

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 634

INTRODUCER: Judiciary Committee; Children, Families, and Elder Affairs Committee; and Senator Brandes

SUBJECT: Guardianship

DATE: March 4, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Crosier</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/CS/SB 634 expands the authority of judges and clerks of court to oversee guardians and assets held by guardians. For this purpose, the bill:

- Redefines the term “audit” to include various practices that meet professional audit standards.
- Requires persons, other than corporate guardians, seeking appointment as a guardian, including employees of a professional guardian to submit to a credit history investigation and background screening.
- Authorizes clerks of court to obtain and review documents and records reasonably relating to guardianship assets and, upon application to the court, to issue subpoenas to do so.
- Allows a guardian or ward who receives notice and a proposed subpoena to object to a clerk’s request for authority from the court to subpoena documents from a third party.
- Allows the court to remove a guardian for a failure in bad faith to submit records during a clerk’s audit.
- Requires a person seeking a guardianship appointment to acknowledge arrests covered by an expunged or sealed record.

II. Present Situation:

Guardianships serve as a mechanism to protect vulnerable individuals in our society who do not have a family or loved one or who is willing and able to manage their property or other personal matters. A guardian may be described as a person “who has the legal authority and duty to care for another’s person or property, esp[ecially] because of the other’s infancy, incapacity, or disability.”¹ Guardianships are governed completely and exclusively under statutes in Florida.² Any adult may petition a court to initiate guardianship proceedings to determine the incapacity of any person.³ An “incapacitated person” is 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 the person.”⁴

A guardian is a surrogate decision-maker appointed by the court to make personal or financial decisions for a minor or an adult having mental or physical disabilities.⁵ Under Florida law, a ward is defined as a person for whom a guardian has been appointed.⁶

The procedure to determine an alleged person’s incapacity is prescribed by statute.⁷ Any person may file, under oath, a petition in circuit court for determination of incapacity alleging that a person is incapacitated.⁸ 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.⁹ If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.¹⁰ 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.¹¹

Guardians

Upon a finding by the court that a guardianship sufficiently addresses the problem of the incapacitated person, a guardian will be appointed. There are many different types of guardians available for court appointment such as a “limited guardian,” “nonprofit guardian,” “preneed guardian,” and “professional guardian.” A “professional guardian,” is any guardian who has at any time rendered services to three or more wards as their guardian.¹² A professional guardian

¹ BLACK’S LAW DICTIONARY (9th ed. 2009).

² *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So. 2d 176, 182 (Fla 2d DCA 1966).

³ Section 744.3201, F.S.

⁴ Section 744.102(12), F.S.

⁵ *See e.g.*, s. 744.102(9), F.S.

⁶ Section 744.102(22), F.S.

⁷ Section 744.331, F.S.

⁸ *Id.* In Florida, circuit courts have exclusive jurisdiction of proceedings relating to the determination of incompetency.

Section 26.12(2)(b), F.S.

⁹ Section 744.331(3), F.S.

¹⁰ Section 744.331(4), F.S.

¹¹ *See s.* 744.331(6)(b), F.S.

¹² Section 744.102(17), F.S.

must comply with statutory application, bond, and educational requirements. Each professional guardian must allow, at the guardian's expense, an investigation of the guardian's credit history, and the credit history of employees of the guardian, in a manner prescribed by the Department of Elderly Affairs.¹³ Each professional guardian shall allow a level 2 background screening of the guardian and employees of the guardian.¹⁴

Any resident of this state who is *sui juris* (someone with full legal rights or capacity and not under any legal disability or power of another such as guardianship)¹⁵ and is 18 years of age or older is qualified to act as a guardian of the ward.¹⁶ A nonresident of the state may serve as a guardian of a resident if he or she is:

- Related by lineal consanguinity¹⁷ to the ward;
- A legally adopted child or adoptive parent of the ward;
- A spouse, brother, sister, uncle, aunt, niece, or nephew of the ward, or someone related by lineal consanguinity to any such person; or¹⁸

Every prospective guardian must complete an application for appointment as a guardian. The application must list the person's qualifications to serve as a guardian.¹⁹ A professional guardian and each employee of a professional guardian who has a fiduciary responsibility to a ward, must complete, at his or her own expense:

- A level 2 background screening, before and at least once every 5 years after the date the guardian is registered.²⁰
- A level 1 background screening²¹, at least once every 2 years after the date the guardian is registered.²²
- An investigation of his or her credit history before and at least once every 2 years after the date of the guardian's registration with the Statewide Public Guardianship Office.²³

If the guardian appointed by the court does not meet the definition of "professional guardian," the guardian is considered a nonprofessional guardian. For nonprofessional guardians, the court

¹³ Section 744.1085(4), F.S.

¹⁴ Section 744.1085(5), F.S.

¹⁵ See e.g., "*Sui juris*" means of full age and capacity; possessing full social and civil rights. BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁶ Section 744.309(1), F.S.

¹⁷ "Lineal consanguinity" means the relationship between persons who are directly descended or ascended from one another (for example, mother and daughter, great-grandfather and grandson, etc.). BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁸ Section 744.309(2), F.S.

¹⁹ Section 744.3125(1), F.S.

²⁰ Section 744.3135(4)(a), F.S.

²¹ A "Level 1" background screening includes, but is not limited to, checks of: employment history; statewide criminal history through the Florida Department of Law Enforcement; the Dru Sjodin National Sex Offender Public website; and optional checks through local law enforcement agencies. Section 435.03, F.S. A Level 1 screening also identifies arrests that have not been adjudicated and pleas of *nolo contendere* to certain enumerated felonies or any history of domestic violence. Section 435.03(2) and (3), F.S. A "Level 2" background screening includes the Level 1 check, plus the submission of fingerprints and a national history records check through the Federal Bureau of Investigation. Section 435.04(1)(a), F.S.

²² *Id.*

²³ Section 744.3135(5), F.S.

must accept the satisfactory completion of a criminal history record check.²⁴ The nonprofessional guardian can satisfy this requirement by undergoing a state and national criminal history record check using fingerprints. The nonprofessional guardian shall have his or her fingerprints taken and provide them to the Department of Law Enforcement with the appropriate fee for processing. The results shall be forwarded to the clerk of the court, maintained in the nonprofessional guardian's file and made available to the court.²⁵ A guardian may be removed for reasons set forth in the law and the removal shall be in addition to any other penalties prescribed by law.²⁶

Annual Accounting

Each guardian of the property of the ward must file an annual accounting with the court.²⁷ The annual accounting must include a full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period. However, the requirement for an accounting does not apply to any property or trust of which the ward is a beneficiary but which is not under the control or administration of the guardian.²⁸

Responsibilities of the Clerk of the Court

In addition to the duty to serve as the custodian of the guardianship files, the clerk must review each initial and annual guardianship report to ensure it contains information about the ward that addresses mental and physical health care, physical and mental health examinations, personal and social services, residential setting, the application of insurance, private benefits and government benefits and the initial verified inventory or the annual accounting.²⁹ The clerk has certain timeframes within which to review reports, audit verified inventory and accountings, and report to the court when a report is not timely filed.³⁰

Court-ordered Sealing of Criminal Records

Sections 943.0585 and 943.059, F.S., provide for the court-ordered expunction or sealing of certain criminal history records. Any court of competent jurisdiction may order a criminal justice agency to seal or expunge the criminal history records of a minor or an adult under certain circumstances. The person seeking to seal a criminal history must apply for and receive a certificate of eligibility for sealing.³¹ When a court orders a criminal history record of a minor or an adult to be sealed or expunged, he or she may lawfully deny or fail to acknowledge the arrests covered by the sealed records except under certain circumstances.³²

²⁴ Section 744.3135(2), F.S.

²⁵ Section 744.3135(3), F.S.

²⁶ Section 744.474, F.S.

²⁷ Section 744.3678(1), F.S.

²⁸ Section 744.3678(2)(a), F.S.

²⁹ Section 744.368(1), F.S.

³⁰ Section 744.368, F.S.

³¹ Section 943.059, F.S.

³² Section 943.059(4)(a), F.S.

III. Effect of Proposed Changes:

This bill expands the authority of judges and clerks of court to oversee guardians and guardianship assets.

Section 1 amends s. 744.102(2), F.S., which contains the definition of “audit.” Currently the term refers to a systematic review of financial and other documents to ensure compliance with court rules and generally accepted accounting principles. Under the bill, the term “audit” also includes various practices that meet professional audit standards such as verifications, reviews of substantiating papers and accounts, interviews, inspections, and investigations.

Section 2 amends s. 744.3135(1), F.S. to require all persons seeking appointment as a guardian (other than a person seeking appointment as a corporate guardian) to submit, at his or her own expense, to an investigation of the person’s credit history and undergo a level 2 background screening. Under existing law, a credit history check and criminal history record check are up to the discretion of the court. If appointed, a nonprofessional guardian may petition the court for reimbursement of reasonable expenses incurred for credit history investigation and background screening.

Section 3 amends s. 744.368, F.S., to expand the authority of the clerk of the court at the direction of the court to obtain or review records and documents that reasonably relate to guardianship assets, including beginning inventory balances and fees charged to the guardianship. If a guardian fails to produce records or documents to the clerk upon request, the clerk may file an affidavit requesting the court to issue an order that identifies the records or documents requested and which shows good cause as to why the documents or records should be produced. In addition, the clerk may apply to the court for the issuance of a subpoena to nonparties to compel production of records or documents. The clerk must properly notice the guardian and the ward and attach a copy of the affidavit for the subpoena to compel production of documents or records from third parties other than the guardian or ward. The guardian or ward may object to the production of such documents or records.

Section 4 amends s. 744.3685, F.S., to create a procedure for the guardian to object upon a showing of good cause to a request for records by the clerk pursuant to an audit. After a timely objection, the clerk must obtain a court order to compel the production of the records.

Section 5 amends s. 744.474, F.S., to provide that the failure of a guardian to submit guardianship records during the audit by a clerk as required by s. 744.368, F.S., due to bad faith is grounds for the removal of the guardian.

Section 6 amends s. 943.0585 F.S., to require a person seeking appointment as a guardian to disclose arrests covered by a court-ordered expunction.

Section 7 amend s. 943.059, F.S., to require a person seeking appointment as a guardian to disclose arrests covered by a sealed record.

Section 8 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issue:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Nonprofessional guardians currently pay the costs for fingerprinting and background checks.³³ The cost to require nonprofessional guardians to be subject to a credit history investigation and level 2 background screening ranges between \$50 and \$85, depending on which livescan service provider is used to obtain fingerprints.³⁴ If appointed, the bill authorizes a nonprofessional guardian to petition the court for reimbursement of reasonable expenses incurred for the investigation of the credit history and level 2 background screening.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Lines 58 - 61 of the bill provide: “[i]f appointed, a nonprofessional guardian may petition the court for reimbursement of the reasonable expenses of the credit history investigation and

³³ According to the Florida Department of Law Enforcement, during the last 6 months, 572 state and national criminal history checks for nonprofessional guardians were received from the clerks of courts. Email from the Florida Association of Clerks and Comptroller (February 20, 2014) (on file with the Senate Committee on Judiciary).

³⁴ Informal telephone survey of livescan service providers obtained from the Florida Department of Law Enforcement’s website at: https://www.fdle.state.fl.us/Content/getdoc/941d4e90-131a-45ef-8af3-3c9d4efefd8e/Livescan-Service-Providers-and-Device-Vendors.aspx#Service_Providers (last visited on February 26, 2014).

background screening.” The Legislature may wish to specify whether this should borne as a guardianship expense or should be paid by another source.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 744.102, 744.3135, 744.368, 744.3685, 744.474, 943.0585, and 943.059.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on March 4, 2014:

The amendment makes minor technical wording changes to clarify the meaning of the bill.

CS by Children, Families, and Elder Affairs on February 11, 2014:

Provides additional responsibilities for the clerk of the court if there is reason to believe further review of records and documents that impact the guardianship assets are appropriate. Provides a process for the clerk to request a court order based on an affidavit that identifies records and documents requested and a show of good cause as to why the records and documents are needed to complete the audit. Provides a process for the clerk to issue a subpoena to nonparties for production of documents and records supported by an affidavit and requires the clerk to give notice to guardian and ward. Provides the guardian or ward a timeframe within which to object to the production of documents.

- B. **Amendments:**

None.