

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 702

SPONSOR: Health, Aging and Long-Term Care Committee, Senators Forman and Grant

SUBJECT: Public Guardianship

DATE: March 15, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Carter</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Fav/1 amendment</u>
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 702 creates the Statewide Public Guardianship Office (Office) to meet the needs of public wards. It is established within the Department of Elderly Affairs, but is not subject to the control, supervision, or direction of the department. The Office is delegated rulemaking authority. An executive director, to be appointed by the Governor, will head the Office and exercise administrative oversight over public guardians in terms of the management of the respective local offices and training of public guardians. Case-specific oversight of public guardians under the jurisdiction of the courts.

CS/SB 702 additionally requires the Office to submit an interim report and a proposed public guardianship plan annually to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the State Supreme Court. The Office is also required to submit annually, following submission of the guardianship plan, a status report with recommendations for addressing the need for public guardianship services and related issues, including the availability and efficacy of seeking Medicaid matching funds. The bill requires the Office to develop a guardianship training program, assisted by a curriculum committee that includes, but is not limited to, probate judges. Also, the Office may conduct or contract for demonstration projects to evaluate the feasibility or desirability of new approaches designed to preserve the civil and constitutional rights of persons of marginal or diminished capacity. The Office is given, upon request, access to medical, financial, or mental health records held by an agency or the court and its agencies that are needed by the Office to carry out its functions.

The bill provides that the circuit court under which a public guardian operates may require its random field audits and subjects the Office to audits by the Auditor General's Office. Funding for surety bonds, required of public guardians, is to be provided from funds of local public guardian offices rather than from the funds appropriated to the judicial circuits. The exemption from background screening granted to spouses and children petitioning for guardianship is repealed. The bill clarifies that the clerk of court is to be the recipient of the results of federal and state

fingerprint background checks and clarifies that the court must consider the results of the investigations in appointing a guardian.

This bill amends ss. 28.241, 744.369, 744.702, 744.703, 744.706, 744.707, 744.708, 744.709, 744.1085, 744.3135, Florida Statutes (F.S.); creates s. 744.7021, F.S.; and contains two undesignated sections of law.

II. Present Situation:

Chapter 744, F.S., provides guidelines governing guardianship in Florida. The term “guardian” is defined in s. 744.102, F.S., to mean *a person who has been appointed by the court to act on behalf of a ward’s person or property, or both*. A “ward” is defined as a person for whom a guardian has been appointed and may include a minor (i.e., a person under the age of 18 whose disabilities have not been removed by marriage or otherwise). There are numerous variations in guardianship, including but not limited to, plenary, nonprofit corporate, limited, professional or standby. *See* §744.102, F.S. The terms of a guardianship are outlined in letters of guardianship as follow:

Letters of guardianship shall be issued to the guardian and shall specify whether the guardianship pertains to the person, or the property, or both, of the ward. The letters must state whether the guardianship is plenary or limited, and, if limited, the letters must state the powers and duties of the guardian. If the guardianship is limited, the letters shall state whether or not and to what extent the guardian is authorized to act on behalf of the ward with regard to any advance directive previously executed by the ward. *See* § 744.345, F.S.

In 1986, the Legislature enacted the Public Guardianship Act (the Act) in Part IX of chapter 744, F.S. *See* ch. 86-120, L.O.F. Part IX of chapter 744, F.S., authorizes a judicial circuit to establish a public guardianship program in that circuit. The public guardianship program is a delivery system of guardianship services to certain persons. The Act authorizes the establishment of offices of public guardian for the purpose of providing guardianship services for individuals who have been adjudicated incapacitated, when the person meets specified income criteria¹, and when there is no family member, friend, or private guardian who is willing and able to act as the person’s guardian. More specifically, they may be persons with developmental disabilities, persons with mental illness, and the elderly who are in need of a limited or plenary guardian and who have been adjudicated incapacitated under either s. 415.1051, F.S., relating to protective services interventions when capacity to consent is lacking, or under s. 744.331, F.S., relating to procedures to determine incapacity. The term “incapacitated person” is defined as:

. . . a person who has been judicially determined to lack the capacity to manage at least some of his or her own property (e.g., administer or dispose of personal property, benefits or other income) or to meet at least some of the essential health and safety

¹Where the person is Medicaid eligible, exclusive of homestead and exempt property as defined in s. 4, Art. X of the *State Constitution*, and the ward’s income, from all sources, is less than \$4,000 per year; income from government programs is excluded from the income computation, as provided in s. 744.404(1)(b), F.S.

requirements (e.g., health care, food, personal hygiene or other care without which serious and imminent physical injury or illness is more likely to occur) of such person. See § 744.102(10), F.S.

Currently, the offices of public guardian operate under the judicial branch of state government. Of the twenty judicial circuits, six--the 2nd (Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla Counties), 11th (Dade County), 13th (Hillsborough County), 15th (Palm Beach County), 17th (Broward County), and 20th (Collier and Lee Counties)--have established and are operating an office of public guardian. Three of the six offices receive some state funding. In 1986, the Legislature established the Offices of Public Guardian for the Second and Seventeenth Judicial Circuits as pilot projects. In 1989, the Legislature provided funds for the 13th Judicial Circuit, Hillsborough County, to contract with Lutheran Ministries, a nonprofit organization, to serve as the Office of Public Guardian for that circuit. Total state funding of offices of public guardians for the current fiscal year approximates \$700,000. In general, revenues collected for funding of the programs come from a combination of county funds, various court filing fees, and funds from nonprofit organizations.

The office of public guardian performs both administrative and legal duties. The office is staffed, generally, with a public guardian who is the attorney and administrative officer, and may include, among others: a court counselor supervisor responsible for case management; court counselors who serve as case managers; an administrative specialist who provides accounting for wards' funds and administers the budget; and a secretary. The public guardian is appointed by the chief judge of the circuit and is answerable to the chief judge in all matters, either directly or through the trial court administrator. The office provides: (1) the attorney for the guardianship estate of wards that the public guardian is appointed to serve; (2) management of all ward's funds entrusted to the public guardian; (3) compliance with all requirements of the guardianship statute; (4) maintenance of a case management system to oversee the safety of the ward and the securing of services and entitlements; and (5) assistance to other judicial circuits when requested.

In 1995, the Office of Program Policy Analysis and Government Accountability (OPPAGA) reviewed the public guardianship program. In that report, OPPAGA recommended that the program be placed more appropriately somewhere other than in the State Courts System. Additional recommendations to the current structure included: (1) discontinuing state funding of existing offices and allow local governments to determine how guardianship services can best be provided to indigent persons; or (2) transferring responsibility for the office to an executive agency. *Review of Public Guardianship Within The State Courts System*, Office of Program Policy Analysis and Government Accountability, Sept. 6, 1995. A follow-up report was issued in 1997 in which OPPAGA concluded: (1) public guardianship is not a necessary function for state government; (2) the current allocation of state program funds is not based on a statewide evaluation that prioritizes and addresses statewide need; and (3) state funds are provided in only three circuits despite requests from chief judges in other circuits for state funded offices. Based on these findings, OPPAGA recommended that the Legislature discontinue state funding for the three public guardian offices primarily because of the inequitable allocation of state funding of judicial circuits. *Follow-Up Report on the Review of Public Guardianship Within the State Courts System*, Office of Program Policy Analysis And Government Accountability, July 1997.

Section 744.3135, F.S., was amended in 1997 to require professional guardians to submit to an investigation of the prospective guardian's credit history and an investigatory check by the National Crime Information Center and the Florida Crime Information Center systems by means of fingerprint checks by the Department of Law Enforcement and the Federal Bureau of Investigation. This provision took effect October 1, 1997, however, no criminal background checks have been performed since the requirement became law based on the assertion of clerks that the law does not specifically authorize them to receive the background screening results. No other state agency is designated to receive such results, a prerequisite of the Federal Bureau of Investigation for release of criminal history information about individuals.

III. Effect of Proposed Changes:

The bill amends existing guardianship law and creates the Statewide Public Guardianship Office to oversee the delivery system of guardianship services to indigent persons adjudicated incapacitated. Oversight of the various public guardianship programs currently in operation is moved from the circuit courts of the Judicial Branch to the Executive Branch of state government within the Department of Elderly Affairs, for administrative purposes only. The Statewide Public Guardianship Office will be administered by an executive director who will supervise the statewide public guardianship program and is charged with the responsibility of exploring innovative approaches to improving and enhancing representation of vulnerable state residents. The program will operate, at the local level, within the state circuit court structure.

Section-by-Section Analysis

Section 1. Amends s. 744.369, F.S., relating to judicial review of guardianship reports, to give the court 30 days, rather than 15 days, to review annual guardianship reports and to permit the courts to require the general or special master to conduct random field audits.

Section 2. Amends s. 744.702, F.S., providing legislative intent, to add language that expresses the intent to establish a statewide public guardianship office and to explicitly highlight *guardian advocates* as examples of guardianship alternatives that are a less intrusive means of assistance to individuals before their rights are removed through an adjudication of incapacity.

Section 3. Creates s. 744.7021, F.S., to establish the Statewide Public Guardianship Office within the Department of Elderly Affairs. The Office is delegated oversight responsibilities for all public guardians, within available resources, and is headed by the executive director. The department is required to provide administrative support and service to the Office to the extent requested by the executive director within the available resources of the department. The Office is not subject to the control, supervision, or direction of the department.

The executive director is appointed by, reports to, and serves at the pleasure of the Governor. The executive director must be a licensed attorney with a background in guardianship law and knowledge of social services available to meet the needs of incapacitated persons.

Specifically, the Statewide Public Guardianship Office is directed to:

- Review the current public guardian programs in Florida and in other states;

- In consultation with local guardianship offices, develop statewide performance measures and standards;
- Review the various methods of funding guardianship programs, the kinds of services being provided by the programs, and the demographics of the wards;
- Review and make recommendations regarding the feasibility of recovering a portion or all of the costs of providing public guardianship services from the assets or income of the wards;
- Submit an interim report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the State Supreme Court by October 1, 2000, describing the progress of the Office in meeting the goals, as described in this section;
- Submit, no later than October 1, 2001, a proposed public guardianship plan, including alternatives for meeting the state's guardianship needs to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the State Supreme Court. The plan may include recommendations for less than the entire state or a phase-in system, and must include estimates of the cost of each of the alternatives. Subsequent to submission of the plan, the Office must report annually on the status of plan implementation and provide further recommendations to address the need for public guardianship services and related issues;
- Review and make recommendations in the annual report on the availability and efficacy of seeking Medicaid matching funds;
- Diligently seek ways to use existing programs and services to meet the needs of public wards; and
- Develop, through the use of a curriculum committee which must include at least one probate judge, a guardianship training program that may be offered to all guardians whether public or private. A fee may be charged to private guardians to defray the cost of providing the training. Training providers may be assessed a fee for up to the amount of the actual cost of evaluation (review) and approval of their respective curriculum. Fees collected relating to training must be deposited into the Department of Elderly Affairs Administrative Trust Fund and used for the guardianship training program.

Additionally, upon request of the Office, any medical, financial, or mental health records held by an agency or the court and its agencies necessary to evaluate the public guardianship system, to assess the need for additional public guardianship offices or services, or to develop the mandatory annual report that the Office is charged with producing must be provided to the Office. Also, the Office may assist local governments or entities in pursuing grant opportunities and it may conduct or contract for demonstration projects, within funds appropriated, or through gifts, grants, or contributions for such purposes, to determine the feasibility or desirability of new concepts of organization, administration, financing, or service delivery designed to preserve the civil and constitutional rights of indigent persons of marginal or diminished capacity due to the infirmities of aging or other physical, mental, or emotional dysfunction. The Office is authorized to adopt rules, in accordance with the requirements of chapter 120, F.S., the Administrative Procedures Act, to carry out the provisions of this section of the bill.

Section 4. Amends s. 744.703, F.S., to transfer from the chief judge of the judicial circuit to the executive director of the Statewide Public Guardianship Office (in consultation with certain persons), the authority to establish offices of public guardian and to appoint public guardians. The executive director may appoint or contract with a public guardian from a list of candidates determined to be best qualified to serve as public guardians in the affected county or judicial

circuit. The executive director must *notify* the chief judge of the judicial circuit and the Chief Justice of the State Supreme Court, in writing, of any appointment of a public guardian

Public guardians are appointed for 4-year terms. At the end of the 4-year term, the executive director must review the appointee and may reappoint the appointee for a term of up to 4 years. The law is amended to authorize the executive director to suspend a public guardian with or without request of the chief judge of the judicial circuit in which the public guardian is serving. When a public guardian is suspended, the executive director is required to appoint an *acting* public guardian as soon as possible to serve until a permanent replacement is selected. The executive director may remove a public guardian from office after consulting with the chief judge of the judicial circuit that the public guardian serves. The executive director must consider a recommendation of removal made by the chief judge of the judicial circuit in which the public guardian serves.

Public guardians serving on October 1, 1999, who were appointed by a chief judge of a judicial circuit of the state in accordance with existing law, may continue to serve until the expiration of their terms pursuant to their respective agreements. Oversight of all public guardians is transferred to the Statewide Public Guardianship Office on the effective date of the bill and the executive director of the Office is delegated all future appointment authority as provided in the bill.

Section 5. Amends s. 744.706, F.S., to redesignate the Statewide Public Guardianship Office as the entity to which public guardians are required to submit their budgets for purposes of securing appropriate budgetary information to be submitted in the legislative budget request for the Department of Elderly Affairs. The Department of Elderly Affairs is required to make a separate and distinct appropriation request for the Statewide Public Guardianship Office. Language that clarifies how the appropriations language is to be construed is expanded to allow the financing of operations of the office of public guardian by moneys raised through the efforts of the Statewide Public Guardianship Office.

Section 6. Amends s. 744.707, F.S., to place public guardians under the oversight jurisdiction of the Statewide Public Guardianship Office.

Section 7. Amends s. 744.708, F.S., providing report requirements and standards relating to public guardians, to transfer authority for receipt of: (1) public guardian annual reports; (2) reports on efforts by the public guardian to locate private-sector guardians for wards assigned and reports of assessment on ward's potential for restoration to capacity [to be submitted simultaneously to the clerk of the circuit court]; (3) audit reports from qualified certified public accountants and the Auditor General from the chief judges of the various circuit courts to the State Public Guardianship Office. Also, authority to increase or decrease the professional-to-ward ratio, currently 1 professional to 40 wards, is transferred from the chief judges of the various circuit courts, based on request of a public guardian or on the court's own initiative, to the Statewide Public Guardianship Office in consultation with the local public guardian and the chief judge of the circuit court of the judicial circuit pursuing such a change. The Statewide Public Guardianship Office annual report must include the rationale for changing the prescribed ratio. The term "professional" as applied to the staff of a public guardian is further clarified to exclude from its meaning the executive director of the Statewide Public Guardianship Office, in addition to anyone designated a public guardian.

Section 8. Amends s. 744.709, F.S., relating to surety bond requirements for public guardians, to clarify that the source of funds used to purchase a surety bond for a public guardian will be the local office of public guardian. The revision to this section avoids possible ambiguous interpretation as to whether it is the local judicial circuit or the Statewide Public Guardianship Office that is to purchase the required surety bond.

Section 9. Amends s. 744.1085, F.S., to transfer from the chief judges of the judicial circuits to the Statewide Public Guardianship Office the educational regulation of professional guardians and to transfer authority for offering courses for training professional guardians from the courts to the Office.

Section 10. Amends s. 744.3135, F.S., to expand the authority to conduct credit and criminal investigations of guardians to include *nonprofessional or public guardians* in addition to professional guardians. (A professional guardian is a guardian who has received compensation for services rendered to two or more wards as their guardians, excluding relatives.) This section eliminates the exemption from credit and criminal investigatory checks currently granted to spouses and children petitioning for guardianship of a relative. Additionally, this section designates the clerks of the circuit courts as the officials authorized to obtain fingerprint cards from the Federal Bureau of Investigation and to make such cards available to all guardians (i.e., nonprofessional or public, or professional guardians). Guardians who are either requested or required to undergo a criminal background check must have their fingerprints taken and submit the appropriate processing fee to the Florida Department of Law Enforcement. However, only professional guardians are required to pay a \$5 fee to the clerk of the circuit court, in the judicial circuit in which they are applying to serve as a guardian, for the handling and processing of their files. The respective clerks of the circuit courts are designated as the recipients of fingerprint check results and are required to make the results available to the court. When a credit or criminal investigation is required, the court must consider the results of the investigations in appointing a guardian.

Section 11. Amends s. 28.241, F.S., to increase the filing fee cap for civil actions in trial and appellate proceedings from \$10 to \$15 which may be imposed by counties, by ordinance or by special or local law, for establishing, maintaining, or supplementing a public guardianship program. The \$200 total cap on civil service charges and filing fees, as specified in subsection (1) of this section, may be increased up to \$210 for the same purpose.

Section 12. Appropriates a \$300,000 lump sum from the General Revenue Fund to the Department of Elderly Affairs to *carry out the purposes of the Act*.

Section 13. Moves, by a type two transfer, all powers, duties, and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds relating to the public guardianship program from the Circuit Court budget entity within the Judicial Branch to the Department of Elderly Affairs.

Section 14. Provides an October 1, 1999, effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

This bill provides for public agency custody, through offices of public guardian possession, of information of a sensitive, personal nature in the form of medical, financial, or mental health records of the wards of public guardians. Committee Substitute for Senate Bill 704, providing an exemption from the Public Records Law, complements this bill with the appropriate and necessary language for making confidential and exempt from the requirements of the Public Records Law those records held by the Statewide Public Guardianship Office relating to the medical, financial, or mental health of vulnerable citizens who are elderly or disabled adults, persons with developmental disabilities, or persons with a mental illness. Additionally, Committee Substitute for Senate Bill 704 contains the appropriate and necessary language to exempt from the Public Records Law records of credit and criminal investigations results required under s. 744.3135, F.S.

C. Trust Funds Restrictions:

The bill provides that fees collected to defray the cost of providing training of public guardians and gifts, grants, or contributions for program development to assist wards are to be deposited into the Department of Elderly Affairs Administrative Trust Fund for purposes of funding the training program. However, this trust fund is not established for purposes of funding public guardianship programs and activities. Therefore, this bill may actually create a trust fund that may be subject to the constitutional requirements for the creation of a new trust fund. A trust fund can only be created by a three-fifths vote of the membership of each house of the Legislature. *See* art. III, §19(f), Fla. Const. The trust fund must relate to the sole subject of the bill.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

A \$5 file handling and processing fee is required under section 9 of the bill, amending s. 744.3135, F.S., relating to management of background screening results received by clerks of court relating to professional guardians. The number of professional guardians in Florida is unknown. Therefore, an estimate of projected revenues generated by this fee is not possible.

In section 10 of the bill, amending s. 28.241, F.S., the cap on civil filing fees, specifically earmarked for the establishment, maintenance, or supplementation of a public guardianship program, is increased from \$10 to \$15. The increase does not take effect, however, until county government imposes it, by ordinance or by special or local law. Additionally, the

overall cap on all service charges and fees permitted relating to civil court filing fees is increased from \$200 to \$210 to accommodate support of public guardianship programs.

B. Private Sector Impact:

It is indeterminate how much dollar value of services elderly adults, disabled adults, the developmentally disabled, and individuals with mental illness who are incapacitated and who also are indigent will receive from representation by public guardians.

C. Government Sector Impact:

The bill should have a positive impact on the circuit courts' workload. The oversight responsibilities, contracting and hiring responsibilities, training program approval, and program administration responsibilities will be removed from the various chief judges of the circuit courts and transferred to the Statewide Public Guardianship Office.

Current appropriations for offices of Public Guardians are in the Circuit Court budget, administered by the State Courts Administrator. There are three circuits with offices of Public Guardians who receive state funding. Current appropriations for these offices in the Circuit Court budget total \$710,029. The bill provides for the transfer of this appropriation to be moved to the Department of Elderly Affairs' budget to continue the existing public guardianship offices. The bill also appropriates \$300,000 for establishing the Statewide Public Guardianship Office, and providing for personnel, equipment, and travel.

Clerks of court may incur additional costs associated with obtaining and providing Federal Bureau of Investigation fingerprint cards to all guardians, costs associated with maintaining the results of all fingerprint checks, and costs associated with handling, processing, and maintaining the files of professional guardians. However, the bill authorizes the clerks of the court to impose a \$5 file management fee from professional guardians which will support those activities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 12 of the bill provides for the "type two transfer" of all powers, duties, functions, property, and appropriations currently in the circuit court budget entity within the judicial branch to the executive branch, specifically, the Department of Elderly Affairs, for purposes of establishing the Statewide Public Guardianship Office. It is not certain whether this transfer is appropriate based on s. 20.06(2), F.S. Chapter 20, F.S., governs the organizational structure and re-organization of the executive branch. However, the term "agency" as defined in s. 20.03(11), F.S., is defined broadly to include "another unit or entity of government" and the term "state agency" as defined in s. 20.055, F.S., relating to establishing agency inspectors general, includes "the state courts system" such that the reference to a type two transfer may be appropriate for purposes of this bill.

VIII. Amendments:

#1 by Judiciary Committee:

This amendment to subsection (1) of section 744.703, F.S., adds that persons qualified to be public guardians by the Statewide Office of Public Guardian must include a credit and criminal investigation background check as set forth in s. 744.3135, F.S.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
