. 2nd DCA 2003), the court reversed the lower court's judgment for attorney's fees and costs and remanded without prejudice to renew the motion. Judge Villanti, in his concurring opinion, addressed the issue of entitlement to attorney's fees, in part, as follows:

As noted by the majority, there is language in the order awarding fees referencing a "benefit to the ward"; however, there are no corresponding findings of fact to justify this conclusion, and there is no evidence in the record to support such a finding.

The record shows that the ward stipulated early in the proceedings to having a guardian of her property appointed. The primary dispute amongst the ward's children was over who that guardian should be. Lynn King initially advocated having herself appointed guardian. When her siblings objected and offered themselves as guardians, Lynn King suggested Lutheran Services as a possible guardian. Ultimately, the trial court appointed Lutheran Services. However, when seeking attorney's fees, Lynn King offered no evidence to demonstrate how having Lutheran Services as guardian rather than some other person or entity constituted a "benefit to the ward." Moreover, she presented no evidence to

establish how having the ward's personal rights, in addition to her property rights, removed was to the ward's benefit. On the record before this court, I do not see how the trial court could have awarded fees on the basis that Lynn King's efforts in getting a specific guardian appointed "benefitted the ward."

As a general proposition, if an interested party hires an attorney to contest any aspect of an incapacity proceeding, including who should be appointed guardian, 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. As the record exists now, there is no evidence that Ferguson, Skipper performed any services "on behalf of the ward" to entitle it to an award of attorney's fees under section 744.108, nor is there any evidence that Ferguson, Skipper performed any services that benefitted the ward or her estate. Therefore, on remand, the trial court should require some evidence that the services at issue were incurred on behalf of or benefitted Thelma King or her estate before it may find that Ferguson, Skipper is entitled to an award of fees from the guardianship estate.

In *Thorpe v. Myers*, 2011 Fla. App. LEXIS 11088, 36 Fla. L. Weekly D1524b (Fla. 2nd DCA July 15, 2011), the ward's spouse was appointed emergency temporary guardian and the examining committee members found the ward to be totally incapacitated. The litigation over the appointment of a guardian was eventually settled in mediation. 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 lower court, in denying their petition, reasoned 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." The appellate court, in reversing the lower court, reasoned:

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.