

STORAGE NAME: h0947s1.rpp

DATE: April 7, 2000

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

BILL #: CS/HB 947

RELATING TO: Guardianship

SPONSOR(S): Committee on Real Property & Probate and Representative Crow

TIED BILL(S): none

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

- (1) REAL PROPERTY & PROBATE YEAS 8 NAYS 0
 - (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; and an office of the public guardian is to be established in each judicial circuit by July 1, 2001.

The Statewide Public Guardian may be appointed by a court to act as a guardianship monitor and to recover fees from the ward's assets. Public guardians may be awarded fees from a ward's assets.

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 the estimate of recurring costs 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 expands public guardianship to all 20 judicial circuits; entitles additional persons to services provided by a public guardian; and provides that the Statewide Public Guardianship Office may be appointed as a guardianship monitor 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 of 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.

An 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. A public guardian is appointed by the executive director of the Statewide Public Guardianship Office. An 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

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), 17th (Broward County), and 20th (Collier and Lee Counties). Three of the six offices receive some state

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.

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

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

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.

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

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. 744.3145, F.S., regarding guardianship education requirements.

Present Situation: Each person appointed as a guardian must complete an 8 hour education course within 1 year of appointment. The chief judge of a judicial circuit is responsible for approving the course and the provider.

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."

Effect of Proposed Changes: Moves responsibility for approval of guardianship courses from judicial circuits to the Statewide Public Guardian.

Section 2. -- Amends s. 744.3215, F.S., regarding rights of persons incapacitated.

Present Situation: Section 744.3215(4), F.S., provides that a guardian may not, without specific court authority: commit the ward to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to Chapters 393, 394, or 397, F.S.; consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure, or to the participation by the ward in any biomedical or behavioral experiment; initiate a petition for dissolution of marriage for the ward; consent on behalf of the ward to termination of the ward's parental rights; or consent on behalf of the ward to the performance of a sterilization or abortion procedure on the ward.

Chapter 765, F.S., provides general provisions on health care advance directives, together with specific provisions on appointment of a health care surrogate; living wills; the administration of an withdrawal of life-prolonging procedures; and appointment of a proxy for withdrawal of life-prolonging procedures when no living will or designation of health care surrogate has been executed.

Effect of Proposed Changes: Further provides in s. 744.3215(4), F.S., that a guardian may not consent, or otherwise direct on behalf of the ward, to withdraw or withhold life-prolonging procedures without specific court authority, and that authority to withdraw or withhold life-prolonging procedures must be made in accordance with Chapter 765, F.S.

Section 3. -- 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:

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:

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

- 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;
- 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;
- The state should properly fund public guardianship services;
- In many instances, the appointment of professional guardians to provide pro bono public guardianship services is the only access indigent incapacitated persons have to guardianship services; and while pro bono services are not discouraged, in some instances the pro bono case load is as much as 50 percent, overburdening such professional guardians to the extent that their economic competitiveness is degraded, resulting in the undersupply of guardianship services;
- Guardianship regulation is currently the responsibility of the courts, that the administrative burden on courts of guardianship regulation should be relieved, and that accordingly the Statewide Public Guardian may convene a workgroup to develop a plan for regulation of professional guardians;
- 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
- 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.

Section 4. 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 as a public defender."²⁸

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

²⁸ The FY 1999-2000 salary for a public defender is \$125,351.00.

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 prior to the program being started and thus 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, developed by a curriculum committee. The physical location of the office for the Statewide Public Guardian is not specified.

Effect of Proposed Changes: This bill provides that the curriculum committee must, in developing a guardianship training program, utilize the recommended minimum content for the professional guardianship course developed by the Florida Guardianship Education Coalition. This bill further 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.²⁹ 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".

This bill further provides that the Statewide Public Guardian may establish an advisory council to assist with training programs and with the preparation of the statewide public guardianship plan. The advisory council must include one member each representing: circuit judges in probate and guardianship; the Real Property, Probate, and Trust Law Section of the Florida Bar; the Elder Law Section of the Florida Bar; the Florida Association of Public Guardians; licensed physicians practicing geriatric medicine; the office of the Attorney General as liaison on elder affairs or elder law; the State Office of Long-Term Care Ombudsman; academicians or researchers in the field of geriatrics who are on the faculty of a university; and elder or senior citizens or consumers from the elder or senior citizen community. All members of the council are appointed by the Statewide Public Guardian, except that the Governor appoints the member representing the elder or senior citizen or consumer from the elder or senior citizen community. Council members are appointed for four year staggered terms. Council members are not paid a salary or wage, but may be reimbursed for expenses to the extent that resources are available.

Present Situation: Local courts supervise guardians on a case-by-case basis. Section 744.107, F.S., provides that a court may, upon inquiry from any interested person or upon

²⁹ At the meeting of the Committee on Real Property & Probate on April 3, 2000, Representative Crow, the bill sponsor, noted that the University of South Florida has already prepared the office space necessary to comply with this requirement.

its own motion in any proceeding over which the court has jurisdiction, appoint a monitor. The monitor may investigate, seek information, examine documents, or interview the ward; and must report to the court his or her findings. The court cannot appoint as a monitor a family member or any person with a personal interest in the proceedings. Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report.

Effect of Proposed Changes: This bill allows a court to appoint the Statewide Public Guardian as a monitor under s. 744.107, F.S. The Statewide Public Guardian may appoint a designee to act as monitor, except that the public guardian for the circuit where the monitor is to be appointed may not be the designee. The Statewide Public Guardian may be awarded a reasonable fee by the court, payable from the ward's property.

Section 5. 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, although there must be "an office providing public guardianship services within each judicial circuit." An appointed public guardian who is not an attorney must be represented by counsel in all guardianship cases.

Section 6. 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 Chapters 393 and 394, F.S. This bill further provides that a public guardian may not be compelled to serve as guardian advocate under Chapters 393 or 394, F.S., if the public guardian does not have sufficient staff to accept the appointment.

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 7. 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: A public guardian may be awarded costs and fees payable from a ward in accordance with s. 744.108, F.S. (which section provides the general application procedure for an award of costs and fees to a guardian in a guardianship case).

Section 8. 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 9. 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 10. Provides an effective date of July 1, 2000.

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, [this bill] states ‘the state should properly fund public guardianship services.’ Furthermore, in Section [4], there are provisions to petition the guardian for fees if any impropriety is uncovered during the investigatory process; and, in Section [7], there are provisions to petition for the recovery of some or all costs attributable to the administration of the guardianship, within limits, from a ward’s assets. Although data to develop the amount of revenue form [sic] these sources in not readily available, it is assumed the income will be minuscule compared to the estimated total cost incurred by the directives of HB 947.”³⁰

³⁰ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000, at section VI.2.a.

2. Expenditures:

The Department of Elderly Affairs estimate of recurring expenses is:

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

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.³²

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Current law provides that a ward may not be charged for public guardianship services. Section 7 of this bill provides that a public guardian may be awarded fees by a guardianship court, payable from the ward's assets.

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, have oversight responsibilities for all public guardians, and appoint advisory councils which may be reimbursed for reasonably incurred expenses."³³

³¹ The Department of Elderly Affairs currently has funds budgeted for the salary of the executive director. This sum is the additional funds necessary to pay the Statewide Public Guardian at the same pay as a Public Defender, as required by this bill.

³² Section 28.241(1), F.S.

³³ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000, at section VI.2.

This bill “increases the administrative workload without compensation for [the Department of Elderly Affairs]. . . . Inasmuch as the University of South Florida must provide office space and support services, there are no provisions for compensation.”³⁴

Fiscal Comments by the Committee on Real Property & Probate

Fiscal responsibilities are unclear under this bill. The intent language states that the state “should properly fund public guardianship services”. 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 15³⁵ 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,³⁶ 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 low. 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 Thirteenth Judicial Circuit, which has a population of 925,277 persons³⁷ 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.
- The office of the public guardian of the Second Judicial Circuit, however, with a population of 309,463 persons and a public guardian office budget of \$287,513,³⁸ 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.

³⁴ Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000, at section VI.2.b.

At the meeting of the Committee on Real Property & Probate on April 3, 2000, Representative Crow, the bill sponsor, noted that the University of South Florida has already prepared the office space necessary to comply with this requirement.

³⁵ The 15th office is the required office for the Statewide Public Guardian at the University of South Florida.

³⁶ Examples of non-recurring costs expected of any new office include renovation of office space to meet the needs of the office, hiring expenses, furniture, equipment, office supplies, and utility and phone connections.

³⁷ July 1, 1998, estimate from the U.S. Department of Census.

³⁸ Auditor General Operational Audit #13512, July 8, 1999.

- Dade County operates an office of public guardian from county funds; its latest budget was \$1.9 million.³⁹ 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 Second 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.⁴⁰

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 court monitor functions.

The approximate cost per ward of public guardianship is \$2,500 per year.⁴¹

³⁹ Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, Seventeenth Judicial Circuit, on February 28, 2000.

⁴⁰ 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 Second 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.

⁴¹ The lowest known cost per ward is \$2,166 for Broward County, which operates a public guardianship program through the Barry University School of Social Work, although neighboring Dade County has the highest cost per ward of \$2,742 (from Michelle Yaffe, Broward County Court Guardianship Counsel, memo of March 9, 2000). The Second 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 Second Judicial Circuit, is \$3,246 (from Governor's 2000-2001 Budget Recommendations), although that cost perhaps includes administrative costs of the statewide public guardianship program not attributable to casework.

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 Affairs⁴²

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 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

⁴² Department of Elderly Affairs, 2000 Bill Analysis of HB 947, undated but received February 25, 2000.

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 Bar⁴³ reviewed SB 1048 (similar to this bill as first filed) and SB 1050. They "conceptually support" these bills, but make the following recommendations:⁴⁴

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.
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,

⁴³ 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.

⁴⁴ Letter from Mary Alice Jackson, of the Elder Law Section, February 24, 2000.

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.⁴⁵

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 3, 2000, the Committee on Real Property & Probate adopted one “remove everything after the enacting clause” amendment, that

- Adds a new section amending s. 744.3145, F.S., transferring from judicial circuits to the Statewide Public Guardian the approval of courses required to meet the guardianship education requirement.
- Adds a new section amending s. 744.3215, F.S., regarding the rights of wards, providing that a guardian may not consent to or otherwise direct on behalf of the ward to withdraw or withhold life-prolonging procedures without specific court authority, and that authority to withdraw or withhold life-prolonging procedures must be made in accordance with Chapter 765, F.S.
- Removes the following legislative findings:
 - 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.
 - 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.
 - Persons requiring public guardianship are the responsibility of the state.
 - The practice of courts requiring professional guardians to provide 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.
 - 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

⁴⁵ Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, Seventeenth Judicial Circuit, on February 28, 2000.

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.
- Modifies the legislative findings regarding pro bono services provided by professional guardians.
- Adds a legislative finding that guardianship regulation is currently the responsibility of the courts, that the administrative burden on courts of guardianship regulation should be relieved, and that accordingly the Statewide Public Guardian may convene a workgroup to develop a plan for regulation of professional guardians.
- Removes the phrase “open and adequately staffed” office in the provisions that require the Statewide Public Guardian to establish an office of the public guardian in every judicial circuit.
- Removes the language that requires a public guardian to have a staff attorney or a contract with an attorney “to perform the legal functions of the wards”.
- Modifies the provisions regarding payment of guardianship fees from the ward’s assets. The bill as filed provides that a public guardian may seek reimbursement of costs from the assets of a ward, provides the time and manner of the application, 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, and limits an award to “the average annual cost per award of providing guardianship services to all persons served by the public guardian.” The amendment simply provides that a public guardian may be awarded fees in accordance with s. 744.108, F.S. (which section provides the general application procedure for an award of costs and fees to a guardian).
- Removes the provision which provides that, 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.

One amendment to the amendment was adopted, regarding the advisory council that the Statewide Public Guardian may appoint, which provides that the advisory council must include one member each representing: circuit judges in probate and guardianship; the Real Property, Probate, and Trust Law Section of the Florida Bar; the Elder Law Section of the Florida Bar; the Florida Association of Public Guardians; licensed physicians practicing geriatric medicine; the office of the Attorney General as liaison on elder affairs or elder law; the State Office of Long-Term Care Ombudsman; academicians or researchers in the field of geriatrics who are on the faculty of a university; and elder or senior citizens or consumers from the elder or senior citizen community. All members of the council are appointed by the Statewide Public Guardian, except that the elder or senior citizens or consumers from the elder or senior citizen community appointment is by the Governor. Council members are appointed for four year staggered

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terms. Council members are not paid a salary or wage, but may be reimbursed for expenses to the extent that resources are available.

The bill, as amended, was reported favorably as a committee substitute.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

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