

By the Committee on Judiciary; and Senator Campbell

590-1066-05

1 A bill to be entitled
2 An act relating to guardianship; amending s.
3 737.2065, F.S.; authorizing the guardian of the
4 property of an incapacitated person to contest
5 the validity of a trust before it becomes
6 irrevocable; amending s. 744.107, F.S.;
7 revising provisions relating to court monitors;
8 requiring orders of appointment and monitors'
9 reports to be served upon certain persons;
10 authorizing the court to enter any order
11 necessary to protect a ward or ward's estate;
12 requiring notice and a hearing; authorizing a
13 court to assess certain costs and attorney's
14 fees under certain circumstances; creating s.
15 744.1075, F.S.; authorizing a court to appoint
16 a court monitor on an emergency basis under
17 certain circumstances; requiring the court to
18 make certain findings; requiring the monitor to
19 report findings and recommendations; providing
20 duties of the court relating to probable cause
21 for the emergency appointment; providing
22 requirements for a court order to show cause
23 for the emergency appointment; specifying a
24 time period for a monitor's authority;
25 providing for extending such time period;
26 authorizing the court to issue certain
27 injunctions or orders for certain purposes;
28 requiring the court to provide copies of such
29 injunctions or orders to all parties;
30 authorizing the court to impose sanctions or
31 take certain enforcement actions; providing for

1 payment of reasonable fees to the monitor;
2 prohibiting certain persons from receiving
3 certain fees; authorizing a court to assess
4 certain costs and attorney's fees under certain
5 circumstances; amending s. 744.331, F.S.;
6 requiring the court to determine whether there
7 is an alternative to guardianship if a person
8 is determined incapable of exercising his or
9 her delegable rights; authorizing an interested
10 person to file a verified statement indicating
11 a belief that an incapacitated person's trust,
12 trust amendment, or durable power of attorney
13 is invalid, in which case such instrument may
14 not be an alternative to the appointment of a
15 guardian; amending s. 744.441, F.S.; requiring
16 the court to determine whether an action
17 contesting the validity of a trust is in the
18 ward's best interests before authorizing a
19 guardian to bring such actions; creating s.
20 744.462, F.S.; requiring that the validity of a
21 ward's durable power of attorney, trust, or
22 trust amendment be reported in the guardianship
23 proceedings; requiring the court to review the
24 continued need for a guardian and delegation of
25 the ward's rights under certain conditions;
26 providing an effective date.

27
28 Be It Enacted by the Legislature of the State of Florida:

29
30 Section 1. Section 737.2065, Florida Statutes, is
31 amended to read:

1 737.2065 Trust contests.--An action to contest the
2 validity of all or part of a trust may not be commenced until
3 the trust becomes irrevocable, except that this section does
4 not prohibit such action by the guardian of the property of an
5 incapacitated grantor.

6 Section 2. Section 744.107, Florida Statutes, is
7 amended to read:

8 744.107 Court monitors.--

9 (1) The court may, upon inquiry from any interested
10 person or upon its own motion in any proceeding over which it
11 has jurisdiction, appoint a monitor. The court may not appoint
12 as a monitor a family member or any person having a personal
13 interest in the proceedings. The order of appointment shall be
14 served upon the guardian, the ward, and such other persons as
15 the court may determine.

16 (2) The monitor may investigate, seek information,
17 examine documents, or interview the ward and shall report to
18 the court his or her findings. The report shall be verified
19 and shall be served on the guardian, the ward, and such other
20 persons as the court may determine.

21 (3) If it appears from the monitor's report that
22 further action by the court to protect the interests of the
23 ward is necessary, the court shall, after a hearing with
24 notice, enter any order necessary to protect the ward or the
25 ward's estate, including an order amending the plan, requiring
26 an accounting, requiring the production of assets, freezing
27 assets, suspending the guardian, or removing a guardian. The
28 ~~court shall not appoint as a monitor a family member or any~~
29 ~~person with a personal interest in the proceedings.~~

30 (4) Unless otherwise prohibited by law, a monitor may
31 be allowed a reasonable fee as determined by the court and

1 paid from the property of the ward. ~~A No~~ full-time state,
2 county, or municipal employee or officer ~~may not shall~~ be paid
3 a fee for such investigation and report. If the court finds
4 the motion for court monitor to have been filed in bad faith,
5 the costs of the proceeding, including attorney's fees, may be
6 assessed against the movant.

7 Section 3. Section 744.1075, Florida Statutes, is
8 created to read:

9 744.1075 Emergency court monitor.--

10 (1) A court, upon inquiry from any interested person
11 or upon its own motion in any proceeding over which it has
12 jurisdiction, may appoint a court monitor on an emergency
13 basis without notice. The court must specifically find that
14 there appears to be imminent danger that the physical or
15 mental health or safety of the ward will be seriously impaired
16 or that the ward's property is in danger of being wasted,
17 misappropriated, or lost unless immediate action is taken. The
18 scope of the matters to be investigated and the powers and
19 duties of the monitor must be specifically enumerated by court
20 order.

21 (2) Within 15 days after the entry of the order of
22 appointment, the monitor shall file his or her report of
23 findings and recommendations to the court. The report must be
24 verified and may be supported by documents or other evidence.

25 (3) Upon review of the report, the court shall
26 determine whether there is probable cause to take further
27 action to protect the person or property of the ward. If the
28 court does not find any probable cause, the court shall issue
29 an order finding no probable cause and discharge the monitor.

30 (4) If the court finds probable cause, it shall issue
31 an order to show cause directed to the guardian or other

1 respondent stating the essential facts constituting the
2 conduct charged and requiring the respondent to appear before
3 the court to show cause why the court should not take further
4 action. The order shall specify the time and place of the
5 hearing allowing a reasonable period of time for the
6 preparation of a defense after service of the order.

7 (5) The authority of a monitor appointed under this
8 section expires 60 days after the date of appointment or upon
9 a finding of no probable cause, whichever occurs first. The
10 authority of the monitor may be extended for an additional 30
11 days upon a showing that the emergency conditions continue to
12 exist.

13 (6) At any time before the hearing on the order to
14 show cause, the court may issue a temporary injunction, a
15 restraining order, an order freezing assets, an order
16 suspending a guardian, an order appointing a guardian ad
17 litem, or other appropriate order to protect the physical or
18 mental health or safety or property of the ward. A copy of all
19 such orders or injunctions shall be transmitted by the court
20 or under its direction to all parties at the time of entry of
21 the order or injunction.

22 (7) Following a hearing on the order to show cause,
23 the court may impose sanctions on the guardian or his or her
24 attorney or other respondent or take any other action
25 authorized by law, including entering a judgment of contempt,
26 ordering an accounting, freezing assets, referring the case to
27 local law enforcement agencies or the state attorney, filing a
28 complaint for abuse, neglect, or exploitation with the
29 Department of Children and Family Services, or initiating
30 proceedings to remove a guardian.

31

1 (8) Unless otherwise prohibited by law, a court
2 monitor may receive a reasonable fee as determined by the
3 court and paid from the property of the ward. A full-time
4 state, county, or municipal employee or officer may not be
5 paid a fee for such investigation and report. If the court
6 finds the motion for court monitor to have been filed in bad
7 faith, the cost of the proceeding, including attorney's fees,
8 may be assessed against the movant.

9 Section 4. Paragraphs (b) and (f) of subsection (6) of
10 section 744.331, Florida Statutes, are amended to read:

11 744.331 Procedures to determine incapacity.--

12 (6) ORDER DETERMINING INCAPACITY.--If, after making
13 findings of fact on the basis of clear and convincing
14 evidence, the court finds that a person is incapacitated with
15 respect to the exercise of a particular right, or all rights,
16 the court shall enter a written order determining such
17 incapacity. A person is determined to be incapacitated only
18 with respect to those rights specified in the order.

19 (b) When an order determines that a person is
20 incapable of exercising delegable rights, the court must
21 consider and find whether there is an alternative to
22 guardianship which will sufficiently address the problems of
23 the incapacitated person. A guardian must be appointed to
24 exercise the incapacitated person's delegable rights unless
25 the court finds there is an alternative. A guardian may not be
26 appointed if the court finds there is an alternative to
27 guardianship which will sufficiently address the problems of
28 the incapacitated person. ~~In any order declaring a person~~
29 ~~incapacitated the court must find that alternatives to~~
30 ~~guardianship were considered and that no alternative to~~
31

1 ~~guardianship will sufficiently address the problems of the~~
2 ~~ward.~~

3 (f) Upon the filing of a verified statement by an
4 interested person stating:

5 1. That he or she has a good faith belief that the
6 alleged incapacitated person's trust, trust amendment, or
7 durable power of attorney is invalid; and

8 2. A reasonable factual basis for that belief,

9
10 the trust, trust amendment, or durable power of attorney shall
11 not be deemed to be an alternative to the appointment of a
12 guardian. The appointment of a guardian does not limit the
13 court's power to determine that certain authority granted by a
14 durable power of attorney is to remain exercisable by the
15 attorney in fact. When an order is entered which determines
16 ~~that a person is incapable of exercising delegable rights, a~~
17 ~~guardian must be appointed to exercise those rights.~~

18 Section 5. Subsection (11) of section 744.441, Florida
19 Statutes, is amended to read:

20 744.441 Powers of guardian upon court approval.--After
21 obtaining approval of the court pursuant to a petition for
22 authorization to act, a plenary guardian of the property, or a
23 limited guardian of the property within the powers granted by
24 the order appointing the guardian or an approved annual or
25 amended guardianship report, may:

26 (11) Prosecute or defend claims or proceedings in any
27 jurisdiction for the protection of the estate and of the
28 guardian in the performance of his or her duties. Before
29 authorizing a guardian to bring an action described in s.
30 737.2065, the court shall first find that the action appears
31 to be in the ward's best interests during the ward's probable

1 lifetime. If the court denies a request that a guardian be
2 authorized to bring an action described in s. 737.2065, the
3 court shall review the continued need for a guardian and the
4 extent of the need for delegation of the ward's rights.

5 Section 6. Section 744.462, Florida Statutes, is
6 created to read:

7 744.462 Determination regarding alternatives to
8 guardianship.--Any judicial determination concerning the
9 validity of the ward's durable power of attorney, trust, or
10 trust amendment shall be promptly reported in the guardianship
11 proceeding by the guardian of the property. If the instrument
12 has been judicially determined to be valid, or if after the
13 appointment of a guardian a petition is filed alleging that
14 there is an alternative to guardianship which will
15 sufficiently address the problems of the ward, the court shall
16 review the continued need for a guardian and the extent of the
17 need for delegation of the ward's rights.

18 Section 7. This act shall take effect upon becoming a
19 law.

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21 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
22 COMMITTEE SUBSTITUTE FOR
23 Senate Bill 64

24 The committee substitute adds provisions to the bill which
25 strengthen a court's ability to investigate guardianships and
protect wards. Specifically, these provisions:

- 26 - authorize courts to enter any order necessary to protect
27 a ward's health, safety, and property;
- 28 - permit courts to appoint emergency court monitors without
29 notice to interested parties when a ward's health,
30 safety, and property are in imminent danger; and
- 31 - allow costs and attorney's fees to be assessed against a
person who files a motion in bad faith for the
appointment of a court monitor.