

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

B. EFFECT OF PROPOSED CHANGES:

The bill creates a limited exception to existing law that prohibits the bringing of any action to contest the validity of a trust before the trust becomes irrevocable. This limited exception will allow the guardian of the property of an incapacitated grantor to contest the validity of a revocable trust that is alleged to be invalid due to fraud, duress, mistake, or undue influence on the grantor at the time of execution of the trust documents.¹

Trusts

There are several different forms of trusts, and numerous types of property held by trusts. A trust is defined by statute as:

an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts; conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.05; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.²

The trustee of a trust and the personal representative of a decedent's estate are considered fiduciaries.³ The trustee has a fiduciary duty toward the beneficiaries of the trust to manage the trust properly to satisfy both the interests of the trust's income beneficiaries during the life of the trust and the interests of the remainder beneficiaries at the trust's termination.⁴

¹ Section 737.206, F.S., provides for the grounds to void the execution of a trust.

² Section 731.201(34), F.S.

³ Section 738.102(3), F.S.

⁴ Section 738.103, F.S.

A person may not bring an action challenging the validity of a trust until the trust becomes irrevocable.⁵ Revocable trusts, by definition, may be revoked or amended by the grantor by exercise of the grantor's reserved power to do so until such time the trust, by its terms, becomes irrevocable.⁶ However, when a grantor becomes incapacitated, he or she is unable to exercise that reserved power and revoke or amend a trust that may no longer be in his or her best interest.⁷

Florida Guardianship Law

Chapter 744, F.S., is the Florida Guardianship Law. This chapter establishes requirements for a variety of guardians including but not limited to, plenary, nonprofit corporate, limited, professional, private, public or standby.⁸ 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."⁹ A "ward" is "a person for whom a guardian has been appointed."¹⁰

In general, any adult person may be appointed as a guardian over a ward, except that appointment of a non-resident guardian is restricted and certain persons are prohibited from acting as a guardian.¹¹ In many guardianships, a close relative or friend of the ward acts as guardian, often waiving the fees that he or she is entitled to earn as guardian. Where no friend or relative is available to act as guardian, and the assets of the ward are sufficient, a professional guardian may be appointed.

Proposed Changes

Section 1 of the bill amends s. 737.2065, F.S., to provide a limited exception to the prohibition against challenges to trusts prior to the trust becoming irrevocable. The exception allows for challenges to a revocable trust by the guardian of the property of an incapacitated grantor.

Section 2 of the bill amends s. 744.331(6)(b), F.S., to combine existing provisions in paragraph (b) and paragraph (f) and to provide that the court must consider whether an alternative to guardianship exists that will sufficiently address the problems of the incapacitated person. Section 2 also amends s. 744.331(6)(f), F.S., to provide that, upon the filing by an interested person¹² of a verified statement with the court stating a good faith belief that the trust, trust amendment, or durable power of attorney of the incapacitated person is invalid, the trust, trust amendment, or durable power of attorney shall not be deemed an alternative to guardianship.

Section 3 of the bill amends s. 744.441(11), F.S., to provide that the court must find that bringing an action by the guardian of property of an incapacitated grantor contesting the validity of a trust prior to the trust becoming irrevocable is in the ward's best interest during his or her probable lifetime before authorizing a guardian to commence the proceeding. If the court denies the request, the court must also review the grantor's continued need for a guardian.

⁵ Section 737.2065, F.S.

⁶ A "grantor" is defined as "one who creates or adds to a trust and includes "settlor" or "trustor" and a testator who creates or adds to a trust." Section 731.201(17), F.S.

⁷ Section 744.102(10), F.S., defines "incapacitated person" as "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."

⁸ Section 744.102, F.S.

⁹ Section 744.102(8), F.S.

¹⁰ Section 744.102(19), F.S.

¹¹ 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 of the elderly, and medical providers to the ward.

¹² Section 744.1025, F.S., provides that definitions found in the Florida Probate Code are applicable to the Florida Guardianship Law. Section 731.201(21), F.S., of the Florida Probate Code defines "interested person" as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved."

Section 4 of the bill creates s. 744.462, F.S., to provide that any judicial determination concerning the validity of a ward's durable power of attorney, trust, or trust instrument must be promptly reported in the guardianship proceeding by the guardian. The court must review the grantor's continued need for a guardian if the trust was judicially determined to be valid.

C. SECTION DIRECTORY:

Section 1: Amends s. 737.2065, F.S., relating to trust contests.

Section 2: Amends s. 744.331(6), F.S., relating to procedures to determine incapacity.

Section 3: Amends s. 744.441(11), F.S., relating to powers of guardians.

Section 4: Creates s. 744.462, F.S., relating to judicial determination regarding alternatives to guardianship.

Section 5: Provides that the bill takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any significant impact on state revenues.

2. Expenditures:

The bill does not appear to have any significant impact on state expenditures. The Office of the State Courts Administrator advises that that there will be minimal impact on court operations and workload as a result of this legislation.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local governments' revenues.

2. Expenditures:

The bill does not appear to have any impact on local governments' expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides an avenue to allow guardians to better protect the assets of an incapacitated ward from the ongoing administration of a trust that was created by fraud, duress, mistake, or undue influence.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

At its March 15, 2004, meeting, the Committee on the Future of Florida's Families passed HB 1327 without amendment.

At its March 23, 2004, meeting, the Committee on Judiciary passed HB 1327 with one amendment. The amendment made a technical revision to the proposed changes in section 2 of the bill which amends paragraph (f) of subsection (6) of s. 744.331, F.S. The amendment revised the formatting of this section, but did not make a substantive change.