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HB 191, Engrossed 1

2006 Legislature

1 A bill to be entitled
2 An act relating to guardianship; amending s. 737.2065,
3 F.S.; excepting the contesting of trust validity by
4 property guardians of incapacitated settlors from a
5 prohibition against commencing certain actions; amending
6 s. 744.107, F.S.; revising provisions relating to court
7 monitors; requiring orders of appointment and monitors'
8 reports to be served upon certain persons; authorizing the
9 court to determine which persons may inspect certain
10 orders or reports; authorizing the court to enter any
11 order necessary to protect a ward or ward's estate;
12 requiring notice and hearing; authorizing a court to
13 assess certain costs and attorney's fees under certain
14 circumstances; creating s. 744.1075, F.S.; authorizing a
15 court to appoint a court monitor on an emergency basis
16 under certain circumstances; requiring the court to make
17 certain findings; specifying a time period for a monitor's
18 authority; providing for extending such time period;
19 requiring the monitor to report findings and
20 recommendations; providing duties of the court relating to
21 probable cause for the emergency appointment; authorizing
22 the court to determine which persons may inspect certain
23 orders or reports; providing requirements for a court
24 order to show cause for the emergency appointment;
25 authorizing the court to issue certain injunctions or
26 orders for certain purposes; requiring the court to
27 provide copies of such injunctions or orders to all

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28 parties; authorizing the court to impose sanctions or take
29 certain enforcement actions; providing for payment of
30 reasonable fees to the monitor; prohibiting certain
31 persons from receiving certain fees; authorizing a court
32 to assess certain costs and attorney's fees under certain
33 circumstances; amending s. 744.331, F.S.; requiring a
34 court to determine whether acceptable alternatives to
35 guardianship of incapacitated persons exist under certain
36 circumstances; requiring appointment of a guardian if no
37 alternative exists; prohibiting such appointment if an
38 alternative exists; specifying circumstances of
39 nonexistence of an alternative; preserving certain court
40 authority to determine exercise of certain powers of
41 attorney; amending s. 744.441, F.S.; requiring a court to
42 make certain findings in a ward's best interest before
43 authorizing a guardian to bring certain actions; requiring
44 a court to review certain continuing needs for guardians
45 and delegation of a ward's rights; creating s. 744.462,
46 F.S.; requiring guardians to immediately report certain
47 judicial determinations in certain guardianship
48 proceedings; requiring a court to review certain
49 continuing needs for guardians and delegation of a ward's
50 rights under certain circumstances; providing an effective
51 date.

52
53 Be It Enacted by the Legislature of the State of Florida:
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55 Section 1. Section 737.2065, Florida Statutes, is amended
56 to read:

57 737.2065 Trust contests.--An action to contest the
58 validity of all or part of a trust may not be commenced until
59 the trust becomes irrevocable, except this section does not
60 prohibit such action by the guardian of the property of an
61 incapacitated settlor.

62 Section 2. Section 744.107, Florida Statutes, is amended
63 to read:

64 744.107 Court monitors.--

65 (1) The court may, upon inquiry from any interested person
66 or upon its own motion in any proceeding over which it has
67 jurisdiction, appoint a monitor. The court shall not appoint as
68 a monitor a family member or any person with a personal interest
69 in the proceedings. The order of appointment shall be served
70 upon the guardian, the ward, and such other persons as the court
71 may determine.

72 (2) The monitor may investigate, seek information, examine
73 documents, or interview the ward and shall report to the court
74 his or her findings. The report shall be verified and shall be
75 served on the guardian, the ward, and such other persons as the
76 court may determine. ~~The court shall not appoint as a monitor a~~
77 ~~family member or any person with a personal interest in the~~
78 ~~proceedings.~~

79 (3) If it appears from the monitor's report that further
80 action by the court to protect the interests of the ward is
81 necessary, the court shall, after a hearing with notice, enter

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82 any order necessary to protect the ward or the ward's estate,
 83 including amending the plan, requiring an accounting, ordering
 84 production of assets, freezing assets, suspending a guardian, or
 85 initiating proceedings to remove a guardian.

86 (4) Unless otherwise prohibited by law, a monitor may be
 87 allowed a reasonable fee as determined by the court and paid
 88 from the property of the ward. No full-time state, county, or
 89 municipal employee or officer shall be paid a fee for such
 90 investigation and report. If the court finds the motion for
 91 court monitor to have been filed in bad faith, the costs of the
 92 proceeding, including attorney's fees, may be assessed against
 93 the movant.

94 Section 3. Section 744.1075, Florida Statutes, is created
 95 to read:

96 744.1075 Emergency court monitor.--

97 (1) (a) A court, upon inquiry from any interested person or
 98 upon its own motion, in any proceeding over which the court has
 99 jurisdiction, may appoint a court monitor on an emergency basis
 100 without notice. The court must specifically find that there
 101 appears to be imminent danger that the physical or mental health
 102 or safety of the ward will be seriously impaired or that the
 103 ward's property is in danger of being wasted, misappropriated,
 104 or lost unless immediate action is taken. The scope of the
 105 matters to be investigated and the powers and duties of the
 106 monitor must be specifically enumerated by court order.

107 (b) The authority of a monitor appointed under this
 108 section expires 60 days after the date of appointment or upon a

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109 finding of no probable cause, whichever occurs first. The
110 authority of the monitor may be extended for an additional 30
111 days upon a showing that the emergency conditions still exist.

112 (2) Within 15 days after the entry of the order of
113 appointment, the monitor shall file his or her report of
114 findings and recommendations to the court. The report shall be
115 verified and may be supported by documents or other evidence.

116 (3) Upon review of the report, the court shall determine
117 whether there is probable cause to take further action to
118 protect the person or property of the ward. If the court finds
119 no probable cause, the court shall issue an order finding no
120 probable cause and discharging the monitor.

121 (4) (a) If the court finds probable cause, the court shall
122 issue an order to show cause directed to the guardian or other
123 respondent stating the essential facts constituting the conduct
124 charged and requiring the respondent to appear before the court
125 to show cause why the court should not take further action. The
126 order shall specify the time and place of the hearing with a
127 reasonable time to allow for the preparation of a defense after
128 service of the order.

129 (b) At any time prior to the hearing on the order to show
130 cause, the court may issue a temporary injunction, a restraining
131 order, or an order freezing assets, may suspend the guardian or
132 appoint a guardian ad litem, or may issue any other appropriate
133 order to protect the physical or mental health or safety or
134 property of the ward. A copy of all such orders or injunctions

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135 shall be transmitted by the court or under its direction to all
 136 parties at the time of entry of the order or injunction.

137 (c) Following a hearing on the order to show cause, the
 138 court may impose sanctions on the guardian or his or her
 139 attorney or other respondent or take any other action authorized
 140 by law, including entering a judgment of contempt, ordering an
 141 accounting, freezing assets, referring the case to local law
 142 enforcement agencies or the state attorney, filing an abuse,
 143 neglect, or exploitation complaint with the Department of
 144 Children and Family Services, or initiating proceedings to
 145 remove the guardian.

146
 147 Nothing in this subsection shall be construed to preclude the
 148 mandatory reporting requirements of chapter 39.

149 (5) Unless otherwise prohibited by law, a monitor may be
 150 allowed a reasonable fee as determined by the court and paid
 151 from the property of the ward. No full-time state, county, or
 152 municipal employee or officer shall be paid a fee for such
 153 investigation and report. If the court finds the motion for a
 154 court monitor to have been filed in bad faith, the costs of the
 155 proceeding, including attorney's fees, may be assessed against
 156 the movant.

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

159 744.331 Procedures to determine incapacity.--

160 (6) ORDER DETERMINING INCAPACITY.--If, after making
 161 findings of fact on the basis of clear and convincing evidence,

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162 the court finds that a person is incapacitated with respect to
163 the exercise of a particular right, or all rights, the court
164 shall enter a written order determining such incapacity. A
165 person is determined to be incapacitated only with respect to
166 those rights specified in the order.

167 (b) When an order determines that a person is incapable of
168 exercising delegable rights, the court must consider and find
169 whether there is an alternative to guardianship that will
170 sufficiently address the problems of the incapacitated person. A
171 guardian must be appointed to exercise the incapacitated
172 person's delegable rights unless the court finds there is an
173 alternative. A guardian may not be appointed if the court finds
174 there is an alternative to guardianship which will sufficiently
175 address the problems of the incapacitated person ~~In any order~~
176 ~~declaring a person incapacitated the court must find that~~
177 ~~alternatives to guardianship were considered and that no~~
178 ~~alternative to guardianship will sufficiently address the~~
179 ~~problems of the ward.~~

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

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

185 2. A reasonable factual basis for that belief,

186
187 the trust, trust amendment, or durable power of attorney shall
188 not be deemed to be an alternative to the appointment of a

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189 guardian. The appointment of a guardian does not limit the
 190 court's power to determine that certain authority granted by a
 191 durable power of attorney is to remain exercisable by the
 192 attorney in fact ~~When an order is entered which determines that~~
 193 ~~a person is incapable of exercising delegable rights, a guardian~~
 194 ~~must be appointed to exercise those rights.~~

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

197 744.441 Powers of guardian upon court approval.--After
 198 obtaining approval of the court pursuant to a petition for
 199 authorization to act, a plenary guardian of the property, or a
 200 limited guardian of the property within the powers granted by
 201 the order appointing the guardian or an approved annual or
 202 amended guardianship report, may:

203 (11) Prosecute or defend claims or proceedings in any
 204 jurisdiction for the protection of the estate and of the
 205 guardian in the performance of his or her duties. Before
 206 authorizing a guardian to bring an action described in s.
 207 737.2065, the court shall first find that the action appears to
 208 be in the ward's best interests during the ward's probable
 209 lifetime. If the court denies a request that a guardian be
 210 authorized to bring an action described in s. 737.2065, the
 211 court shall review the continued need for a guardian and the
 212 extent of the need for delegation of the ward's rights.

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

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215 744.462 Determination regarding alternatives to
216 guardianship.--Any judicial determination concerning the
217 validity of the ward's durable power of attorney, trust, or
218 trust amendment shall be promptly reported in the guardianship
219 proceeding by the guardian of the property. If the instrument
220 has been judicially determined to be valid or if, after the
221 appointment of a guardian, a petition is filed alleging that
222 there is an alternative to guardianship which will sufficiently
223 address the problems of the ward, the court shall review the
224 continued need for a guardian and the extent of the need for
225 delegation of the ward's rights.

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