

# 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.)

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Prepared By: Banking and Insurance Committee

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BILL: CS/SB 64

SPONSOR: Judiciary Committee and Senator Campbell

SUBJECT: Guardianship

DATE: February 21, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u><b>Fav/CS</b></u>
2.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u><b>Favorable</b></u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The committee substitute authorizes a guardian of the property of an incapacitated grantor to contest the validity of a trust as an exception to the general rule that an action to contest the validity of a trust may not be commenced until the trust becomes irrevocable.

The committee substitute prohibits a court from appointing a guardian for an incapacitated person if there is an alternative, such as a trust or durable power of attorney, which will sufficiently address the incapacitated person's problems. The validity, however, of the trust, trust amendment, or durable power of attorney may be challenged by an interested person who files a verified statement that provides a factual basis for the belief that an instrument is invalid. Additionally, the committee substitute provides that a court may appoint a guardian and allow the authority granted by a durable power of attorney to remain exercisable by an attorney in fact.

If a court denies the request of a guardian to contest the validity of a trust created by and for the benefit of a ward, the court must consider whether the guardian is needed to exercise the delegable rights of the ward. If a judicial proceeding determines that the ward's durable power of attorney, trust, or trust amendment is valid, or a petition is filed alleging that an alternative to guardianship exists, a court must consider whether a guardian is needed to exercise the delegable rights of the ward.

The committee substitute also strengthens a court's ability through court monitors to investigate guardianships and enter any necessary orders to protect a ward's health, safety, or property. The committee substitute permits the appointment of an emergency court monitor without notice to interested parties when immediate action is necessary to protect the ward.

This committee substitute substantially amends the following sections of the Florida Statutes: 737.2065, 744,107, 744.331, and 744.441. The committee substitute also creates sections 744.1075 and 744.462, Florida Statutes.

## II. Present Situation:

### Trusts

A “trust” is:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . The term[] . . . “beneficiary of a trust” signif[ies] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.<sup>1</sup>

A grantor is one who creates or adds to a trust and includes a settlor or trustor and a testator who creates or adds to a trust.<sup>2</sup>

### *Purposes of a Revocable Trust*

A revocable trust is a “trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income.”<sup>3</sup> This type of instrument is commonly used as a will substitute. Unlike a will, however, a revocable trust allows a settlor to use the trust property during his or her lifetime.<sup>4</sup>

### *Trust Contests*

Under s. 737.2065, F.S., the validity of a trust may only be contested after the trust has become irrevocable. According to the Real Property, Probate, and Trust Law Section of The Florida Bar, there have been instances where a settlor and beneficiary of a trust did not have the capacity to revoke a revocable trust procured by fraud, duress, mistake, or undue influence. In some of these cases, no person, including a guardian, was able to challenge the validity of the trust to protect the settlor beneficiary from financial harm.

### Guardianship

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.<sup>5</sup> A guardianship is:

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<sup>1</sup> 55A Fla. Jur. 2d Trusts s. 1 (database updated November 2004).

<sup>2</sup> Section 731.201(17), F.S.

<sup>3</sup> Black’s Law Dictionary (7th ed. 1999).

<sup>4</sup> WM. FLETCHER BELCHER, PROPOSED EXCEPTION TO EXISTING PROHIBITION AGAINST CONTESTING REVOCABLE TRUSTS, ACTIONLINE, Vol. XXV, No. 2, 11 (Winter 2003).

<sup>5</sup> Section 744.1012, F.S.

a trust relationship of the most sacred character, in which one person, called a “guardian,” acts for another, called the “ward,” whom the law regards as incapable of managing his own affairs.<sup>6</sup>

### ***Determination of Incapacity***

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. The petition must provide factual information that demonstrates that a person is incapacitated. The petition will also state the delegable rights that an alleged incapacitated person is incapable of exercising.<sup>7</sup> These delegable rights include the right to contract, sue and defend lawsuits, apply for government benefits, manage property, determine his or her residence, consent to medical treatment, and make decisions about the incapacitated person’s social environment.<sup>8</sup> If applicable, a petition for the appointment of a guardian must be filed with the petition to determine incapacity.<sup>9</sup>

After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.<sup>10</sup> If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.<sup>11</sup> If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.<sup>12</sup> The costs of a proceeding adjudicating a person as incapacitated will be paid by a guardian from the property of the ward.<sup>13</sup> If a petition for determination of incapacity is dismissed, the costs of the proceedings may be assessed against the petitioner.<sup>14</sup>

### ***Authority of a Guardian***

An order appointing a guardian must specify the specific powers and duties of the guardian and the delegable rights which have been removed from the ward.<sup>15</sup> The order must preserve an incapacitated person’s right to make decisions to the extent that he or she is able to do so.<sup>16</sup> A guardian is empowered with the authority to protect the assets of the ward and to use the ward’s property to provide for his or her care.<sup>17</sup> Some powers under s. 744.441, F.S., which may only be exercised by a guardian with court approval, include the power to:

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<sup>6</sup> 28 Fla. Jur. 2d Guardian and Ward s. 1 (database updated November 2004).

<sup>7</sup> Section 744.3201(1) and (2), F.S.

<sup>8</sup> Section 744.3215(3), F.S.

<sup>9</sup> Section 744.3201(3), F.S.

<sup>10</sup> Section 744.331(3), F.S.

<sup>11</sup> Section 744.331(4), F.S.

<sup>12</sup> See s. 744.331(6)(b) and (f), F.S.

<sup>13</sup> Section 744.331(7)(b), F.S.

<sup>14</sup> Section 744.331(7)(c), F.S.

<sup>15</sup> Section 744.344(1), F.S.

<sup>16</sup> Section 744.344(2), F.S.

<sup>17</sup> See ss. 744.361(4) and 744.444, F.S.

(2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

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(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties.

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(19) Create revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning.

The forgoing statutory provisions appear to authorize a guardian to exercise a ward's rights under a revocable trust. This right may include the right to revoke the trust. Accordingly, a guardian was authorized by a court to exercise a ward's authority under a revocable trust to appoint a new trustee.<sup>18</sup> In so holding, the court determined that a guardian with court approval has "the power not only to execute the powers of the ward, but to exercise or release any powers the ward would have as trustee, personal, representative, custodian, conservator or donee."<sup>19</sup>

In *Ullman v. Garcia*, however, the court would not allow a guardian to attack the validity of a revocable trust that was alleged to have been created through undue influence. The case did not involve an attempt by a guardian to revoke the revocable trust. The court stated in holding that the guardian could not attack the validity of the trust:

that the guardian of an incapacitated person cannot seek to rewrite the testamentary plan of a ward by contesting the validity of a revocable trust on the basis of undue influence. A finding to the contrary would defeat the evident purpose of the settlor/ward, and interfere with the settlor/ward's vested right to dispose of her property as she pleases.<sup>20</sup>

### ***Court Monitors***

Court monitoring is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."<sup>21</sup> Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. They may be compensated from the property of the ward. However, full-time state, county, or municipal employees may not be compensated for acting as a court monitor.<sup>22</sup>

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<sup>18</sup> *In Re Guardianship of Muller v. Boyle*, 650 So. 2d 698, 699 (Fla. 4th DCA 1995).

<sup>19</sup> *Id.* at 700 (quoting an unidentified House staff analysis summary).

<sup>20</sup> *Ullman v. Garcia*, 645 So. 2d 168, 170 (Fla. 3d DCA 1994).

<sup>21</sup> SUPREME COURT COMMISSION ON FAIRNESS, COMMITTEE ON GUARDIANSHIP MONITORING, GUARDIANSHIP MONITORING IN FLORIDA: FULFILLING THE COURT'S DUTY TO PROTECT WARDS 13 (2003).

<sup>22</sup> Section 744.107, F.S.

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court.<sup>23</sup> Court monitoring is necessary because often after a person is declared incapacitated no one exists to bring concerns about the ward to the attention of the court.<sup>24</sup> According to the Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship."<sup>25</sup>

### **III. Effect of Proposed Changes:**

This committee substitute increases the ability of a guardian to protect the assets of a ward held under an invalid trust and increases a court's ability through court monitors to oversee guardians and protect the health, safety, and property of wards.

#### **Trust Validity**

The committee substitute authorizes a guardian of the property of an incapacitated grantor to contest the validity of a trust as an exception to the general rule that an action to contest the validity of a trust may not be commenced until the trust becomes irrevocable.

The committee substitute prohibits a court from appointing a guardian for an incapacitated person if there is an alternative, such as a trust or durable power of attorney, which will sufficiently address the incapacitated person's problems. The validity, however, of the trust, trust amendment, or durable power of attorney may be challenged by an interested person who files a verified statement that provides a factual basis for the belief that an instrument is invalid. Additionally, the committee substitute provides that a court may appoint a guardian and allow the authority granted by a durable power of attorney to remain exercisable by an attorney in fact.

If a court denies the request of a guardian to contest the validity of a trust created by and for the benefit of a ward, the court must consider whether the guardian is still needed to exercise the delegable rights of the ward. If a judicial proceeding determines that the ward's durable power of attorney, trust, or trust amendment is valid, or a petition is filed alleging that an alternative to guardianship exists, a court must consider whether a guardian is still needed to exercise the delegable rights of the ward.

#### **Court Monitoring**

The statutes authorizing courts to appoint court monitors to investigate a guardianship are revised by the committee substitute to require interested parties be served with notice of the appointment of a court monitor and a copy of the court monitor's report. Additionally, the committee substitute expressly grants a court the authority to proactively protect the ward after a noticed hearing. The court may enter any necessary orders to protect the ward, including an order amending the guardianship plan, requiring an accounting, requiring the production of assets, freezing assets, and suspending or removing the guardian.

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<sup>23</sup> Section 744.107, F.S.

<sup>24</sup> SUPREME COURT COMMISSION ON FAIRNESS, *supra* note 21.

<sup>25</sup> SUPREME COURT COMMISSION ON FAIRNESS, *supra* note 21, at 4.

The committee substitute also provides for the appointment of an emergency court monitor without notice to interested parties when immediate action is necessary to protect a ward's health, safety, or property. An emergency court monitor must report his or her findings to the court within 15 days of appointment. The committee substitute suggests that some unspecified responsibilities of an emergency court monitor continue after the court monitor report is completed because emergency court monitors may serve up to 90 days.

If a court finds that an emergency court monitor report shows that probable cause exists to take further action, it must issue a show cause order ordering the guardian or respondent to appear to explain why the court should not take further action. Additionally, before the hearing on the show cause order, the court may enter any necessary order to protect the health, safety, or property of the ward.

Upon a hearing on the show cause order, a court may impose sanctions on the guardian, the guardian's attorney, or other respondent; enter a judgment of contempt; freeze assets; refer the matter to law enforcement or a state attorney; file a complaint with the Department of Children and Families; or initiate proceedings to remove the guardian.

Lastly, the committee substitute provides that court costs and attorney's fees may be assessed against a person who files a motion in bad faith for the appointment of a court monitor.

The committee substitute takes effect upon becoming a law.

#### **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:

The committee substitute authorizes guardians to contest the validity of a ward's revocable trust and provides courts with greater authority to oversee the relationship between a guardian and a ward to protect the ward's health, safety, and property.

Specifically, the court has the authority to freeze the assets of a ward, suspend or remove a guardian, or require a guardian to make an accounting. More private sector court monitors may be appointed as a result of the expanded authority of courts to oversee the relationship between guardians and wards.

**C. Government Sector Impact:**

Under existing law and as continued in this committee substitute, full-time employees of the state, county, and municipal governments may serve as court monitors without additional compensation for acting as a court monitor. More government employee time may be spent acting as court monitors because the expanded authority granted to courts to oversee the relationship between guardians and wards may encourage the appointment of more court monitors. The expanded authority of courts to oversee the relationship between guardians and wards could result in an increase in judicial workloads on guardianship matters.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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