

STORAGE NAME: h0947.rpp
DATE: March 3, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
ANALYSIS**

BILL #: HB 947
RELATING TO: Guardianship
SPONSOR(S): Representative Crow
TIED BILL(S): none

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

- (1) REAL PROPERTY & PROBATE
 - (2) JUDICIARY
 - (3) GOVERNMENTAL RULES & REGULATIONS
 - (4) HEALTH & HUMAN SERVICES APPROPRIATIONS
 - (5)
-

I. SUMMARY:

This bill amends various provisions of Part IX of Chapter 744, (F.S.), relating to public guardianship. The "executive director" of the Statewide Public Guardianship Office (SPGO) is renamed as the "Statewide Public Guardian". The Louis de la Parte Florida Mental Health Institute at the University of South Florida is required to provide office space and support services for the SPGO. The Statewide Public Guardian is required to submit a proposed statewide public guardianship plan to the Governor and the Legislature by January 1, 2001.

Each judicial circuit will be required to establish an office of public guardian by July 1, 2001; and each circuit will be limited to one public guardian. A non-attorney public guardian must have an attorney on staff or available.

The Statewide Public Guardian may be appointed by a court to investigate any court-appointed guardian and to recover the cost of the investigation from the guardian. Certain wards may be required to reimburse the SPGO for guardianship services.

There are concerns regarding this bill; see the "Other Comments" section herein as well as the italicized portion of the "Section-by-Section Analysis". Some of the concerns are addressed in an amendment to be filed by the sponsor.

The Department of Elderly Affairs estimates that this bill represents an estimated recurring fiscal impact of \$1,533,317. No estimate of non-recurring costs has been provided, and there is a concern that this estimate may be low. See "Fiscal Comments" herein. This bill may also constitute a mandate, see "Applicability of Mandates Provision".

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill requires each of the 20 judicial circuits to establish an office of public guardian; entitles certain persons to the services of a public guardian; and provides that the Statewide Pubic Guardianship Office may investigate the activities of a court appointed guardian.

B. PRESENT SITUATION:

For present situation specific to each section of this bill, see "Section-by-Section Analysis".

State Guardianship Law, In General

A "guardian" is "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."¹ A "ward" is "a person for whom a guardian has been appointed."² A person will only become a ward if that person is an "incapacitated person", which is "a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person."³ Guardianship is the legal process of determining the necessity of appointing a guardian for a ward, and monitoring and supervising that appointment. There are many variations in guardianship, including plenary,⁴ limited, nonprofit corporate, professional or standby. While many wards are elderly, wards are also persons with developmental disabilities, persons with mental illness, and persons with severe medical problems.

In general, any adult person may be appointed as a guardian, except that appointment of a non-resident guardian is restricted and certain persons are prohibited from acting as a

¹ Section 744.102(8), F.S.

² Section 744.102(19), F.S.

³ Section 744.102(10), F.S.

⁴ "Plenary" is defined by Black's Law Dictionary as "full, entire, complete, absolute, perfect, unqualified".

guardian.⁵ In many guardianships, a close relative or friend of the ward acts as guardian, often waiving the fees that he or she would be entitled to earn as guardian. When no friend or relative is available to act as guardian, and the assets of the ward are sufficient, a professional guardian may be appointed.

Professional Guardians

A "professional guardian" is "any guardian who receives or has at any time received compensation for services rendered to more than two wards as their guardian. A person serving as guardian for two or more relatives . . . is not considered a professional guardian."⁶ A professional guardian must submit to credit and criminal history background checks. No state agency has oversight authority over the conduct of professional guardians, the only oversight is by the local circuit court.

Public Guardianship

In 1986, the Legislature enacted the Public Guardianship Act (the Act) as Part IX of Chapter 744, F.S. The Act authorizes a judicial circuit to establish a public guardianship program in that circuit, for the purpose of providing guardianship services for individuals who have been adjudicated incapacitated, when the person meets specified income criteria,⁷ and when there is no family member, friend, or private guardian who is willing and able to act as the person's guardian.

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 executive director of the Statewide Public Guardianship Office. The office of public guardian provides: (1) the attorney for the guardianship estate of wards that the public guardian is appointed to serve; (2) management of all wards' 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.⁸

Currently, the offices of public guardian operate under the judicial branch of state government. Of the twenty judicial circuits, six have established and are operating an office of public guardian: the 2nd (Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla Counties), 11th (Dade County), 13th (Hillsborough County), 15th (Palm Beach County),

⁵ Section 744.309, F.S. Persons prohibited from acting as a guardian include convicted felons, persons with a record of abuse or neglect of children or the elderly, and medical providers to the ward.

⁶ Section 744.1002(15), F.S.

⁷ A public guardian may only be appointed if "the assets of the ward do not exceed the asset level for Medicaid eligibility, 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 public welfare programs, supplemental security income, optional state supplement, a disability pension, or a social security pension shall be excluded in such computation. However, a ward whose total income, counting excludable income, exceeds \$30,000 a year may not be served."

⁸ Senate staff analysis of companion bill SB 1048, February 9, 2000, at 5.

17th (Broward County), and 20th (Collier and Lee Counties). Three of the six offices receive some state funding. In 1986, the Legislature established an Office of Public Guardian for the Second Judicial Circuit and for the Seventeenth Judicial Circuit 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. In general, revenues collected for funding the programs come from a combination of county funds, various court filing fees, and funds from nonprofit organizations.⁹

Statewide Public Guardianship Office (SPGO)

In 1999, the Legislature established the Statewide Public Guardianship Office (SPGO) to oversee the delivery of guardianship services to indigent persons adjudicated incapacitated.¹⁰ Oversight of the various public guardianship programs already in operation when the SPGO was created was moved from the judicial branch to the executive branch.¹¹ The SPGO was placed under the Department of Elderly Affairs for administrative purposes only; it is not subject to the control, supervision, or direction of the department.¹²

The administrator of the SPGO is the executive director who supervises the statewide public guardianship program.¹³ The program operates, at the local level, within the state circuit court structure.¹⁴ 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.¹⁵

The Statewide Public Guardianship Office is authorized to:

- Review current public guardian programs in Florida and in other states;¹⁶
- Develop statewide performance measures and standards;¹⁷
- Review the various methods of funding guardianship programs; the kinds of services being provided by the programs; the demographics of the wards; and to review and make recommendations regarding the feasibility of recovering a portion

⁹ Senate staff analysis of companion bill SB 1048, February 9, 2000, at 2.

¹⁰ Chapter 99-277, L.O.F., Section 744.7021, F.S.

¹¹ Section 744.703(6), F.S.

¹² Section 744.7021, F.S.

¹³ Section 744.7021, F.S. The Department of Elderly Affairs reports that an executive director has been appointed by the Governor, but will not assume full responsibility until Spring 2000. Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000.

¹⁴ Section 744.703(1), F.S.

¹⁵ Section 744.7021(1), F.S.

¹⁶ Section 744.7021(2)(a), F.S.

¹⁷ Section 744.7021(2)(b), F.S.

or all of the costs of providing public guardianship services from the assets or income of wards;¹⁸

- 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 specific tasks assigned when it was created;¹⁹
- 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. Annually thereafter, the SPGO must report on the status of plan implementation and provide further recommendations to address the need for public guardianship services;²⁰
- Review and make recommendations in the annual report on the availability and efficacy of seeking Medicaid matching funds; and seek ways to use existing programs and services to meet the needs of public wards;²¹
- 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. The SPGO may charge fees for attending training programs and for evaluating and approving the training materials;²²
- Receive public guardian annual reports; receive reports on efforts by public guardians to locate private-sector guardians for wards assigned; receive reports on assessments of potential for restoration to capacity; and audit offices of the public guardian;²³
- Select the public guardian in any judicial circuit where an office of the public guardian exists.²⁴

Guardian Advocates for Developmentally Disabled Persons and Persons with Mental Health Disorders

¹⁸ Section 744.7021(2)(c), F.S.

¹⁹ Section 744.7021(2)(d), F.S.

²⁰ Id.

²¹ Section 744.7021(2)(e), F.S.

²² Section 744.7021(2)(f), F.S.

²³ Section 744.708, F.S.

²⁴ Section 744.703(1), F.S. Duly appointed public guardians serving on October 1, 1999, may continue to serve until the expiration of their terms pursuant to their respective agreements.

Chapter 393, F.S., provides for guardian advocates to represent the interests of persons with developmental disabilities. Guardian advocates, as provided in s. 393.12, F.S., are individuals or corporations qualified to act as guardians with the same powers, duties, and responsibilities required of a guardian under Chapter 744, F.S., or those defined by court order under s. 393.12, F.S., who are appointed by a probate court. A guardian advocate is appointed to represent a person with developmental disabilities when the person with developmental disabilities voluntarily petitions for the appointment of a guardian advocate or when the person lacks capacity to do some of the tasks necessary to care for his or her person, property, or estate.

Chapter 394, F.S., provides for guardian advocates to represent the interests of persons suffering from mental illness. The appointment of a guardian advocate is made by the administrator of a receiving facility or treatment facility²⁵ for mental illness. A guardian advocate is authorized to represent the interests of a mental health patient determined by a psychiatrist to be incompetent to consent to treatment when a guardian with authority to consent to mental health treatment has not been appointed. A guardian advocate appointed under Chapter 394, F.S., must meet the qualifications of a court-appointed guardian under Chapter 744, F.S., and must agree to the appointment. In selecting a guardian advocate, the court must give preference to a health care surrogate or a guardian with authority to consent to medical treatment, if one has already been designated. If a health care surrogate has not been designated, the court must choose a guardian advocate from persons listed in s. 394.4598(5), F.S.²⁶

C. EFFECT OF PROPOSED CHANGES:

See "Section-by-Section Analysis".

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 744.702, F.S., regarding the legislative intent of the Public Guardianship Act.²⁷

Present Situation: The legislative intent regarding public guardianship is stated as:

²⁵ A receiving facility is a public or private facility, excluding county jails, designated by the Department of Children and Family Services to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment. A treatment facility is a state-owned, state-operated, or state-supported hospital, center, or clinic designated by the Department of Children and Family Services for extended treatment and hospitalization, beyond that provided by a receiving facility, of persons who have a mental illness, including federal facilities for purposes of treating persons whose care is the responsibility of the federal Department of Veterans Affairs, and any private facility designated by the department when rendering treatment under the provisions of Chapter 394, F.S.

²⁶ Section 394.4598(5), F.S., provides that, in "selecting a guardian advocate, the court shall give preference to a health care surrogate, if one has already been designated by the patient. If the patient has not previously selected a health care surrogate, except for good cause documented in the court record, the selection shall be made from the following list in the order of listing: (a) The patient's spouse. (b) An adult child of the patient. (c) A parent of the patient. (d) The adult next of kin of the patient. (e) An adult friend of the patient. (f) An adult trained and willing to serve as guardian advocate for the patient."

²⁷ The Public Guardianship Act is Part IX of Chapter 744, F.S., ss. 744.701-.709, F.S.

The Legislature finds that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person, and such person does not have adequate income or wealth for the compensation of a private guardian. The Legislature intends through this act to establish the Statewide Public Guardianship Office, and permit the establishment of offices of public guardian for the purpose of providing guardianship services for incapacitated persons when no private guardian is available. The Legislature further finds that alternatives to guardianship and less intrusive means of assistance should always be explored, including, but not limited to, guardian advocates, before an individual's rights are removed through an adjudication of incapacity. The purpose of this legislation is to provide a public guardian only to those persons whose needs cannot be met through less drastic means of intervention.

Effect of Proposed Changes: Adds additional legislative findings and intent relating to the need for public guardianship services, specifically:

- It is against state policy to allow a person to be adjudicated incapacitated and fail to provide that person with a guardian to exercise those rights that the court finds should be delegated to a guardian;

Concerns arise that this language could be used to establish liability against the state for failure to provide services.

- It is against state policy to allow a person to be without the protection of guardianship because the person does not have adequate income or wealth for the compensation of a private guardian when such a person is functionally incapable of exercising the rights retained by persons determined to be incapacitated;
- The number of persons in the state in need of guardianship who are financially unable to afford the cost of a private guardian *constitutes a crisis* that must be addressed by the Executive and Legislative branches at the earliest possible date;

The Office of Program Policy Analysis and Government Accountability (OPPAGA) stated in 1997 that "public guardianship is not a necessary function for state government".²⁸ A 1995 study on public guardianship by OPPAGA noted a 1984 report regarding public guardianships that stated then that it was a public responsibility to pay for guardianship services,²⁹ yet 16 years later Florida still only provides minimal funding of public guardianships. "Crisis" is defined as "a condition of instability or danger, as in social, economic, political, or international affairs, leading to a decisive change."³⁰

- By July 1, 2001, an office of public guardian must be established in each judicial circuit, staffed to appropriately manage the demand for public guardianship services in each judicial circuit;

²⁸ Office of Program Policy Analysis and Government Accountability, Report No. 97-05, July 1997, at 1.

²⁹ Office of Program Policy Analysis and Government Accountability, Report No. 95-04, September 1995, at 29.

³⁰ Webster's Encyclopedic Unabridged Dictionary of the English Language.

- Each person who needs a guardian and who meets the income and asset limitations, established in state law, has access to the court to have his or her need for a guardian addressed;
- Persons requiring public guardianship are the responsibility of the state and the state should properly fund public guardianship services;

This language may be interpreted to mean that the state is totally responsible for all financial, medical, and social needs of any person qualifying as a person requiring public guardianship. The fiscal impact of such an interpretation could be substantial.

- The practice of courts requiring or appointing professional guardians to provide public guardianship services without remuneration discourages the establishment of private guardianship services by those who cannot afford to operate a professional guardianship business that is burdened with non-fee-producing public guardianship services which creates a crisis in the availability of guardianship services for all economic levels of wards in the state;³¹
- There is an increasing need for guardianship services not only among the elderly, but among people of all ages, including those who are developmentally disabled;
- The Statewide Public Guardianship Office should be the provider of support for all public guardianship services through whatever agency or under whatever program these services are needed; and is not limited to providing guardian services to only elderly persons;
- The guardianship profession is largely unregulated and that in the interest of protecting the public, and in the interest of raising the standards and accountability of professional guardians, the law should provide for registration, licensure, and educational training requirements; and that licensure and regulation of professional guardians should be through and administered by the Statewide Public Guardianship Office;

To include regulation of professional guardians substantially enlarges the jurisdiction and regulatory function of the SPGO. There is a concern regarding adding additional responsibilities to the SPGO when the originally defined tasks for that office have not yet been accomplished.

- There is no agency available in the state for courts to turn to as a guardianship ombudsman;
- There are cases where guardians are appointed, often friends or family members, and the issue is raised either upon suggestion of the court or by petition of a third party as to the adequacy of the services provided by the guardian, and in which instance there is reason to believe that a disinterested agency should evaluate and report to the court concerning the propriety and appropriateness of the guardian's services; and

³¹ It is estimated that one-half of the caseload of professional guardians is non-paying. While some of those cases have been non-paying from the beginning, the more typical scenario is that a ward has run out of assets, but the professional guardian continues to provide services. Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, 17th Judicial Circuit, on February 28, 2000.

- It is in the best interest of wards that the Statewide Public Guardianship Office, as guardian ombudsman, have the authority, when appointed, to investigate the conduct of guardians and to report its findings to the court that has jurisdiction over the investigated guardian.

This process may raise conflict of interest issues.

Section 2. Amends s. 744.7021, F.S., regarding the Statewide Public Guardianship Office.

Present Situation: The Statewide Public Guardianship Office is managed by an executive director. The salary of the executive director is not specified.

Effect of Proposed Changes: This bill changes the title of “executive director” to “Statewide Public Guardian”, and provides that the Statewide Public Guardian is to be paid “at the same annual salary set by law for the public defender in each judicial circuit”.³²

This language could perhaps be interpreted to mean the total of all public defender salaries statewide.

Present Situation: The Statewide Public Guardianship Office is required to prepare an interim report by October 1, 2000, that describes the progress of the Statewide Public Guardianship Office in meeting the goals of the office. By October 1, 2001, the Statewide Public Guardianship Office is to submit a proposed public guardianship plan including alternatives for meeting the state’s guardianship needs. The plan may include recommendations for less than the entire state and for a phase-in period.

Effect of Proposed Changes: This bill deletes the interim progress report due on October 1, 2000, and changes from October 1, 2001, to January 1, 2001, the due date for a proposed public guardianship plan. That plan must include a plan for providing public guardianship services to the entire state, and may not include a phase-in system.

This bill eliminates the report and the plan, and simply implements public guardians statewide. It is unclear why this report is being eliminated and the program being started before the results of that report and plan can be reviewed and evaluated by the Legislature.

Present Situation: The Statewide Public Guardianship Office must develop a guardianship training program. The physical location of the office for the Statewide Public Guardian is not specified.

Effect of Proposed Changes: This bill provides that the Statewide Public Guardianship Office must be located at the Louis de la Parte Florida Mental Health Institute at the University of South Florida. The Institute must provide adequate office space and support services. The stated purpose of this location is to “facilitate development of guardianship training programs and the establishment of curriculum and in order to have the assistance of academicians in the area of mental health”. The Statewide Public Guardian may appoint advisory councils to assist with training

³² The FY 1999-2000 salary for a public defender is \$125,351.00.

programs and with the preparation of the statewide plan, council members are not compensated but may be reimbursed for expenses.

Present Situation: Local judges, with the assistance of local clerks of court, monitor and supervise guardians on a case-by-case basis. A guardian may be removed for cause.³³

Effect of Proposed Changes: This bill allows a court to appoint the Statewide Public Guardian to investigate and report to the court about the conduct of any guardian appointed by that court. The costs of the investigation may be assessed against the guardianship, regardless of the outcome of the investigation, if there are sufficient assets. Any fees collected are payable to the Department of Elderly Affairs Administrative Trust Fund to the account of the Statewide Public Guardian, which funds may be used by the Statewide Public Guardian to supplement the budgets of the public guardians throughout the state and to reimburse the Statewide Public Guardian's investigative costs.

Section 3. Amends s. 744.703, F.S., regarding the office of public guardian.

Present Situation: The executive director of the Statewide Public Guardianship Office may establish an office of the public guardian in any judicial circuit. The public guardian is appointed by the executive director after consultation with the chief judge and other circuit judges of the circuit.

Effect of Proposed Changes: This bill requires the Statewide Public Guardian to establish an office of the public guardian in every judicial circuit. The Statewide Public Guardian may appoint one person to act as public guardian in multiple judicial circuits, provided that each circuit must have "an open and adequately staffed office providing public guardianship services within each judicial circuit." There may only be one public guardian in a judicial circuit. An appointed public guardian who is not an attorney must have a staff attorney or a contract with an attorney "to perform the legal functions of the wards."

The phrase "open and adequately staffed" is not defined. The language that requires every office of public guardianship to have available an "attorney to perform the legal functions of the wards" could be interpreted to mean that an office of public guardian is required to provide wards with unlimited legal services.

Section 4. Amends s. 744.704, F.S., regarding the powers and duties of a public guardian.

Present Situation: A public guardian may serve as a guardian of a person found incapacitated in a guardianship action under Chapter 744, F.S. It is unclear whether a public guardian may be appointed as a guardian advocate under Chapter 393, F.S. (persons with developmental disabilities), or Chapter 394, F.S. (persons with mental health problems).

Effect of Proposed Changes: This bill provides that a public guardian may also serve as a guardian advocate, as defined by Chapter 393, F.S., or Chapter 394, F.S. This bill further provides that a public guardian may not be compelled to serve as guardian advocate under Chapter 394, F.S., if the public guardian does not have sufficient staff to accept the appointment.

³³ Section 744.474, F.S., lists 19 causes for removal of a guardian.

Present Situation: A public guardian may only be appointed if “the assets of the ward do not exceed the asset level for Medicaid eligibility, 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 public welfare programs, supplemental security income, optional state supplement, a disability pension, or a social security pension is excluded in such computation. However, a ward whose total income, counting excludable income, exceeds \$30,000 a year may not be served.”

Effect of Proposed Changes: This bill increases allowable assets to \$2,000 above the asset level for Medicaid eligibility, exclusive of homestead and exempt property; and increases allowable income, not including excluded categories of income, from \$4,000 to \$6,000.

Section 5. Amends s. 744.705, F.S., regarding the costs of a public guardian.

Present Situation: The costs of a public guardian may not be recovered from a ward.

Effect of Proposed Changes: This bill provides that a public guardian may seek reimbursement of costs from the assets of a ward. The petition or application for reimbursement is to be made with the annual accounting, or at such time as the public guardian expects the ward's assets to exceed the Medicaid asset limitation. The petition must be itemized, must show the method of charges for direct case management and charges for purely administrative functions, and must affirmatively show that all competing needs of the ward have been met and can reasonably be expected to be met in the coming reporting year. A cost award may not “exceed the average annual cost per award of providing guardianship services to all persons served by the public guardian.” If awarded and received, the funds are deposited in the Department of Elderly Affairs Administrative Trust Fund and credited to the account of the Statewide Public Guardianship Office to be made available to the Statewide Public Guardian to supplement the budgets of the public guardians.

A public guardian may only be appointed where the ward's assets do not exceed the asset level for Medicaid eligibility. Section 4 of this bill increases the asset limit to \$2,000 above the level for Medicaid eligibility, yet this section provides that assets in excess of the Medicaid eligibility level may be awarded to the public guardian to reimburse him or her for the costs and expenses of providing guardianship services. This section appears inconsistent with section 4 of this bill.

In cases where the public guardian is entitled to seek fees, the award may not exceed the “average annual cost per award”. Because no award may ever exceed the current average, every award of less than the average reduces the average to be used in the future; and eventually the average will be reduced to zero. It is unclear why this restriction is being proposed.

It is unclear what incentive any public guardian would have to file an application for reimbursement of costs, as the cost recovery, if awarded, is paid to the Statewide Public Guardianship Office, not to office of the public guardian that has to make the application.

Section 6. Amends s. 744.708, F.S., regarding reports and standards required of a public guardian, changing the title of “executive director” to “Statewide Public Guardian”, and making grammatical changes.

Section 7. Amends s. 744.709, F.S., regarding the surety bond required of a public guardian.

Present Situation: Upon taking office, a public guardian must file a surety bond.

Effect of Proposed Changes: This bill allows the chief judge of the judicial circuit to waive the bond requirement.

Section 8. Adds a new section to Chapter 744, F.S., regarding information held by the Statewide Public Guardianship Office.

Present Situation: "Discovery" is the process of obtaining information from other parties in litigation. The discovery process is governed by court rule. A "statement against interest" is governed by the evidence code. In general, an out-of-court statement offered to prove the truth of the statement is inadmissible as hearsay. A "statement against interest" is an out-of-court statement which "at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true."³⁴ A "statement against interest" is considered an exception to the hearsay rule, and accordingly such a statement may be admissible in a court proceeding if it otherwise meets the test for admissibility of evidence required by the evidence code.

Effect of Proposed Changes: This bill adds a new section of law, which provides:

In responses to surveys by the Statewide Public Guardianship Office as to whether patients or residents are unable to give informed consent for medical treatment or are unable to conduct their affairs, the opinions of any privately owned nursing home, group home, adult living facility, or hospital whose patients or residents receive public funds that contribute to the cost of their care are not subject to forced discovery in any action brought against them to admit their answers as an admission against interest.

That certain surveys or opinions of medical providers "are not subject to forced discovery" is unclear. It is uncertain whether this is a public records exemption, a rule of evidence, a court rule, or some combination thereof.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

"This bill does not appropriate any funding for the stated expansion of the Statewide Public Guardianship Office. However, Section 1, page 3, lines 30 and 31 states "the state should properly fund public guardianship services". Furthermore, in Section 2 (5), there are provisions to petition the guardian for fees if any impropriety is uncovered during the investigatory process; and, in Section 5 (3), there are provisions to petition for the recovery of some or all costs attributable to the administration of the

³⁴ Section 90.804(2)(c), F.S.

guardianship, within limits, from a ward's assets. Although data to develop the amount of revenue from [sic] these sources is not readily available, it is assumed the income will be minuscule compared to the estimated total cost incurred by the directives of HB 947."³⁵

2. Expenditures:

The Department of Elderly Affairs estimate of recurring expenses is:

Statewide Public Guardian	\$ 70,490
Allocated costs	31,299
Funding 14 new circuit offices	<u>1,431,528</u>
Total Estimated Recurring	<u>\$1,533,317</u>

Not included in the estimate were the possible expenses of the advisory council that the Statewide Public Guardian may appoint.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create any new fees or taxes, but counties currently may add a fee of up to \$15 to all court actions to be used for funding of a public guardian office.³⁶

2. Expenditures:

The fiscal impact on local governments has not yet been determined.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A ward whose assets increase in value above the statutory threshold may be charged for the services of the public guardian.

D. FISCAL COMMENTS:

Fiscal Comments by the Department of Elderly Affairs

This bill "has the capacity of having a significant fiscal impact to the Statewide Public Guardianship Office within the Department of Elder Affairs. This bill mandates the office to establish an office of public guardian in each of the remaining 14 judicial circuits, provide support for all public guardianship services through whatever agency or program these services are needed and for all age groups, develop a guardianship training program, administer the licensure and regulation of guardians, investigate the conduct of guardians,

³⁵ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000, at section VI.2.a.

³⁶ Section 28.241(1), F.S.

have oversight responsibilities for all public guardians, and appoint advisory councils which may be reimbursed for reasonably incurred expenses.”³⁷

This bill “increases the administrative workload without compensation for [the Department of Elderly Affairs]. Section 2 (5) and Section 5 (3) states all fees and any award collected for costs recovery must be deposited in the [department’s] Administrative Trust Fund and made available to the Statewide Public Guardian. Inasmuch as the University of South Florida must provide office space and support services, there are no provisions for compensation.”³⁸

Fiscal Comments by the Committee on Real Property & Probate

Fiscal responsibilities are unclear under this bill. The intent language states that it is the state’s responsibility to provide public guardianship services, but this bill requires local judicial circuits to establish an office of public guardianship. No funding source is identified in this bill. Fourteen of the 20 judicial circuits do not presently have any office of public guardian, and thus 15³⁹ new offices will have to be created. Presumably, any such new office will require office space, equipment, supplies, and employees. As to the 14 new circuit court offices, s. 43.28, F.S., provides that “[t]he counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the state, personnel necessary to operate the circuit and county courts.” The fiscal estimate provided by the Department of Elderly Affairs does not mention the non-recurring start-up costs of creating these 15 new offices,⁴⁰ nor is there any reimbursement to counties or circuits that currently have an office of public guardian for the value of equipment and supplies that are being assumed by the Office of the Statewide Guardian.

There is a concern that the fiscal estimate for recurring costs may be inaccurate. The state currently funds an office of the public guardian in 3 judicial circuits at a total cost of \$1.1 million, it is unclear how 14 judicial circuits can be funded at the estimated cost of only \$1.4 million. Some alternative calculations are:

- The estimate was based on funding the 14 judicial circuits in which an office of public guardian does not exist at the same rate as the smallest appropriation to an existing circuit-wide program. That smallest appropriation is the 13th Judicial Circuit, which has a population of 925,277 persons⁴¹ and a public guardian office budget of \$102,252, yielding a cost per resident for public guardianship services of \$0.11; which multiplied by state population of 14,915,980 yields an estimated statewide recurring cost of \$1,648,359 to fund an office of the public guardian in each judicial circuit.

³⁷ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000, at section VI.2.

³⁸ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000, at section VI.2.b.

³⁹ The 15th office is the required office for the Statewide Public Guardian at the University of South Florida.

⁴⁰ Examples of non-recurring costs expected of any new office include renovation of office space to meet needs of the office, advertising for employees, hiring expenses, furniture, equipment, supplies, utility and phone connections, letterhead, and the like.

⁴¹ July 1, 1998, estimate from the U.S. Department of Census.

- The office of the public guardian of the 2nd Judicial Circuit, however, with a population of 309,463 persons and a public guardian office budget of \$287,513,⁴² had a cost per resident for public guardianship services of \$0.93, which would equal \$13,858,000 statewide. Subtracting current expense of \$1.1 million yields a fiscal impact of \$12.8 million.
- Dade County operates an office of public guardian from county funds, their latest budget was \$1.9 million.⁴³ With a population of 2,152,437, the county had a cost per resident for public guardianship services of \$0.88, which would equal \$13,166,639 statewide. Subtracting current expense of \$1.1 million yields a fiscal impact of \$12.1 million.
- Utilizing the formula of the division (14 times a per-circuit expense), but utilizing the 2nd Judicial Circuit in the formula, yields a fiscal impact of \$4 million. Adjusting the formula to account for all circuits is \$287,513 times 20, minus current expense of \$1.1 million, which yields a fiscal impact of \$4.7 million.

Actual costs between judicial circuits is likely to vary widely based upon differing populations, numbers of elderly and others requiring services, the availability of family members to volunteer guardianship services, and income levels of residents.⁴⁴

The fiscal impact statement provided by the Department of Elderly Affairs assumes that the department will only have to fund a new office of public guardian in 14 of the 20 judicial circuits. However, only 3 circuits are currently state funded, and accordingly a multiplier of 17 may be appropriate. Alternatively, the current costs of the three non-state funded programs should be added to the fiscal estimate of establishing the new programs when using a multiplier of 14. One of those programs alone (Dade County) has an annual budget of \$1.9 million.

The fiscal impact statement provided by the Department of Elderly Affairs does not address the fiscal impact of adding guardian advocate responsibilities under Chapter 393, F.S., or Chapter 394, F.S., to the duties of the office of the public guardian.

The fiscal impact statement provided by the Department of Elderly Affairs does not address the fiscal impact of increasing the asset and income thresholds. It is likely that increasing the threshold levels will increase the number of wards who qualify to receive public guardianship services.

The fiscal impact statement provided by the Department of Elderly Affairs does not address the fiscal impact of creating training programs or investigatory functions.

⁴² Auditor General Operational Audit #13512, July 8, 1999.

⁴³ Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, 17th Judicial Circuit, on February 28, 2000.

⁴⁴ Hillsborough County is close to statewide averages in relevant categories. In 1995, the poverty rate for Hillsborough County was 16.5%, the statewide rate was 15.2%. In 1998, 13% of Hillsborough County was age 65 or greater, the statewide rate was 18%. Source: U.S. Census Bureau. Note too that the 2nd Judicial Circuit may have a disproportionate share of persons who qualify for appointment of a public guardian because the Florida State Hospital at Chattahoochee is within that circuit.

The cost per ward of public guardianship is approximately \$3,000 per year.⁴⁵

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill perhaps requires counties or municipalities to spend funds or to take an action requiring the expenditure of funds. Specifically, counties may be required to provide office space and may perhaps be required to fund the office of the public guardian. It is unclear whether the existing revenue raising authority at s. 28.241, F.S., is sufficient to offset these anticipated expenses. If this bill is a mandate, and does not meet the criteria for an exemption or exception, then it needs a statement of an "important state interest".

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities 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:

A. CONSTITUTIONAL ISSUES:

none

B. RULE-MAKING AUTHORITY:

none

C. OTHER COMMENTS:

Comments by the Department of Elderly Affairs⁴⁶

The Department of Elderly Affairs bill analysis provides:

Given Florida's growing elderly population and recent judicial directives to address the needs of Florida's developmentally disabled, the state needs a mechanism to provide services for some of its most vulnerable citizens. Often, persons adjudicated incapacitated have no one available to act as their guardian and no

⁴⁵ The 2nd Judicial Circuit cost for last year was \$2,514 per ward (from Auditor General Operational Audit #13512, July 8, 1999). The expected average annual cost per ward of the three state-funded public guardianship programs currently in existence, which includes the 2nd Judicial Circuit, is \$3,246 (from Governor's 2000-2001 Budget Recommendations).

⁴⁶ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000.

resources by which to obtain professional guardianship services. Without public guardianship services, these person are left with no ability to exercise fundamental civil rights.

In previous years, few state resources were dedicated beyond public guardianship demonstration projects. Through its legislative findings, this bill sets forth the state's policy on the importance of public guardianship, providing clear leadership and direction. The state-funded public guardianship pilot projects have operated for over a decade and clearly demonstrate the need for public guardianship services. This bill will make available public guardianship services in every judicial circuit. The revisions to the operations of the Statewide Office of the Public Guardian will enable the Statewide Public Guardian to perform its statutory mandates. The jurisdiction of the Statewide Public Guardian is clarified and broadened to provide public guardianship services to eligible individuals regardless of age. The bill expands the of the Statewide Office of the Public Guardian's authority to assist the courts in guardianship cases by acting as a guardianship ombudsman and providing investigatory authority. This will serve as a valuable sources of information to the courts to aid in monitoring guardianship cases. This oversight function should reduce and prevent incidences of guardianship abuses.

Comments by Interested Parties

Members of the Guardianship Law Subcommittee of the Elder Law Committee of the Florida Bar⁴⁷ reviewed SB 1048 (similar to this bill) and SB 1050. They "conceptually support" these bills, but make the following recommendations:⁴⁸

1. The Statewide Public Guardian should take the lead in convening a workgroup to develop and recommend to the legislature a unified plan for guardianship regulation. We acknowledge the tremendous administrative burden of guardianship regulation on the courts and urge that proposals for regulation be expedited.
2. The limits of the role of the Statewide Public Guardian regarding monitoring of other guardians should be defined within the existing framework of guardianship oversight found in Chapter 744.
3. Guardianship training development should utilize and acknowledge the work already done by the Florida Guardianship Coalition in developing curriculum standards.
4. As a matter of policy, the role of the professional guardian in providing pro-bono service to indigent wards should be acknowledged and encouraged.

⁴⁷ The expressed comments by this subcommittee is a compilation of the comments of the individual members of this subcommittee, and do not represent the formal legislative position of The Florida Bar. Only the Board of Governors of The Florida Bar may establish a formal legislative position for The Florida Bar.

⁴⁸ Letter from Mary Alice Jackson, of the Elder Law Section, February 24, 2000.

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5. The Statewide Public Guardian should be awarded reasonable fees as determined by the court to be paid from the property of the ward in accordance with the provisions of s. 744.108. F.S.

In noting that the 1999 legislation in this area requires the Statewide Public Guardianship Office to deliver an interim report on guardianship issues by October 1, 2000, and a plan for implementation of public guardians in all or some of the judicial circuits by October 1, 2001, practitioners in this area of the law suggest that it may be prudent to wait until the report and plan are in and can be reviewed.⁴⁹

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

J. Marleen Ahearn, Ph.D., J.D.

⁴⁹ Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, 17th Judicial Circuit, on February 28, 2000.