

THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
PROBATE DIVISION

IN RE: HOWARD C. FORMAN
An Alleged Incapacitated Person.

CASE NO: MHC-17-0822
DIVISION: 62J(SPEISER)

ORDER GRANTING HOWARD C. FORMAN'S MOTION TO ASSESS COSTS AND ATTORNEY'S FEES AGAINST BRENDA FORMAN PURSUANT TO 744.331(7)(c)(2)

THIS CAUSE came before the Court on Howard C. Forman's Renewed Motion to Dismiss Petition to Determine Incapacity and Assess Costs and Attorney's Fees (hereinafter "Motion"). The Court, having considered the Motion and Brenda Forman's Memorandum in Support of Oral Argument (hereinafter "Memo"), having heard arguments of counsel on February 9, 2018, and being otherwise fully advised in the premises, finds as follows:

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CLERK OF COURT
BROWARD COUNTY, FLORIDA

Brief Statement of Facts

This action arises out of a Petition to Determine Incapacity and Petition for Appointment of Emergency Temporary Guardian filed by Brenda Forman, (hereinafter "Brenda") on March 30, 2017. Brenda filed these petitions less than twenty-four hours after Howard Forman (hereinafter "Howard") filed a Petition for Dissolution of Marriage and commenced the Divorce Proceeding on March 29, 2017. It should be noted that surprisingly and astonishingly, this legal maneuver was taken significantly prior to May 3, 2017, the date that Brenda accepted service of Howard's Petition for Dissolution of Marriage. On April 2, 2017, four days after Howard initiated the Divorce Proceeding, Brenda filed a Petition for Appointment of Plenary Guardian. Brenda then filed a Motion to Stay in the Divorce Proceeding on April 21, 2017. Howard filed a Petition for Voluntary Guardianship on June 1, 2017.

Dismissal of Petition to Determine Incapacity

In his Motion, Howard cites to Section 744.331(4), which provides that 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. § 744.331(4), Fla. Stat. (2017). The examining committee, comprised of Josimar Saldana, PHD, Wendy Wilner, LCS, and Ruben Vallejo, MD

evaluated Howard on November 7, 2017, November 8, 2017, and November 9, 2017, respectively. All three members of the examining committee, unanimously and independent of one another, concluded Howard was fully capacitated. As such, this Court determined on December 5, 2017 that dismissal of the Petition to Determine Incapacity was statutorily mandated and should be granted pursuant to 744.331(4).

Controlling Law for the Determination of Fees in Incapacity Proceedings

In order to make a finding regarding responsibility to pay fees and costs in connection with a petition to determine incapacity, the court must first ascertain the applicable statutory framework. In his Motion, Howard cites to Section 744.331(7)(c), as the controlling law for the determination of fees in connection with a petition to determine incapacity. This section states in pertinent part:

“[i]f the petition is dismissed or denied: 1. The fees of the examining committee shall be paid upon court order as expert witness fees under s. 29.004(6). 2. Costs and attorney fees of the proceeding may be assessed against petitioner if the court finds the petition to have been filed in bad faith. The petitioner shall also reimburse the state courts system for any amounts paid under subparagraph 1. upon such a finding.

§ 744.331(7)(c), Fla. Stat. (2017).

Brenda contends that Section 57.105, applies in this case. Brenda further argues that Howard has the burden to establish bad faith as Howard is the Respondent in the Petition to Determine Incapacity. *See* § 57.105, Fla. Stat. (2010). Brenda also contends that Howard did not comply with the required notice and twenty-one (21) day limitation of Section 57.105(4)(a) to withdraw the offending pleading, which is the Petition to Determine Incapacity in the case at bar. The Court finds that the law set forth in Section 744.331(7)(c) not Section 57.105, is applicable to the instant motion. It is unequivocally evident to this Court that the Florida legislature enacted 744.331(7)(c) to specifically address a bad faith pleading filed in the context of a guardianship case. Section 57.105 was generally contemplated and enacted to focus on the initiation of bad faith litigation in an arena where the Florida legislature did not provide a specific statutory remedy for unsupported claims or defenses in civil proceedings. Howard’s Motion, Brenda’s Memo, and the

arguments made by counsel at the February 9, 2018 hearing all address the issue of responsibility of fees and costs in the context of Brenda's initiation of the guardianship proceeding under Chapter 744, not a Motion for fees under Section 57.105. As such, this Court determines that Section 744.331(7)(c), is the controlling statute on this issue.

Evidentiary Hearing for Determination of Bad Faith

In her Memo, Brenda's counsel argues that Howard's Motion should be dismissed pursuant to Section 744.331(7)(c). *See Drelich v. Guardianship of Drelich*, 201 So.3d 15 (Fla. 3d DCA 2013). In *Drelich*, a husband, at a scheduled non-evidentiary hearing, requested the guardianship court to grant his motion for attorney's fees and costs under Section 744.331(7), alleging his wife had acted in bad faith in filing a petition for incapacity against him that was ultimately dismissed. *Id* at 17. The trial court denied the husband's summary motion for fees and costs stating that section 744.331(7) shifts the responsibility of paying the costs and attorney's fees to the wife who had purportedly pursued a guardianship in bad faith. *Id* at 17. On appeal, the Third District Court of Appeal found that the wife's petition to determine incapacity was replete with omissions of material fact and disproven allegations. *Id* at 17. The Appellate Court also stated that the wife's efforts to delay the divorce proceedings and her refusal to allow her husband to occupy his condominium unit was in sharp contrast with her petition to become the guardian for her husband. *Id* at 17. Accordingly, the Appellate panel held this set of facts warranted an evidentiary hearing on the husband's motion for attorney's fees and cost under Section 744.331(7), and not a dismissal. *Id* at 17. The Third District Court of Appeal reversed the trial court's order denying the husband's motion for reconsideration of his pending motion for attorney's fees and costs and remanded it for an evidentiary hearing regarding the issue of bad faith. *Id* at 18. The facts of *Drelich* closely parallel the case at bar. However in *Drelich*, the wife actually requested a stay of the proceedings in the divorce action in order to file her petition to determine incapacity before she actually filed the petition for incapacity in the guardianship court. In the case at hand, Brenda did not request a

stay in the Divorce Proceeding until after she filed her Petition to Determine Incapacity. In fact, Brenda filed and initiated her Petition to Determine Incapacity before the guardianship court less than a day after Howard filed his Petition for Dissolution of Marriage. Therefore, as in *Drelich*, the issue before this Court is whether Brenda's Petition to Determine Incapacity was filed in bad faith. In *Drelich*, the Third District Court of Appeal stated that findings of bad faith could not be established in a non-evidentiary summary proceeding but rather at an evidentiary hearing. *Id* at 17. In this case, this Court has complied with the *Drelich* decision. Therefore, the Court finds that an additional evidentiary hearing is unnecessary. This Court has already taken testimony, accepted exhibits into evidence, and heard argument of counsel all addressed to the issue of whether Brenda acted in bad faith. That hearing is the forbearer of this Order.

Bad Faith Determination

The main issue to be resolved by the Court is whether Brenda filed her Petition to Determine Incapacity in bad faith. Bad faith in connection with Section 744.331(7)(c), is not defined in the statute nor addressed in the paucity of decisions interpreting this statute. *Black's Law Dictionary* defines bad faith as dishonesty of belief, purpose, or motive. *Black's Law Dictionary* (10th ed. 2014). In his Motion, Howard argues that Brenda's Petition to Determine Incapacity was filed in bad faith based upon the following: (1) the timing of the filing of the Petition to Determine Incapacity; (2) the relief sought by Brenda; and (3) that Howard himself filled a Petition for Voluntary Guardianship on June 1, 2017 after Brenda initiated the guardianship proceeding by filing a Petition to Determine Incapacity.

First, Brenda filed the Petition to Determine Incapacity on March 30, 2017, less than twenty-four hours after Howard filed the Petition for Dissolution of Marriage. According to court records, Brenda accepted service of process of Howard's Petition for Dissolution of Marriage on May 3, 2017. Additionally, during Brenda's testimony at trial, counsel for Howard asked Brenda if she knew that filing a petition to determine incapacity against Howard could stay the Divorce

Proceeding for up to three years, pursuant to Section 61.052(1)(b). Brenda stated that her first attorney brought this to her attention. Yet Brenda herself nevertheless signed the verified petition for determination of incapacity. When asked at closing about the short amount of time between the filing of the Dissolution of Marriage and the Petition to Determine Incapacity, counsel for Brenda called it a “coincidence”. This Court is gravely concerned and equally curious as to how Brenda discovered that Howard filed the Petition for Dissolution of Marriage and was able to rush to the courthouse to initiate her incapacity proceeding against Howard over a month, prior to even being served with process in the Divorce Proceeding.

Second, in her Petition to Determine Incapacity, Brenda sought a plenary guardianship, meaning no rights whatsoever removable under Chapter 744 of the Florida Statutes could be retained by Howard. As evidence for the guardianship, Brenda stated that she believed Howard to be incapacitated because Howard did not take his medication, did not attend his doctor’s appointments, and showed poor judgment in managing his assets. However, during trial, only Brenda testified in support of her claims. No witnesses were called from any of Howard’s Physicians’ offices to corroborate that he failed to appear for any scheduled doctor’s appointments. There was little if any testimony or corroboration that addressed Howard’s inability to handle or oversee his assets, nor was there any indication that his assets were being depleted, wasted, or lost. Lastly, little evidence was presented by Brenda as to which medication Howard was not taking, how long Howard went without taking that medication and what effect if any the absence of the medication had on him.

Howard, on the other hand, called seven witnesses. The witnesses were former colleagues, work associates, his divorce attorney, and family members. Each and every witness testified that Howard was capacitated during their visits with him which coincided with the time frame Brenda alleges that Howard was incapacitated. Additionally, Howard submitted himself to a complete psychological examination by James Jordan, M.D., a psychiatrist, on April 22, 2017. In his report,

Dr. Jordan indicated that he found Howard to be capacitated. This report was provided to counsel for Brenda on June 1, 2017. Notwithstanding the findings of this report, Brenda continued with the incapacity proceeding.

Third, in the Memo, Brenda argues that Howard's filing of a Voluntary Guardianship should be considered an admission of Howard's inability to manage his assets, a claim stated by Brenda in her Petition to Determine Incapacity. However, Section 744.341, the voluntary guardianship statute, states

“[w]ithout adjudication of incapacity, the court shall appoint a guardian of a resident or non-resident person who, though mentally competent, is incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and has voluntarily petitioned for the appointment.”

§ 744.341(1), Fla. Stat. (2006).

This statute supports Howard's position that elderly individuals do not need to be deemed “incapacitated” to secure court oversight of the management of their affairs. Not only did the examining committee members find no indicia of Howard being incapacitated, but also Dr. James Jordan, whose opinion letter accompanied Howard's Petition for Voluntary Guardianship and was marketed into evidence, concluded Howard was neither incapacitated nor incompetent. Howard also cites to *Bryan v. Century Nat'l Bank*, 498 So. 2d 868 (Fla 1986), wherein, the Florida Supreme Court held that the voluntary guardianship statute as amended, contemplates a cooperative relationship between guardian and ward, and is in effect solely for the ward's convenience and only so long as the ward should desire. In *Bryan*, the court found the petition for appointment of a voluntary guardian must be accompanied by a physician's certification that the ward is competent to understand the nature of the guardianship and the delegation of authority involved. *Id.* Here, there is no evidence to suggest Brenda ever had a discussion with Howard about a voluntary guardianship prior to filing the Petition to Determine Incapacity.

It is readily apparent to this Court that Brenda knowingly and inappropriately used Chapter 744 and more particularly, Section 744.331 to initiate an involuntary guardianship proceeding

when there was no basis in fact to support this undertaking. Filing and verifying that a person is incapacitated and in need of a plenary guardianship can be potentially devastating and have drastic consequences on an individual's life, liberty, and pursuit of happiness. As Section 744.1012 indicates:

the Legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of her or his civil and legal rights and that such a deprivation may be unnecessary. The Florida legislature further finds that it is always desirable to make available a least restrictive form of guardianship to assist persons who are partially incapable of caring for their needs.

Voluntary guardianships are a viable alternative that do not require a determination of incapacity and allows individuals who realize they need some assistance to be able to have their needs met. This distinction is significant since Section 61.052 contemplates barring the entry of a judgment of dissolution of marriage if a party to the proceeding is legally determined to be incapacitated. *See* § 61.052(1)(b), Fla. Stat. (2008). This Court can only conclude that Brenda's incapacity petition was filed solely before the Court to prevent Howard from securing a divorce from her when there was no evidentiary basis, factually or otherwise, to support or buttress this endeavor. Section 744.331(7)(c)(2) was enacted to preclude and establish consequences for a calculated or blind disregard for the functional remedy, mission, and purpose that the guardianship statute was created to address; that is individuals truly incapacitated and in need of a plenary guardianship. The guardianship legislation was never contemplated to be used as a tool, device, or artifice to preclude or delay a bona fide petition for dissolution of marriage.

This Court can only ask the rhetorical question: If Brenda was so concerned about Howard's welfare and well-being, why did she wait until after Howard filed a divorce petition to pursue a guardianship for Howard? It would appear to this Court that if such an endeavor was not undertaken with a bad faith motive, as identified by the Court, why was it not done prior to the

filing of Howard's divorce petition? Certainly, the causes for Brenda's concern did not suddenly and miraculously come to light for the first time during the twenty-four hour period that elapsed between March 29th when Howard filed for divorce and March 30th when Brenda sought a determination of incapacity.

Therefore, based on the foregoing, this Court concludes that Howard has provided enough evidence to support a finding of bad faith within the meaning of Section 744.331(7)(c)(2) of the Florida Statutes.

Accordingly, it is hereby:

ORDERED that Howard C. Forman's Motion to Assess Cost and Attorney's Fees Against Brenda Forman Pursuant to 744.331(7)(c)(2) is GRANTED.

It is FURTHER ORDERED, that the Howard C. Forman shall schedule a hearing regarding the reasonable amount of attorney's fees and costs to be imposed on Brenda Forman, unless the parties can otherwise agree. This Court retains jurisdiction to award attorney's fees and costs.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 2 day of March, 2018.



MARK A. SPEISER
CIRCUIT COURT JUDGE

Copies to:

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