

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 457 CS  
**SPONSOR(S):** Sands and Others  
**TIED BILLS:** HB 459

Guardianship

**IDEN./SIM. BILLS:** CS/CS/SB 472

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Future of Florida's Families Committee</u>	<u>7 Y, 0 N, w/CS</u>	<u>Preston</u>	<u>Collins</u>
2) <u>Civil Justice Committee</u>	<u>7 Y, 0 N, w/CS</u>	<u>Shaddock</u>	<u>Bond</u>
3) <u>Judiciary Appropriations Committee</u>	<u>(W/D)</u>	<u></u>	<u></u>
4) <u>Health &amp; Families Council</u>	<u>6 Y, 0 N</u>	<u>Preston</u>	<u>Moore</u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

HB 457 CS incorporates the recommendations of the 2003 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 Elderly Affairs (DOEA). Provisions of the bill address:

- Creating definitions for the terms “audit” and “surrogate guardian,” and amending the definition of the term “professional guardian.”
- Increasing the dollar threshold required for when a court must appoint a guardian ad litem to review a settlement from \$25,000 to \$50,000 when the settlement involves a minor.
- Creating new reporting requirements related to the appointment of emergency temporary guardians.
- Creating new requirements related to investigations of credit history and background screening for guardians, including background investigations using inkless electronic fingerprints instead of fingerprint cards.
- Decreasing the amount of time during which a guardian must complete the required instruction and education from 1 year to 4 months.
- Emphasizing the importance of an incapacitated person’s right to quality of life, clarifying which rights cannot be delegated, reinforcing the significance of the right to marry, and subjecting the right to marry to court approval.
- Creating new restrictions and requirements relating to the appointment of an attorney for an alleged incapacitated person and providing for new requirements for members of examining committees.
- Creating requirements for additional information that must be included in an annual guardianship plan.
- Creating additional requirements relating to proof of payment for expenditures and disbursements made on behalf of a ward.
- Providing clerks of court with the authority to audit simplified and final accountings.
- Creating a new section of law related to the appointment of surrogate guardians.

The bill does not appear to have a fiscal impact on state or local governments.

# 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. The bill also requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations. The Florida Department of Law Enforcement must adopt a rule to establish procedures for the retention of guardian fingerprints and dissemination of search results of all arrest fingerprint cards.

**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 limit function. In such instances, a guardian may be 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. Upon making such a determination, the court may appoint either a limited guardian<sup>1</sup> or a plenary guardian.<sup>2</sup> 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. 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:

- Appoint a professional guardian to act on the ward's behalf when the ward has assets that may be used to pay for guardianship services provided;<sup>3</sup> or
- Appoint a public guardian in instances where the incapacitated ward does not have enough assets to afford a professional guardian.<sup>4</sup>

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<sup>1</sup> A limited guardian 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. See s. 744.102(8)(a), F.S.

<sup>2</sup> A plenary guardian 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. See s. 744.102(8)(b), F.S.

<sup>3</sup> See ss. 744.102(16) and 744.334, F.S.

<sup>4</sup> See s. 744.703, F.S.

## **Department of Elderly Affairs, the Statewide Public Guardianship Office, and the Guardianship Task Force**

In order to ensure that Florida's incapacitated residents who are indigent receive appropriate public guardianship services, the 1999 Florida Legislature created the Statewide Public Guardianship Office (SPGO). The SPGO is responsible for establishing local offices of public guardian and ensuring the registration and education of public and professional guardians.<sup>5</sup> Currently, public guardianship services are provided to persons in 22 counties through 15 local offices of public guardian and during 2003, those 15 offices served a total of 1,716 wards. In May 2003, the SPGO was transferred to the direct supervision of the Secretary of Elderly Affairs.<sup>6</sup>

The 2003 Legislature also created the Guardianship Task Force within the Department of Elderly Affairs (DOEA), for the purpose of 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 Elderly Affairs on January 1, 2005.<sup>7</sup>

### **Public Guardianship Funding Through Court Filing Fees**

Until July 2004, each county was authorized under s. 28.241, F.S., 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 \$15 allowable for additional expenses that counties were formerly authorized to implement in order to fund public guardianship programs was also removed.<sup>8</sup>

### **HB 457 CS**

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 Elderly Affairs. Specifically, the bill contains provisions related to the following:

#### **Definitions**

The bill defines the term "audit" for purposes of Chapter 744, F.S., 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. A 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.

#### **Natural Guardians**

The bill 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,

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<sup>5</sup> See s. 744.7021, F.S. and Chapter 99-227, Laws of Florida.

<sup>6</sup> See Chapter 2003-57, Laws of Florida.

<sup>7</sup> See Chapter 2003-57, Laws of Florida.

<sup>8</sup> See Chapter 2003-402, Laws of Florida.

the bill 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.

### **Guardian ad Litem Appointments 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;<sup>9</sup>
- 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, to be paid against the gross proceeds of the settlement.

### **Emergency Temporary Guardians**

- The bill increases the initial length of time of an emergency temporary guardianship from 60 days to 90 days;
- 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
- An emergency temporary guardian is required to file a final report within 30 days upon expiration of the guardianship and a copy of the final report must be provided to the successor guardian and the ward.

### **Standby Guardianships**

- 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.

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<sup>9</sup> A guardian appointed in such a case is not a guardian drawn from publicly funded programs.

## **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, retain investigation documents, and is required 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 method 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 2 background screening every five years, a level 1 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, 2006, all fingerprints electronically submitted to the Department of Law Enforcement shall be retained as provided by rule and entered into the statewide automated fingerprint identification system. The Department of Law Enforcement shall 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.

## **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, 2007, 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; and
- 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.

### **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, 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; and
- 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.

### **C. SECTION DIRECTORY:**

**Section 1.** Amends s. 744.102, F.S., relating to definitions.

**Section 2.** Amends s. 744.1083, F.S., relating to professional guardian registration.

**Section 3.** Amends s. 744.301, F.S., relating to natural guardians.

**Section 4.** Creates s. 744.3025, F.S., relating to claims of minors.

**Section 5.** Amends s. 744.3031, F.S., relating to emergency temporary guardianship.

**Section 6.** Amends s. 744.304, F.S., relating to standby guardianship.

- Section 7.** Amends s. 744.3115, F.S., relating to advance directives for health care.
- Section 8.** Amends s. 744.3135, F.S., relating to credit and criminal investigation.
- Section 9.** Amends s. 744.3145, F.S., relating to guardian education requirements.
- Section 10.** Amends s. 744.3215, F.S., relating to rights of persons determined to be incapacitated.
- Section 11.** Amends s. 744.331, F.S., relating to procedures to determine incapacity.
- Section 12.** Amends s. 744.341, F.S., relating to voluntary guardianship.
- Section 13.** Amends s. 744.361, F.S., relating to powers and duties of a guardian.
- Section 14.** Amends s. 744.365, F.S., relating to verified inventory.
- Section 15.** Amends s. 744.367, F.S., relating to the duty to file an annual guardianship report.
- Section 16.** Amends s. 744.3675, F.S., relating to the annual guardianship plan.
- Section 17.** Amends s. 744.3678, F.S., relating to annual accounting.
- Section 18.** Amends s. 744.3679, F.S., relating to simplified accounting procedures in certain cases.
- Section 19.** Amends s. 744.368, F.S., relating to responsibilities of the clerk of the circuit court.
- Section 20.** Amends s. 744.441, FS., relating to the powers of a guardian upon court approval.
- Section 21.** Creates s. 744.442, F.S., relating to the delegation of authority.
- Section 22.** Amends s. 744.464, F.S., relating to the restoration to capacity.
- Section 23.** Amends s. 744.474, F.S., relating to reasons for removing a guardian.
- Section 24.** Amends s. 744.511, F.S., relating to the accounting upon removal of a guardian.
- Section 25.** Amends s. 744.527, F.S., relating to final reports and application for discharge of guardian.
- Section 26.** Amends s. 744.528, F.S., relating to the discharge of a guardian named as a personal representative.
- Section 27.** Amends s. 744.708, F.S., relating to reports and standards.
- Section 28.** Amends s. 765.101, F.S., relating to definitions.
- Section 29.** Amends s. 28.345, F.S., relating to the exemption from court-related fees and charges.
- Section 30.** Amends s. 121.091, F.S., relating to benefits payable.
- Section 31.** Amends s. 121.4501, F.S., relating to Public Employee Optional Retirement Program.
- Section 32.** Amends s. 709.08, F.S., relating to durable power of attorney.

**Section 33.** Amends s. 744.1085, F.S., relating to the regulation of professional guardians.

**Section 34.** Reenacts s. 117.107, F.S., relating to prohibited acts.

**Section 35.** Provides for an effective date of July 1, 2006.

## **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:**

The public records exemption will allow anonymous donations to the direct-support organization for the Statewide Public Guardianship Office. As such, those donors and potential donors who wish to donate anonymously will no longer be discouraged from donating by public records laws. Persons involved in guardianship will be required to have additional training. These persons may also have to spend more time drafting reports regarding a person's capacity. The cost of these reports may be borne by the ward. Guardians will have to visit their wards more frequently.

### **D. FISCAL COMMENTS:**

The public records law in general creates a significant, although unquantifiable, increase in government spending. Government employees must locate requested records, and must examine every requested record to determine if a public records exemption prohibits release of the record. There is likely no marginal fiscal impact to a single public records exemption; the location and examination process remains whether or not a particular public records exemption exists.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:



None.

**B. RULE-MAKING AUTHORITY:**

The bill requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations. It also requires the Florida Department of Law Enforcement to adopt a rule to establish procedures for the retention of guardian fingerprints and dissemination of search results of all arrest fingerprint cards.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On March 28, 2006, the Future of Florida's Families Committee adopted 3 amendments which do the following:

- Removes the requirement that professional guardians provide the Statewide Public Guardianship Office (SPGO) with the names, address, and dates of birth for each member of their partnerships, associations, persons owning at least 10% of their corporation, or persons providing guardian delegated services;
- Removes the requirement that a certified public accountant conduct the public guardian's ward file review and requires the SPGO to conduct such review;
- Removes the prohibition on the executive director of a public guardian office from being included in the ratio of staff to wards; and
- Restores current language related to the termination of a voluntary guardianship.

The bill was reported favorably as a committee substitute.

On April 4, 2006, the Civil Justice Committee adopted 2 amendments to the bill. The first amendment made a minor grammatical change. The second, substantive amendment removed the possibility of the imposition of a \$15 surcharge by counties on non-criminal traffic infractions and criminal violations and the required \$18 surcharge on all misdemeanors throughout the state, \$15 of which would be used to fund public guardianship programs. The bill was then reported favorably with a committee substitute. This analysis is drafted to the committee substitute.