

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Children and Families Committee

BILL: CS/CS/SB 1958

SPONSOR: Children and Families Committee, Judiciary Committee, Senators Saunders and Fasano

SUBJECT: Guardianship

DATE: April 25, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Sanford</u>	<u>Whiddon</u>	<u>CF</u>	<u>Fav/CS</u>
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>JA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute for the committee substitute for SB 1958 amends the Florida Guardianship Law, including implementing recommendations made by the Guardianship Task Force. It contains provisions addressing:

- Guardian ad litem appointments for minors;
- Appointments of emergency temporary guardians;
- Appointments of standby guardianships;
- Credit and criminal background checks of guardians, including inkless electronic fingerprinting;
- Time frames of educational requirements for guardians;
- Rights of an incapacitated person;
- Appointments of attorneys from attorney registries;
- Examining committee members in incapacity hearings;
- Voluntary guardianships;
- Quarterly visits by professional and public guardians;
- Filings of annual guardianship reports;
- Annual guardianship plans for minors;
- Delegation of authority to surrogate guardians;
- Removal of guardians; and
- Final reports upon the death of the ward.

The committee substitute for the committee substitute makes clarifying technical changes to fingerprinting language relating to guardians and to the requirements for annual accounting and continuing court supervision over certain trusts.

The committee substitute for the committee substitute provides that when a court is considering removing a guardian, and the guardian is a relative by blood or marriage, there is a rebuttable presumption that the guardian is acting in the ward's best interest.

This committee substitute for the committee substitute substantially amends the following sections of the Florida Statutes: 28.345, 121.091, 709.08, 744.102, 744.1083, 744.1085, 744.301, 744.3031, 744.304, 744.3115, 744.3135, 744.3145, 744.3215, 744.331, 744.341, 744.361, 744.365, 744.367, 744.3675, 744.3678, 744.3679, 744.368, 744.441, 744.464, 744.474, 744.511, 744.527, 744.528, 744.708, and 765.101. This committee substitute for the committee substitute creates the following sections of the Florida Statutes: 744.3025, and 744.442. This committee substitute for the committee substitute reenacts section 117.107(4), Florida Statutes.

II. Present Situation:

Overview of Chapter 744

Chapter 744 contains the Florida Guardianship Law.¹

Definitions

A guardian is defined as someone who has been court-appointed to act on behalf of a ward's person or property, or both.² An incapacitated person is defined 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."³ A professional guardian is a guardian who is or has been compensated for services given to more than two wards in a guardian capacity, unless the wards are certain relatives of the guardian.⁴ A standby guardian is a "person empowered to assume the duties of guardianship upon the death of adjudication of incapacity of the last surviving natural or appointed guardian."⁵ Neither "audit" nor "surrogate guardian" is defined in current law.

Professional Guardians

Professional guardians are required to register with the Statewide Public Guardianship Office (Office).⁶ Specific information is required on the registration form, depending upon whether the guardian is a natural person, professional partnership or association, or corporation.⁷ The Office is required to receive and review copies of credit and criminal investigations completed within the prior two years.⁸ Professional guardians are required to take a minimum of 40 hours of instruction and training, completed through a course approved or offered by the Office.⁹

¹ s. 744.101, F.S.

² s. 744.102(8), F.S.

³ s. 744.102(11), F.S.

⁴ s. 744.102(16), F.S.

⁵ s. 744.102(18), F.S.

⁶ s. 744.1083(1), F.S.

⁷ s. 744.1083(3), F.S.

⁸ s. 744.1083(4), F.S.

⁹ s. 744.1085(3), F.S.

Natural Guardians

Parents are jointly natural guardians of their children while the children are minors. If one parent dies, the surviving parent is still the natural guardian, even if he or she remarries.¹⁰ Natural guardians are authorized to settle any claim or cause of action accruing to any minor children for damages to person or property, where the amount is not more than \$15,000.¹¹

Guardians ad Litem for Minors

The court is authorized to appoint a guardian ad litem for a minor who has a claim in a personal injury, property damage, or wrongful death case when the claim exceeds \$15,000 and requires the appointment of a guardian ad litem in such cases when the claim exceed \$25,000.¹²

Emergency Temporary Guardians

In the interim between the time that a petition for determination of incapacity has been filed and the appointment of a guardian, the court may appoint an emergency temporary guardian for the person or property or both of the person who is the subject of the incapacity hearing. The court is only authorized to do so upon a finding of imminent danger to the person or that the property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.¹³ An emergency temporary guardianship expires the earlier of 60 days after appointment or when a guardian is appointed, but is extendable for up to 30 more days upon a showing that the emergency conditions still exist.¹⁴

Standby Guardianship

Upon petition or consent of parents or the surviving parent, a standby guardian for a minor may be appointed. The court is also authorized to appoint an alternate to act if the standby guardian is unable to serve after the death of the last surviving parent of the minor.¹⁵

Guardianship Appointment

All prospective guardians, other than for-profit, corporate guardians, must complete an application for appointment as guardian, which lists the person's qualifications to serve.¹⁶ The application must also contain a list of the names of all wards for whom the person is currently acting as a guardian.¹⁷

Credit and Criminal Investigation

The court is authorized to require a non-professional guardian, and must require a professional or public guardian, to submit to an investigation of the guardian's credit history and to undergo a background screening.¹⁸ Upon receiving credit or criminal investigation results of any public or

¹⁰ s. 744.301(1), F.S.

¹¹ s. 744.301(2), F.S.

¹² s. 744.301(4)(a), F.S.

¹³ s. 744.3031(1), F.S.

¹⁴ s. 744.3031(3), F.S.

¹⁵ s. 744.3041(1), F.S.

¹⁶ s. 744.3125(1) and (3), F.S.

¹⁷ s. 744.3125(2), F.S.

¹⁸ s. 744.3135, F.S.

professional guardian, the clerk of the court is required to forward copies to the Statewide Public Guardianship Office.¹⁹

Education Requirements for Public Guardians

Every person appointed by the court to be a guardian must complete at least eight hours of education within one year of appointment, except for a parent who is the guardian of the property of a minor child.²⁰ The court must approve this course.

Procedures to Determine Incapacity

While courts are required to appoint counsel to represent each person alleged to be incapacitated, there is no requirement that the appointment be made from any particular registry and no requirement that the attorney has completed any education in guardianship. There is no restriction on members of examining committees being subsequently appointed as a guardian for the person examined and no requirement for training for members of the examining committee.

Costs but not fees may be assessed against the petitioner if the petition is dismissed and the court finds that it was filed in bad faith.

Voluntary Guardianship

When a person who is mentally competent but who is incapable of the care, custody, and management of his or her estate petitions the court, a voluntary guardian of the property shall be appointed without an adjudication of incapacity.²¹ The petition must be accompanied by a physician's statement that he or she has examined the petitioner and that the petitioner is competent to understand the nature of the guardianship and the delegation of authority, but no time period is given for the examination. There is no requirement for a physician's statement in any annual report. A voluntary guardianship may be terminated by the ward by filing a notice with the court, without the requirement of a physician's statement.

Removal of Guardians

Guardians who are relatives may be removed only for listed reasons; guardians who are not relatives may be removed when doing so is determined by the court to be in the best interest of the ward.²²

Creation of the Statewide Public Guardianship Office and Guardianship Task Force

In 1996, the Florida Legislature created the Statewide Public Guardianship Office, which began operation in 2000. The purpose of the Office is to appoint local offices to provide guardianship services to indigent persons who do not have a family member or friend willing to serve as guardian and who cannot afford private guardians. The Office is also responsible for the registration of professional guardians and coordinates education for professional guardians.²³ In May of 2003, the Legislature additionally created a Guardianship Task Force within the Department of Elder Affairs for the purpose of examining guardianship and incapacity and

¹⁹ s. 744.3135(1), F.S.

²⁰ s. 744.3145(2), F.S.

²¹ s. 744.341(1), F.S.

²² s. 744.474, F.S.

²³ See the Statewide Public Guardian website at: <http://elderaffairs.state.fl.us/doea/english/public.html>

making recommendations to the Governor, Department of Elder Affairs Secretary, and the Legislature.²⁴ Task force meetings were held around the state from 2003 to 2004, during which time public testimony was taken. In the task force's final report, key areas targeted for improvement were noted.

Critical needs identified by the task force include:

- Uniform professional guardian education;
- Additional funding for public guardianship;
- Safeguarding minor's property;
- Uniform procedure for appointment of counsel;
- Increase pool of persons qualified to serve on examination committees;
- Flexibility in duration of emergency temporary guardianships, and
- Least restrictive alternative approach to ensuring the dignity of the ward.²⁵

Public Guardianship Program Study

The Statewide Public Guardianship Office commissioned a study to estimate the unmet demand for Public Guardianship Office services, and to determine costs of serving individuals in need of public guardians. The report, published in 2004, found the following:

- Only 16 public guardianship offices are currently operating in the state, and 51 of Florida's 67 counties have no public guardianship services;
- Between 5,000 and 10,000 persons are estimated to be in need of public guardians, but are unable to meet that need due to program shortages;
- Funding sources include state appropriations, local funds, and private donations; and
- About 80 percent of funding to individual offices is from sources other than direct funding by the Statewide Public Guardian Office.²⁶

III. Effect of Proposed Changes:

Definitions

This committee substitute for the committee substitute defines the term "audit" for the purposes of the Florida Guardianship Law as a systematic review of financial documents in accordance with generally accepted auditing standards. The term "surrogate guardian" is defined as a professional guardian who is designated by a guardian to exercise the powers of the guardian if the guardian is unavailable to act.

Professional Guardians

The executive director of the Statewide Public Guardianship Office is authorized to suspend or revoke the registration of a professional guardian if the guardian violates a provision of guardianship law.

²⁴ See s. 16, ch. 2003-57, L.O.F., (CS/SB 2568).

²⁵ *Guardianship Task Force Final Report 2004*, 7-11.

²⁶ *Public Guardianship Program Study 2004*, 1-18.

Natural Guardians

This committee substitute for the committee substitute clarifies that if a parent of a minor child dies, the surviving parent remains as the sole natural guardian even if he or she remarries. Regarding claims or causes of action on behalf of minor children, this committee substitute for the committee substitute clarifies that natural guardians are authorized to make certain financial decisions for minor children when the aggregate amount is not more than \$15,000. Natural guardians are precluded from using a ward's property for the guardian's benefit or to satisfy the guardian's support obligation to the ward without court approval.

Guardians ad Litem for Minors

- The court is authorized to appoint a guardian ad litem to represent the minor's interest, before approving a settlement in which a minor has a damages claim in which the gross settlement is more than \$15,000, and the court is required to appoint a guardian ad litem where the gross settlement is \$50,000 or more;
- The guardian ad litem appointment is required to be without the necessity of bond or notice;
- The duty of the guardian ad litem is to protect the minor's interests in accordance with Florida Probate Rules;
- A court is not required to appoint a guardian ad litem if a guardian has previously been appointed who does not have an adverse interest to the minor; however, a court may appoint a guardian ad litem if the court believes it necessary to protect the minor's interests; and
- The court is required to award reasonable fees and costs to the guardian ad litem, unless waived, paid against the gross proceeds of the settlement.

Emergency Temporary Guardians

- An emergency temporary guardian is required to file a final report within 30 days upon expiration of the guardianship;
- An emergency temporary guardian is a guardian for the property and, as such, must include certain information related to accounting and inventory in the final report;
- In instances where the emergency temporary guardian is a guardian of the person, the final report must include such information as residential placement, medical condition, mental health and rehabilitative services, and the social condition of the ward; and
- A copy of the final report must be provided to the successor guardian and the ward.

Standby Guardianship

- The court may appoint a standby guardian upon petition by the natural guardians or a legally appointed guardian;
- The court may also appoint an alternate if the standby guardian does not serve or ceases to serve;
- The court must serve a notice of hearing on the parents, next of kin, and any currently serving guardian unless notice is waived in writing or by the court for good cause shown; and
- The standby guardian must submit to a credit and criminal investigation.

Credit and Criminal Background checks:

- If a credit or criminal investigation is required, the court must consider investigation results before the appointment of a guardian;
- The court may require a credit investigation at any time;
- The clerk of the court is required to keep a file on each appointed guardian and to retain investigation documents, and is permitted to collect up to \$7.50 from each professional guardian for handling and processing of files;
- The court and the Statewide Public Guardianship Office are required to accept the satisfactory completion of a criminal background investigation by any methods stated in these provisions.
- A guardian complies with background requirements by paying for and undergoing an electronic fingerprint criminal history check or a criminal history record check using a fingerprint card. The results of the criminal history check shall be immediately forwarded to the clerk who will maintain the results in the guardian's file, and the Statewide Public Guardianship Office;
- A professional guardian is required to complete and pay for a level two background screening every five years, a level one background screening every two years, unless screened using inkless electronic fingerprinting equipment, and a credit history investigation at least once every two years after appointment;
- Effective December 15, 2005, all fingerprints electronically submitted to Department of Law Enforcement shall be retained as provided by rule and entered into the statewide automated fingerprint identification system, and shall also search all arrest fingerprint cards against those in the system, reporting any matches to the clerk of the court;
- The clerk of the court is required to forward any arrest records to the Statewide Public Guardianship Office within five days upon receipt;
- Guardians who elect to participate in electronic criminal history checks are required to pay a fee, unless the clerk of the court absorbs the fee;
- The Statewide Public Guardianship Office is required to adopt a rule detailing acceptable methods for completing a credit investigation, and may set a fee of up to \$25 to reimburse costs; and
- The Statewide Public Guardianship Office may inspect at any time the results of any credit or criminal history check of a public or professional guardian.

Education Requirements for Public Guardians

Guardians must complete instruction and educational requirements within four months upon appointment.

Procedures to Determine Incapacity

- Attorneys representing the ward must be appointed from an attorney registry compiled by the circuit's Article V indigent services committee and must, effective January 1, 2006, have completed a minimum of 8 hours education in guardianship.
- A member appointed is precluded from subsequently being appointed as a guardian of the person;
- Each member must file an affidavit certifying completion of course requirements or that they will be completed within four months upon appointment;

- The initial training and continuing education program must be established by the Statewide Public Guardianship Office, in conjunction with other listed entities;
- The committee's report must include the names of all persons present during the member's examination, the signature of each member, and the date and time each member examined the alleged incapacitated person.

Voluntary Guardianships

- A guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward no more than 90 days before the annual report is filed with the court, which certifies that the ward is competent to understand the nature of the guardianship and is also aware of the ward's authority to delegate powers to the voluntary guardian; and
- Where a ward files a notice of termination of guardianship with the court, the notice must include a certificate from a licensed physician who has examined the ward no more than 30 days before the ward filed the notice, certifying that the ward is competent to understand the significance of the termination.

Removal of Guardian

This committee substitute for the committee substitute provides that when a court is considering removing a guardian, and the guardian is a relative by blood or marriage, there is a rebuttable presumption that the guardian is acting in the ward's best interest.

Surrogate Guardians

- A guardian may designate a surrogate guardian if the guardian is unavailable, but the surrogate must be a professional guardian;
- A guardian must file a petition with the court requesting permission to designate a surrogate;
- Upon approval, the court's order must contain certain information, including the duration of appointment, which is up to 30 days, extendable for good cause; and
- The guardian is liable for the acts of the surrogate guardian and may terminate the surrogate's authority by filing a written notice with the court.

Other Provisions

An incapacitated person retains the right to receive necessary services and rehabilitation necessary to maximize the quality of life and the right to marry unless the right to enter into a contract has been removed, in which case the court must approve the right to marry.

Professional and public guardians are required to ensure that each of the guardian's wards is personally visited by the guardian or staff at least once every calendar quarter, unless appointed only as a guardian of the property. During the visit, the guardian or staff person must assess the ward's physical appearance and condition, current living situation, and need for additional services.

The annual guardianship report is required to be filed by April 1, rather than within 90 days after the end of the calendar year, which is current law.

Annual guardianship plans for minors must include information about the minor's residence, the medical and mental health conditions, and treatment and rehabilitation needs of the minor, and the minor's educational progress.

Property that is under the guardian's control, including any trust of which the ward is a beneficiary but not under the control or administration of the guardian, is not subject to annual accounting requirements.

If the ward dies, the guardian must file a final report with the court within 45 days after being served with letters of administration or curatorship, rather than the prompt filing requirement under current law.

Regarding the discharge of a guardian named as a personal representative for the ward's estate, any interested person may file a notice of a hearing on any objections filed by the beneficiaries of the ward's estate. If a notice is not served within 90 days after filing, objections are considered abandoned.

This committee substitute for the committee substitute takes effect July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The clerk of the court is required to receive additional fees and documents, but is authorized to collect a service charge for these tasks. The guardian ad litem is required to perform new duties relating to minors having claims for certain settlements.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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