

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill increases requirements and duties for a number of entities, including guardians, the clerks of court, and the Statewide Public Guardianship Office, with the goal of reducing risk to those being served through the guardianship process. The bill also requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations.

Ensure lower taxes – The bill imposes a surcharge on non-criminal traffic infractions and criminal violations to fund a county's public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for a surcharge to all misdemeanors; a portion of which would be used to fund public guardianship programs, with the remaining portion going to the clerks of court as a service fee.

Safeguard individual liberty – The bill contains provisions designed to reduce risk to wards and ensure that they are better served by the guardianship process.

Empower families – The bill has the potential to increase the number of individuals able to access the services of a public guardian.

B. EFFECT OF PROPOSED CHANGES:

Guardianship and Public Guardianship

Guardianship is the process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions when they have not otherwise planned in advance for such a loss of capacity. Those individuals in need of guardianship may have dementia, Alzheimer's disease, a developmental disability, chronic mental illness or other such conditions that may cause functional limitations. A guardian may be an individual or corporation, appointed by the court to manage some or all the affairs of another.

Prior to a guardianship being established, it must first be determined that a person lacks the capacity required to make decisions concerning his or her personal and/or financial matters and that no other less restrictive alternatives exist. Any adult may file with the court a petition to determine another person's incapacity.¹ The court then appoints an examining committee consisting of three members, each of which examines the person and reports his or her findings to the court.² The court also appoints an attorney to represent the person alleged to be incapacitated.³ If the examining committee finds the person to be incapable of exercising certain rights, the court must determine whether the person is totally or partially incapacitated.⁴ Upon making such a determination, the court may appoint:

- A limited guardian, which is defined as a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of limited guardian;⁵ or

¹ See section 744.3201(1), Florida Statutes.

² See section 744.331(3), Florida Statutes.

³ See section 744.331(2), Florida Statutes.

⁴ See section 744.331(5) and (6), Florida Statutes.

⁵ See section 744.102(8)(a), Florida Statutes.

- A plenary guardian, which is defined as a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property.⁶

In the vast majority of cases that result in guardianship, the court will appoint a family member or close friend of the ward to act as guardian.⁷ However, when a family member or close friend is unavailable or unwilling to act as guardian, there are generally two options a court may use to provide assistance to the incapacitated person:

- A court may appoint a professional guardian to act on the ward's behalf. The professional guardian may, with the court's permission, use the assets of the incapacitated ward to pay himself or herself for guardianship services provided;⁸ or
- In instances where the incapacitated ward does not have enough assets to afford a professional guardian, a public guardian may be appointed. The government, many times in conjunction with local charities, pays for the guardianship services provided by a public guardian.⁹

Without the availability of public guardianship, many Florida residents who become incapacitated and have not preplanned would necessarily face medical and health decisions alone. With the rapid growth of the state's population and with the growing number of retirees, more and more individuals who may be indigent and have no willing or qualified family member or friend to serve as guardian will require the services of a public guardian.

Department of Elder Affairs and the Statewide Public Guardianship Office

In order to ensure that Florida's indigent and incapacitated citizens received appropriate public guardianship services, the 1999 Florida Legislature created the Statewide Public Guardianship Office (SPGO), which began operation in May of 2000. The SPGO is responsible for establishing local offices of public guardian and ensuring the registration and education of public and professional guardians.¹⁰ Currently, public guardianship services are provided to persons in 22 counties through 16 local offices of public guardian. During 2003, the 16 offices of public guardian served a total of 1716 wards.

In May 2003, the SPGO was transferred under the direct supervision of the Secretary of Elder Affairs. Appropriations for the SPGO are made within the Department of Elder Affairs (DOEA or the department) budget under the budget entity entitled "Consumer Advocate Services."¹¹

Public Guardianship Funding Through Court Filing Fees

Until July 2004, each county was authorized under section 28.241, Florida Statutes, to impose, by ordinance or by special or local law, a fee of up to \$15 for each civil action filed, for the establishment, maintenance, or supplementation of a public guardian. However, this authority was rescinded as part of the legislative implementation of constitutional Revision 7 to Article V of the State Constitution. Revision 7, adopted by the voters in 1998, required the state to shift primary costs and funding for the operation of the state courts system to the state and to reallocate other costs and expenses among the local governments and other users and participants in the state courts system. As part of this implementation, all filing fees for trial and appellate proceedings were regulated by the state, with a portion to revert directly to the Department of Revenue to be used to fund court proceedings. However, the former \$15 allowable additional expense that counties were authorized to implement in order to fund public guardianship programs was also removed.¹²

⁶ See section 744.102(8)(b), Florida Statutes.

⁷ See section 744.312, Florida Statutes.

⁸ See sections 744.102(16) and 744.334, Florida Statutes.

⁹ See section 744.703, Florida Statutes.

¹⁰ See section 744.7021, Florida Statutes and Chapter 99-227, Laws of Florida.

¹¹ See Chapter 2003-57, Laws of Florida.

¹² See Chapter 2003-402, Laws of Florida.

Guardianship Task Force

The 2003 Legislature created the Guardianship Task Force within DOEA, for the purpose of examining guardianship and incapacity and making recommendations to the Governor and the Legislature.¹³ The Task Force consisted of the following ten members:

- A judge with experience in guardianship proceedings appointed by the Florida Conference of Circuit Judges;
- A representative of the Association of Clerks of Court;
- A professor of law with experience in elder issues appointed by the Secretary of Elder Affairs;
- A representative of the Florida State Guardianship Association;
- A representative of the Florida Guardianship Foundation;
- A representative of the Real Property and Probate Section of The Florida Bar;
- A representative of the Elder Law Section of The Florida Bar;
- A professional with experience performing examination and determining incapacity;
- A representative of the Florida Banker's Association; and
- A citizen appointed by Florida AARP.

The Task Force was statutorily charged with recommending specific statutory and other changes for achieving best practices in guardianship and for achieving citizen access to quality guardianship services. The final report was submitted to the Secretary of Elder Affairs on January 1, 2005.

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The bill incorporates the recommendations of the Guardianship Task Force, the Florida State Guardianship Association, the Statewide Public Guardianship Office and the State Long-term Care Ombudsman Program within the Department of Elder Affairs. Specifically, the bill:

- Provides definitions for the terms “audit” and “surrogate guardians” and amends the definition of “professional guardian”. The change to the definition of professional guardian clarifies that professional guardians do not have to receive compensation in order to serve as professional guardians as long as they meet all statutory requirements.
- Clarifies the role of a surviving natural guardian and requires a court order for a natural guardian to use the ward’s funds to satisfy the guardian’s support obligation to the ward. The bill also increases the monetary threshold required for a court to appoint a guardian ad litem to review a settlement from \$15,000 to \$50,000. The changes regarding settlement values and associated actions have been recommended to further protect the interests of minors.
- Increases the initial length of time of an emergency temporary guardianship from 60 days to 90 days. Currently, emergency temporary guardians may be appointed for sixty days and the appointment may be extended for an addition thirty days, serving for no more than a total of ninety days. Since there are many cases in which this maximum of ninety days is not sufficient to properly serve the alleged incapacitated person, judges may be inclined to ignore the time limitation and extend the appointment beyond the ninety days. Therefore, this bill recommends a legislative change to allow the initial appointment period to last for up to ninety days, with an additional ninety-day extension. This change will allow for an emergency temporary guardianship to last for a maximum of one hundred and eighty-days.

In addition, the bill requires an emergency temporary guardian to file a final report consisting of an inventory, accounting, and residential, medical, and social information regarding the ward. Currently, most guardians, with the exception of emergency temporary guardians are required to report on the

¹³ See Chapter 2003-57, Laws of Florida.

status of the ward and the ward's assets, if applicable. This change will require emergency temporary guardians to submit reports as well.

- Requires a notice of hearing on petitions for the appointment of a standby guardian to be served on the natural parents or any current guardian unless notice is waived. The bill also requires standby guardians to submit to a credit and criminal investigation prior to the issuance of letters of guardianship.
- Provides that the term "health care decision" in section 744.3115, Florida Statutes, Advance Directives for Health Care, shall have the same meaning as "health care decision" in section 765.101, Florida Statutes.
- Allows guardians to use inkless electronic fingerprinting equipment for their fingerprint background checks in lieu of the traditional fingerprint card method. Inkless electronic fingerprinting equipment takes a person's fingerprint and a second computer onsite processes the required fees to a credit card. The results of the investigation could be e-mailed, within 48 hours, simultaneously to the clerk of the court and the SPGO. This would significantly lessen the burden on the clerks of the court who are required under the current statute to send the SPGO copies of every professional guardian's credit and criminal investigation. This change would also simplify the professional guardian's SPGO registration process and only require a guardian to have their fingerprints taken once. Many public employees already utilize this equipment to satisfy background investigations. This change would simply allow professional guardians to take advantage of this updated system. The current law requires that the only satisfactory method for a guardian's background check is by using a fingerprint card.

An additional added benefit of using inkless electronic fingerprinting equipment is that the system would automatically notify the clerk and the SPGO any time a new record was entered in its database relating to the individual fingerprinted. Therefore, the system would act as a perpetual background check, thereby offering additional protections to vulnerable wards. Currently, a guardian is only required to have a background check performed once every two years.

- Reduces the amount of time a non-professional guardian has to obtain the required hours of education from 1 year to 4 months. It has been determined to not be in the best interests of a ward to allow a guardian up to one (1) year from the date of his or her appointment to obtain the requisite non-professional guardian education. Shortening the time period to four (4) months for non-professional guardians to receive their education would assist the court in ensuring that non-professional guardians are aware of their duties and responsibilities in a timely manner and prior to their annual filing deadlines.
- Emphasizes the importance of an incapacitated person's right to quality of life, clarifies which rights cannot be delegated and reinforces the significance of the right to marry. The bill provides that the right to marry be subject to court approval so that a judicial determination can be made as to whether the ward understands the marriage contract and is not a likely victim of abuse or financial exploitation.
- Provides a procedure for the appointment of the court appointed attorney in incapacity proceedings. Court appointed attorneys in incapacity proceedings are required to be on an attorney registry compiled by the circuit's Article V indigent services committee and appointments must be made on a rotating basis, taking into consideration any conflicts of interest. In addition, court approval is required before an alleged incapacitated person substitutes his or her own attorney for the court appointed attorney and court appointed attorneys are required to have a minimum of 8 hours of initial education and continuing education.
- The bill also allows for professional guardians to serve as members of the examining committee; requires the clerk to send the notice of appointment of examining committee to each person appointed within 3 days of appointment; prohibits any member of the examining committee to serve as guardian for a person who was the subject of their examination; requires examining committee members to have a minimum of 4 hours of initial training and 2 hours of continuing education every two years; provides that the training should be developed under the supervision of the Statewide Public Guardianship

Office in consultation with the Florida Conference of Circuit Court Judges, the Elder Law and Real Property, Probate and Trust Law sections of the Florida Bar, the Florida State Guardianship Association, and the Florida Guardianship Foundation.

Each member of the examining committee is also required to submit a separate report which must include the date and time of the examination as well as the names of any persons present during the examination who provided responses. Attorney's fees are added to the costs that maybe assessed against a petitioner that files in bad faith.

- Requires a voluntary guardian to file a physician's certification with the annual accounting. The capacity of voluntary wards may diminish over time, and, as long as the wards sign consents for the actions that their guardians take, it is unlikely that the courts and the clerk's auditors will be in a position to question those actions. In order to ensure a voluntary guardianship remains voluntary, this section proposes language requiring the guardian to submit, with the annual report to the court, a certificate of a licensed physician specifying that he or she has examined the ward, within the previous 90 days. The certificate should include a statement that the ward remains competent to understand the nature of the guardianship and his or her delegation of authority. This section also requires a physician's certification to be filed with a notice of termination of voluntary guardianship. The certification must state that the ward is competent to understand the implications of terminating the voluntary guardianship.

- Requires a professional guardian or the guardian's professional staff to visit his or her wards at least once each calendar quarter. Currently, professional guardians are allowed to decide on a case-by-case basis when (or if) they need to visit their wards; they are not required by law to make personal visits. This puts the ward in a potentially hazardous situation. Public guardians are required to ensure that a professional staff person sees each ward at least four times a year. The bill would apply the same standard to professional guardians who are being paid from the assets of the ward. During this personal visit, the guardian or professional staff person must:

- Assess the ward's physical appearance and condition;
- Assess the appropriateness of the ward's current living situation; and
- Assess the need for any additional services and the necessity for continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct service, health, and personal care needs.

These personal visits will help ensure that each professional guardian is regularly updated on the needs of each of the vulnerable wards under his or her care.

- Requires the guardian to include trusts of which the ward is a beneficiary on the verified inventory. Whether to list a trust on an initial inventory has long been an issue for guardians, attorneys and the court. It has not always been clear if and when the court may have authority over trust assets and what responsibilities a guardian may have over them.

- Requires legal guardians of minor wards to submit an annual plan and specifies what is to be included in those plans.

- Clarifies that a guardian need not include a trust of which a ward is a beneficiary if the trust is not under the control of the guardian. The bill also addresses the "Check 21" change in federal law that provides that banks are no longer required to return canceled checks. Adding the language "other proof of payment" to the list of acceptable forms of documents guardians are required to maintain will keep Florida law consistent with the new federal law.

- Provides clerks of court with the authority to audit simplified and final accountings. Simplified accountings are to be filed when there are clearly defined limited transactions during the course of the year in a guardianship account. Final accountings are filed prior to discharge in guardianships. Currently, the clerk of courts does not have authority to audit simplified and final accountings, which creates the potential for fraud and exploitation.

- Allows professional guardians to designate a surrogate guardian. The responsibility of a guardian is a 24-hour, seven day a week undertaking. Professional guardians are always faced with a dilemma when they are unable to carry out their duties as guardian. For example, if the guardian has a death in his or her family and needs to leave town, or if the guardian simply wants to take a vacation, then there is nobody who can legally serve as guardian for the ward in the guardian's absence. In an effort to fill this void in the statute, the bill creates the concept of a "surrogate guardian." The surrogate guardian would be appointed by the court to act temporarily for the permanent guardian.
- Removes the 90-day ban on filing a petition for restoration to better reflect the legislative intent of section 744.1012, Florida Statutes. A suggestion of capacity should be filed whenever the ward has shown the ability to exercise some or all of the rights that were removed.
- Amends current language that provides that a final guardianship report does not need to be served on a ward that is "under 14 years of age" to "minor."
- Addresses concerns about guardianships remaining open well after the ward has passed away. The recommended language provides that a final report shall be filed no later than 45 days after service on the guardian of letters of administration or letters of curatorship. The proposed change will allow more flexibility to the guardian who needs to wait until an estate is filed, but at the same time will not allow the guardianship to remain open indefinitely after probate administration has commenced.
- Adds "mental health treatment" to the definition of health care decision in Chapter 765, Florida Statutes, unless otherwise stated in the advance directives. This provision keeps the statutes consistent with the intent that that advance directives should assist people to remain out of the guardianship system.
- Corrects an unintended consequence of Article V. Public guardians were not included in the group of entities exempt from payment of court-related fees. This is an undue burden on these programs that serve the indigent and incapacitated on behalf of the state. The public guardians should be added to the organizations (that include judges, state attorneys, guardians ad litem and public defenders, acting in their official capacity, and state agencies) that are exempt from all court-related fees and charges assessed by the clerks of the circuit courts.

C. SECTION DIRECTORY:

Section 1. Amends section 744.102, Florida Statutes, relating to definitions.

Section 2. Amends section 744.1083, Florida Statutes, relating to professional guardian registration.

Section 3. Amends section 744.301, Florida Statutes, relating to natural guardians.

Section 4. Creates section 744.3025, Florida Statutes, relating to claims of minors.

Section 5. Amends section 744.3031, Florida Statutes, relating to emergency temporary guardianship.

Section 6. Amends section 744.304, Florida Statutes, relating to standby guardianship.

Section 7. Amends section 744.3115, Florida Statutes, relating to advance directives for health care.

Section 8. Amends section 744.3135, Florida Statutes, relating to credit and criminal investigation.

Section 9. Amends section 744.3145, Florida Statutes, relating to guardian education requirements.

Section 10. Amends section 744.3215, Florida Statutes, relating to rights of persons determined to be incapacitated.

- Section 11.** Amends section 744.331, Florida Statutes, relating to procedures to determine incapacity.
- Section 12.** Amends section 744.341, Florida Statutes, relating to voluntary guardianship.
- Section 13.** Amends section 744.361, Florida Statutes, relating to powers and duties of a guardian.
- Section 14.** Amends section 744.365, Florida Statutes, relating to verified inventory.
- Section 15.** Amends section 744.367, Florida Statutes, relating to the duty to file an annual guardianship report.
- Section 16.** Amends section 744.3675, Florida Statutes, relating to the annual guardianship plan.
- Section 17.** Amends section 744.3678, Florida Statutes, relating to annual accounting.
- Section 18.** Amends section 744.3679, Florida Statutes, relating to the use of simplified accounting procedures in certain cases.
- Section 19.** Amends section 744.368, Florida Statutes, relating to responsibilities of the clerk of the circuit court.
- Section 20.** Amends section 744.441, Florida Statutes, relating to the powers of a guardian upon court approval.
- Section 21.** Creates section 744.442, Florida Statutes, relating to the delegation of authority.
- Section 22.** Amends section 744.464, Florida Statutes, relating to the restoration to capacity.
- Section 23.** Amends section 744.511, Florida Statutes, relating to the accounting upon removal of a guardian.
- Section 24.** Amends section 744.527, Florida Statutes, relating to final reports and application for discharge of guardian.
- Section 25.** Amends section 744.528, Florida Statutes, relating to the discharge of a guardian named as a personal representative.
- Section 26.** Amends section 744.708, Florida Statutes, relating to reports and standards.
- Section 27.** Amends section 765.101, Florida Statutes, relating to definitions.
- Section 28.** Amends section 28.345, Florida Statutes, relating to the exemption from court-related fees and charges.
- Section 29.** Amends section 121.091, Florida Statutes, relating to benefits payable.
- Section 30.** Amends section 709.08, Florida Statutes, relating to durable power of attorney.
- Section 31.** Amends section 744.1085, Florida Statutes, relating to the regulation of professional guardians.
- Section 32.** Reenacts section 117.107, Florida Statutes, relating to prohibited acts.
- Section 33.** Amends section 318.18, Florida Statutes, relating to amount of civil penalties.

Section 34. Creates section 938.065, Florida Statutes, relating to additional costs for public guardianship programs.

Section 35. Provides for an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill imposes a \$15 surcharge on non-criminal traffic infractions and criminal violations listed in section 318.17, Florida Statutes, to fund a county's public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an \$18 surcharge to all misdemeanors; \$15 of which would be used to fund public guardianship programs, with the remaining \$3 going to the clerks of court as a service fee.

According to the Department of Highway Safety and Motor Vehicles, in 2003, the traffic statistics for criminal traffic, non-criminal moving, and non-moving infractions were as follows:

Total Violations: 4,361,619
Guilty: 430,855
Pending Disposition: 287,903
Adjudication withheld by Judge: 513,658
Adjudication withheld by Clerk: 470,790

Total Collected: \$14,167,695
Guilty: \$6,462,825
Adjudication withheld by Judge: \$7,704,870

These numbers assume 100% collection, each county would utilize this mechanism for public guardianship funding, and that fines are imposed for each adjudication withheld.

The department estimates there is a minimum of 5,000 to 10,000 indigent and incapacitated persons per year that require the services of a public guardian. Currently, public guardians serve slightly over

1,700 of those individuals. The majority of the state does not have access to a public guardian, and even those areas that do have a public guardian, services are not readily available because the current office is at capacity. These provisions replace the public guardianship funding that was removed in July 2004 in implementing Article V revisions.

The number of misdemeanors where a fine would be imposed for 2003 was: 192,679. Multiplying that figure by \$15 (not the full \$18) results in a possible \$2,890,185 for public guardianship. Again, this assumes 100% collection.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES