

STORAGE NAME: h0719s1.rpp

DATE: April 8, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HBs 719, 1223 and 1439

RELATING TO: Guardians

SPONSOR(S): The Committee on Real Property & Probate, and Representatives Geller, Ritter and Hafner

STATUTE(S) AFFECTED: Creating s. 744.1085, and amending ss. 624.606, 744.3135, 744.3145, and 744.3675, Florida Statutes

COMPANION BILL(S): SB 1214

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE YEAS 7 NAYS 0
- (2) FINANCE & TAXATION
- (3) HEALTH & HUMAN SERVICES APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

CS/HB 719, 1223 & 1439, requires a blanket fiduciary bond in an amount not less than \$50,000 for each professional guardian and each employee of a professional guardian who has direct contact with a ward or a ward's assets; provides for educational requirements; provides for an annual audit; and requires a criminal history and credit check for professional guardians, but requires a waiver if the guardian is the spouse or child of the ward.

The bill redefines the term "surety insurance" to include a blanket fiduciary bond issued to professional guardians. The bill amends the provision for the physician's examination, for purposes of the annual guardianship plan. Professional guardians are excluded from described educational requirements.

Finally, professional guardians are forbidden to borrow or purchase property from their wards.

This bill will have a fiscal impact.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. Guardians generally

Chapter 744, Florida Statutes, recognizes that in certain situations it is necessary to appoint a guardian to assist a person 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. Section 744.102(8), Florida Statutes, defines the term "guardian" to mean a person who has been appointed by the court to act on behalf of a ward's person or property, or both. Section 744.102(15), Florida Statutes, (1996 Supp.), defines "professional guardian" to mean any guardian who receives or has at any time received compensation for services rendered to more than two wards as their guardian. However, a person serving as a guardian for two or more relatives is not considered a professional guardian. Section 744.309, Florida Statutes, provides that any resident of this state who is sui juris and is 18 years of age or older is qualified to act as guardian of a ward. Section 744.312, Florida Statutes, provides some guidance to the court in appointing a guardian.

2. Guardian application and investigation

Section 744.3125, Florida Statutes, requires every guardian to complete an application for appointment. This application must include the person's qualifications to serve as a guardian, the names of all wards for whom the person is currently acting as a guardian, the type of guardianship services being provided, i.e., limited or plenary guardian of the person or property or both. (This section does not apply to corporate guardians other than nonprofit corporate guardians or to public guardians.)

Section 744.3135, Florida Statutes, permits the court to require a prospective guardian to submit to an investigation of the guardian's credit history or an investigatory check by the National Crime Information Center and the Florida Crime Information Center systems, or both. This would be at the expense of the prospective guardian.

3. Educational requirements

Section 744.3145, Florida Statutes, requires each guardian appointed by the court to receive a minimum of 8 hours of instruction and training within one year after his or her appointment as guardian. The courses must be approved by the chief judge of the circuit court, and taught by a court-approved organization. However, the court may waive some or all of the educational requirements, or may impose additional requirements. Expenses incurred to satisfy the education requirement may be paid from the ward's estate, unless the court directs otherwise.

4. Bonding requirements

Section 744.351, Florida Statutes, provides for bonding of guardians. This section requires that every person appointed guardian of the property of a ward must file a bond with surety as prescribed in section 45.011, Florida Statutes, to be approved by the clerk. (Section 45.011, Florida Statutes, defines the term "bond with surety" to mean a bond with two good and sufficient sureties, each with unencumbered property not

subject to any exemption afforded by law equal in value to the penal sum of the bond or a bond with a licensed surety company as surety or a cash deposit conditioned as for a bond.) The bond must be conditioned on the faithful performance of all duties by the guardian, and the bond must be joint and several. However, this bond requirement may be waived by the court if the petitioner or guardian presents compelling reasons, or the court may require the use of a designated financial institution. See section 744.351(1), Florida Statutes, (1996 Supp.)

The penal sum of the bond is fixed by the court, but must be in an amount not less than the full amount of the cash on hand and on deposit belonging to the ward and subject to the control of the guardian, plus the value of the notes and bonds owned by the ward that are payable to the bearer. If, however, the size of the bond is burdensome, or for other cause, the court may order, in lieu of the bond or in addition to a lesser bond, that the guardian place all or part of the property of the ward in a designated financial institution under the same conditions and limitations as are contained in section 69.031, Florida Statutes. (Section 69.031, Florida Statutes, provides for designated financial institutions for assets in the hands of guardians, curators, administrators, trustees, receivers, or other officers, and provides for accountings.) This section was amended in 1996 to specify that a designated financial institution also includes a dealer, as defined in section 517.021(6), Florida Statutes, if the dealer is a member of the Security Investment Protection Corporation and is doing business in the state.

5. Reporting requirements

Section 744.362, Florida Statutes, requires each guardian to file with the court an initial guardianship report within 60 days after his appointment as guardian. The initial report for a guardian of the property consists of a verified inventory, while the initial report for a guardian of the person consists of an initial guardianship plan. Thereafter, the guardian must file an annual report in accordance with section 744.367, Florida Statutes. (This section requires a guardian of the property to file an annual accounting, and requires a guardian of the person to file an annual guardianship plan. The annual report is served on the ward and on the attorney for the ward, if any, and any other person the court directs.) Sections 744.3675, and 744.3678, Florida Statutes, provide a list of information which must be contained in the guardianship plan, and the accounting, respectively.

6. Audit requirements

Section 744.368, Florida Statutes, provides that the clerk of the circuit court must ensure that certain specified information is included in the reports. Within 90 days after the filing of the initial or annual guardianship report by a guardian of the property, the clerk must audit the verified inventory or the annual accounting, and advise the court of the results of the audit. Pursuant to section 744.369, Florida Statutes, the court must then review the initial or annual guardianship report. The court may appoint general or special masters to assist in this review function. If the court determines that a change is needed, section 744.371, Florida Statutes, requires the court, after a hearing with appropriate notice, to amend the plan or enter any other order necessary to protect the ward.

B. EFFECT OF PROPOSED CHANGES:

CS/HBs 719, 1223 and 1439 requires each professional guardian to post a blanket fiduciary bond in an amount not less than \$50,000, with the clerk of the circuit court. The bill requires each professional guardian to receive a minimum of 40 hours of instruction and training by October 1, 1998, or within 1 year after becoming a professional guardian, and requires a minimum of 16 hours of continuing education every 2 calendar years thereafter. Attorney's who are licensed to practice law in this state are exempted.

The CS provides for random audits of at least 0.5 percent of the annual account reports required to be filed with the court by professional guardians. Each circuit court must increase the annual financial return audit fees in an amount sufficient to defray the costs associated with conducting the random audits required by this bill.

The CS makes the credit and criminal investigations mandatory for professional guardians. The court must waive the credit and criminal investigations for a guardian who is the spouse or child of the ward. Current law provides that the credit and criminal investigations may be required by the court if it deems it necessary.

Finally, the CS provides that professional guardians may not purchase property or borrow money from a ward. Prior to 1996, guardians were not permitted to purchase property or borrow money from a ward. During the 1996 session, an amendment was passed on a bill permitting this activity, provided that a court authorized the sale or loan after a hearing to which interested persons are given notice, or the property is sold at a public sale and the guardian is a spouse, parent, child, brother, or sister of the ward or a cotenant of the ward in the property being sold. This CS would preclude this activity for "professional guardians" only.

The bill will take effect October 1, 1997.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill requires a blanket fiduciary bond, more education, and requires criminal and credit checks. This will arguably provide for better screening of potential guardians, resulting in less abuses and less need for actions against guardians.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. The bill requires clerks to conduct random audits, and requires the court to approve courses for education of guardians. The bill also requires a blanket fiduciary bond, and requires the guardian to show proof of the existence of the bond to the clerk.

- (3) any entitlement to a government service or benefit?

No.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

Yes. The bill provides for an increase in the annual financial return audit fees in an amount sufficient to defray the costs associated with conducting the random audits.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

Yes. See b. above.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Yes.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. The bill requires professional guardians to post a blanket fiduciary bond, to complete additional education requirements, and adds an audit function to the clerk's duties. In addition, the bill requires professional guardians to submit to credit and criminal investigations. The court must waive this requirement for a guardian who is the spouse or the child of the ward.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

The court.

- (2) Who makes the decisions?

The guardian with oversight of the court.

- (3) Are private alternatives permitted?

There are alternatives to guardianship in some circumstances. In addition, there are different kinds of guardianships available.

- (4) Are families required to participate in a program?

No.

- (5) Are families penalized for not participating in a program?

No.

- b. Does the bill directly affect the legal rights and obligations between family members?

The bill provides for additional accountability of guardians. Since a guardianship significantly affects the rights of the ward, it can affect the legal rights and obligations between the ward and other family members.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

The bill does not affect a "program", however, the bill does change the law relating to guardians. The courts have oversight of guardians.

- (2) service providers?

Professional guardians as well as non-professional guardians are subject to the oversight of the courts.

- (3) government employees/agencies?

The courts oversee guardianships.

D. SECTION-BY-SECTION RESEARCH:

Section 1.

Creates section 744.1085, Florida Statutes, relating to professional guardians.

(1) Provides that this section is in addition to any other provisions of the Florida Guardianship Law.

(2) Requires each professional guardian to post a blanket fiduciary bond of not less than \$50,000 with the clerk of the circuit court in the county in which the guardian's primary place of business is located, and to show proof of that bond in any other circuits in which s/he applies for appointment as a professional guardian.

The bond must be maintained by the guardian in an amount not less than \$50,000.

The liability of the provider of the bond shall be limited to the face amount of the bond, regardless of the number of wards assigned to the professional guardian.

Each employee of a guardian who has direct contact with the ward or the wards assets is subject to the provisions of this subsection.

Provides that the bond cover all wards assigned to the guardian at any given time, and be payable to the Governor of the State of Florida and his successors in office and conditioned on the faithful performance of all duties by the guardian. In form the bond must be joint and several.

This bond is in addition to any bonds required pursuant to section 744.351, Florida Statutes.

Excludes licensed attorneys, financial institutions and public guardians from the bond requirement.

(3) Requires each professional guardian to complete 40 hours of instruction and training by October 1, 1998, or within one year after appointment as a professional guardian, whichever is later. Each professional guardian must receive at least 16 hours of continuing education every 2 years thereafter.

The instruction and education must be completed through a course approved by the chief judge of the circuit court and taught by a court approved organization. The professional guardian will bear the expenses incurred to satisfy the educational requirements. The court may impose additional educational requirements. This subsection does not apply to licensed attorneys.

(4) Provides that in addition to the provisions in section 744.368, Florida Statutes, each clerk of the circuit court must conduct a random audit of at least 0.5 percent of the annual accounting reports required to be filed with the court by professional guardians. An audit may be conducted at the office of the clerk, and/or at the domicile of the ward and must include an inspection of all financial records and accounting statements, including, but not limited to, bank and brokerage statements, and receipts of all expenditures. The audit must include a field audit of assets purchased for the ward. The bill requires the professional guardian to cooperate with the clerk or the clerk's designee in completing the audit.

Each circuit court shall increase the annual financial return audit fees in an amount sufficient to defray the costs associated with conducting the random audits.

Section 2.

Authorizes the issuance of a blanket fidelity bond.

Section 3.

Directs the court to require professional guardians to submit to an investigation of the guardian's credit history and a criminal history check, at the expense of the guardian. This section requires the court to waive this requirement for a guardian who is the spouse or child of the ward.

Section 4.

Clarifies that the report of a physician who examined the ward must be no more than 90 days before the beginning of the applicable reporting period, since the guardianship plans are filed for the upcoming year.

Section 5.

Clarifies that the educational requirements set out in section 744.3145, Florida Statutes, do not apply to professional guardians.

Section 6.

Provides that "professional guardians" may not purchase property or borrow money from a ward.

Section 7.

Provides that this act will take effect October 1, 1997.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill may have a fiscal impact on the courts.

3. Long Run Effects Other Than Normal Growth:

Unknown.

4. Total Revenues and Expenditures:

Unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

The bill requires the court to approve the courses necessary to meet the education requirements. The court currently approves the existing educational requirements, however, the requirements for professional guardians is significantly increased. Therefore, there may be some additional impact on the courts.

2. Recurring Effects:

Local governments will experience a fiscal impact to the extent that the courts will be responsible for determining which guardians are professional guardians, and for monitoring professional guardians to ensure they have posted a fiduciary bond, have complied with the educational requirements, and have submitted to a criminal and a credit history check. A precise fiscal impact is unknown at this time.

The cost of the proposed field audits is indeterminable at this time, however, the bill requires that the annual financial return audit fees be increased to defer the cost of the audits. According to the Florida Association of Court Clerks, the audits would take approximately one week to perform, and the cost would depend upon the market rate in each circuit.

3. Long Run Effects Other Than Normal Growth:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Professional guardians will be responsible for the costs of the additional bond, as well as the initial and continuing educational requirements. The cost of the classes are different in each circuit, ranging from zero to approximately \$40.00 per 8-hour course. Some circuits offer 40 hours of education at a cost of \$250.00. The guardian will also be responsible for the cost of a criminal history and credit check.

The exact fiscal impact on the guardian is indeterminable at this time.

The bill requires that the annual financial return audit fees be increased to defer the cost of the audits.

2. Direct Private Sector Benefits:

The wards of the state should benefit from additional oversight and education of professional guardians.

3. Effects on Competition, Private Enterprise and Employment Markets:

The additional bonding requirement may be prohibitive to some guardians.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may be a local mandate. Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: . . . the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality

CS/HBs 719, 1223 and 1439 provides that each circuit court shall increase the annual financial return audit fees in an amount sufficient to defray the costs associated with conducting the random audits required by the proposed law. This bill would appear to fall within an exception to the local mandate preclusion by providing an enhancement to an existing tax source. The actual cost of this bill to circuit courts is not known at this time.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

As amended, the CS/HB 719, 1223 & 1439 **requires** a credit and criminal background check for professional guardians, and **precludes** a credit and criminal background check for a guardian who is a spouse or child of the ward. The CS does not address all other guardians, for purposes of credit and criminal background investigations. Currently, the law provides that the court may require these checks for any guardian. This results in an ambiguity with regard to whether or not a court may require a credit and criminal background check for a guardian who is not a professional guardian, or a guardian who is the spouse or child of the ward.

According to the Florida Department of Law Enforcement (FDLE), access to a non-Florida criminal history record by non-criminal justice agencies requires a state law approved by the United States Attorney General (FBI). The state law must require submission of fingerprints to FDLE for forwarding to the FBI. The existing language providing for an investigatory check by the National Crime Information Center may not be sufficient.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Real Property & Probate adopted three amendments to CS/HB 719, 1223 & 1439. The amendments changed the provision in the CS that would have required credit and criminal background investigations for all guardians. Pursuant to the CS, the credit check and criminal background investigation will be mandatory for professional guardians, and must be waived for a guardian who is the spouse or the child of the ward. The CS does not address any other guardian. See Comments section above.

The CS combines portions of HBs 719, 1223 and 1439.

HB 719 contains the following provisions:

--Requires professional guardians to post a blanket fiduciary bond;

--Requires 40 hours of instruction and training by October 1, 1998, or within 1 year after appointment; requires a minimum of 16 hours of continuing education every 2 calendar years thereafter;

--Makes the credit and criminal investigations mandatory; and

--requires a random fiscal field audit, and provides for an increase in the annual financial return audit fees to defray the costs of the audits.

HB 1223 contains the following provisions:

--Requires professional guardians to post a blanket fiduciary bond;

--Requires 40 hours of instruction and training by October 1, 1999 or within 2 year after appointment; requires a minimum of 16 hours of continuing education every 2 calendar years thereafter; and

--Requires that the annual report include, if applicable, the report of a physician who examined the ward no more than 90 days before the beginning of the applicable reporting period. Current law requires the examination 90 days before the end of the reporting period.

HB 1439 contains the following provisions:

--Removes the provision that the court may waive a bond in section 744.351(1), Florida Statutes;

--includes stocks and bank accounts in the list of assets of the ward which must be covered by the bond;

--removes the provision permitting the court, for good cause, to reduce the bond, or to release the surety;

--Provides that when it is expedient and necessary because the bond is burdensome, or for other cause, the court may order the use of a designated financial institution, in lieu of a bond or in addition to a lesser bond;

--Makes the credit and criminal investigations mandatory;

--Requires a fine for late filing of an annual report on the ward's finances or other required reports. The fine must not exceed 10% of the bond of the guardian;

--Permits the circuit court to charge an additional fee, not to exceed \$10 per application, for appointment as guardian, to be used to employ an additional investigator or to create a program to use volunteers to help monitor or oversee guardian cases;

--Adds a provision requiring the guardian to disclose whether the guardian received money or gifts in exchange for being utilized as a guardian; and

--Provides for a guardian mediation pilot project in the Department of Children & Family Services.

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VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

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