

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: SB 318

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Guardianship Proceedings

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Pre-meeting
2.			ACJ	
3.			FP	

I. Summary:

SB 318 amends the emergency temporary guardianship statutes for three general purposes to:

- Ensure that a hearing to appoint an emergency temporary guardian is duly noticed and that the petitions pertaining to the hearing are served on the alleged incapacitated person and his or her attorney before the hearing is conducted;
- Reduce the time that an emergency temporary guardian may serve; and
- Provide recourse and sanctions if an emergency temporary guardian does not timely file a final report.

The bill also:

- Specifies the powers and duties of an emergency temporary guardian;
- Requires the court to specify what authority a guardian or surrogate may exercise if an advance directive was executed before the person became incapacitated; and
- Provides that a court may not appoint a guardian solely based on the fact that he or she served as the emergency temporary guardian.

II. Present Situation:

Guardianship

Background

A guardianship is a relationship based upon trust in which one person, a guardian, has the legal duty and authority to care for the person or property of another person, who is referred to as a ward. A guardianship is established because a court has determined that the ward is not capable of managing his or her affairs, generally due to infancy, incapacity, or disability.¹ A guardian may be appointed over the person, over the property, or both.

¹BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

When a court determines that someone is incapacitated,² it must consider whether there is an alternative to guardianship which will sufficiently meet the person's needs. If no alternative can be found, then a guardian³ must be appointed.⁴ The Legislature has stated, however, that the form of assistance be chosen in each situation that least interferes with the legal capacity of someone to act on his or her behalf.⁵

Guardianship Proceedings

A guardianship proceeding is initiated in circuit court when an adult files a petition to determine incapacity and alleges specifically the factual information on which the petitioner believes the incapacity is based.⁶ Within 5 days after the petition is filed, the court must appoint a three member examining committee⁷ to examine the allegedly incapacitated person to determine his or her incapacity. The members have 15 days⁸ after their appointment to submit a written report to the court which sets an adjudicatory hearing to be held within 14 days⁹ after the examining members' reports are filed. If the court finds on the basis of clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the incapacity, but only with respect to those rights specified in the order.¹⁰

Powers and Duties of a Guardian

A guardian has a fiduciary relationship with a ward and is bound to act in good faith and trust on the ward's behalf. The guardian may not use that relationship for private gain except for the reimbursement of fees and expenses provided by law.¹¹ The guardian of an incapacitated person may only exercise the rights that have been removed from the ward and delegated to the guardian. In addition to performing all duties required of him or her by law, a guardian is required to file an initial guardianship report and an annual guardianship report, implement the guardianship plan, and at the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to the property.¹² If the guardian breaches the fiduciary duty owed to the ward, the court is obligated to take the steps necessary to protect the ward and the ward's assets.¹³

² An "incapacitated person" is a person who has been judicially determined to lack the capacity to manage at least some of his or her property or to meet at least some of his or her essential health and safety requirements. Section 744.102(12), F.S.

³ Various provisions in chapter 744, F.S., provide for a guardian ad litem, limited guardian, plenary guardian, standby guardian, foreign guardian, corporate guardian, nonprofit corporate guardian, preneed guardian, professional guardian, surrogate, and public guardian.

⁴ Section 744.331(6)(b), F.S.

⁵ Section 744.1012, F.S.

⁶ Section 744.3201, F.S.

⁷ One member must be a psychiatrist or other physician and the remaining members must be a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology, or other person who has special skill, training, or education to advise the court in the form of an expert opinion.

⁸ Section 744.331(3), F.S.

⁹ Section 744.331(5), F.S.

¹⁰ Section 744.331(6), F.S.

¹¹ Section 744.446, F.S.

¹² Section 744.361, F.S.

¹³ Section 744.446, F.S.

Responsibilities of the Clerk of Court and Judicial Review

The clerk of the circuit court, as custodian of the guardianship files, must review each initial and annual guardianship report, which is later reviewed by the circuit court. The court retains jurisdiction over all guardianships and must review the appropriateness and extent of a guardianship annually.¹⁴

Termination of a Guardianship

The relationship between a guardian and ward is terminated when a ward is restored to capacity, the guardian has been unable to find the ward after a diligent search, or for a guardian of the property, when the property subject to the guardianship has been exhausted.¹⁵ The relationship is also terminated upon the death of the guardian or ward, by resignation¹⁶ or removal of the guardian,¹⁷ or by a change or domicile to a foreign jurisdiction.¹⁸

Emergency Temporary Guardianship

The process of appointing a guardian may take up to 34 days or longer, upon a showing of good cause. The statutes, however, provide a more timely remedy through an additional type of guardianship in an emergency situation. A court may appoint an emergency temporary guardian¹⁹ for an allegedly incapacitated person upon a finding that there appears to be an imminent danger that:

- The physical or mental health or safety of the person will be seriously impaired; or
- The person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

Under those circumstances, a court may appoint an emergency temporary guardian after the filing of a petition for determination of incapacity and before the appointment of a guardian. The court must appoint counsel to represent the alleged incapacitated person during the proceedings. Further, the court may appoint an emergency temporary guardian on its own motion if no petition for appointment of guardian has been filed when the order determining incapacity is entered.²⁰

The emergency temporary guardian's authority expires 90 days after the appointment or when a guardian is appointed, whichever occurs first. The authority may be extended for 90 additional days upon a showing that the emergency conditions continue to exist.²¹ The emergency temporary guardian's authority and responsibility begin when the letters of emergency temporary guardian are issued. He or she must file a final report no later than 30 days after the emergency

¹⁴ Sections 744.368 and 744.372, F.S.

¹⁵ Section 744.521, F.S.

¹⁶ Section 744.467, F.S.

¹⁷ Section 744.474, F.S.

¹⁸ Section 744.524, F.S.

¹⁹ Section 744.3031(1), F.S.

²⁰ Section 744.3031(2), F.S.

²¹ Section 744.3031(3), F.S.

temporary guardianship expires²² and the final report must be served on the successor guardian and the ward.²³

Advance Directives

An “advance directive” is a written document or oral statement that is witnessed in which a person states his or her desires regarding health care and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.²⁴ An advance directive permits a competent adult to express his or her wishes regarding decisions relating to his or her own health, particularly the right to choose or refuse medical treatment.

Considerations When Appointing a Guardian

The statutes provide a list of factors that a court must consider when appointing a guardian.²⁵

The court must give preference to a person who:

- Is related by blood or marriage;
- Has educational, professional, or business experience that is relevant to the services needed for the ward;
- Has the capacity to manage the ward’s financial resources; or
- Has the ability to meet the law’s requirements and unique needs of the case at hand.

The court must also consider:

- The wishes expressed by the incapacitated person as to who the guardian should be;
- The preferences of a minor who is over the age of 14 years as to who the guardian should be;
- Any person designated as a guardian in a will under which the ward is a beneficiary.

The court shall appoint the standby guardian or preneed guardian, unless that is contrary to the best interests of the ward.²⁶

III. Effect of Proposed Changes:

Emergency Temporary Guardian

This bill amends the emergency temporary guardianship statute for three general purposes to:

- Ensure that a hearing to appoint an emergency temporary guardian is duly noticed and that the petitions pertaining to the hearing are served on the alleged incapacitated person and his or her attorney before the hearing is conducted;
- Reduce the time that an emergency temporary guardian may serve; and
- Provide recourse and sanctions if an emergency temporary guardian does not timely file a final report.

²² Section 744.3031(7) and (8)(a), F.S.

²³ Section 744.3031(8)(d), F.S.

²⁴ Section 765.101, F.S.

²⁵ Section 744.312, F.S.

²⁶ Section 744.312(4), F.S.

Notice Provisions (Section 1)

The bill amends s. 744.3031, F.S., to provide that a court may appoint an emergency temporary guardian after a petition for determination of incapacity has been held, but only after that hearing is duly noticed. The notice of filing of a petition for appointment of an emergency temporary guardian and notice of any hearing on that petition must be served on the alleged incapacitated person and his or her attorney before a hearing on the petition is begun.

Length of Time a Guardian May Serve (Section 1)

The current statute limits an emergency temporary guardian's authority to 90 days, but this bill limits the authority to 60 days. Current law provides that the emergency temporary guardian's authority may be extended for 90 days, but this bill limits an extension to 60 days and requires that a hearing be held first to demonstrate that the emergency conditions still exist.

Filing of a Final Report (Section 1)

Currently, an emergency temporary guardian must file a final report within 30 days after the emergency temporary guardianship expires.²⁷ This bill provides that, if the final report is not timely filed, the court may issue an order to show cause to the emergency temporary guardian to appear and explain why no further action should be taken against him or her by the court. The court's order must specify the time and place of the hearing within a reasonable time after service of the order to allow the guardian to prepare a defense. Prior to the hearing, the court may:

- Issue a temporary injunction, a restraining order, or an order freezing the assets of the emergency temporary guardian;
- Suspend the emergency temporary guardian or appoint a guardian ad litem; or
- Issue any other appropriate order to protect the physical or mental health or safety or the property of the ward.

A copy of the order or injunction must be transmitted to all parties when it is issued.

After the hearing on the order to show cause, the court may impose sanctions on the emergency temporary guardian or his or her attorney or other respondent or take any other action authorized by law including:

- Entering a judgment of contempt;
- Ordering an accounting;
- Freezing assets;
- Referring the case to local law enforcement agencies or the state attorney;
- Filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; and
- Initiating proceedings to remove the emergency temporary guardian.

²⁷ Section 744.3031(8), F.S.

Enumerated Powers and Duties of an Emergency Temporary Guardian (Section 2)

Section 744.3032, F.S., is created in this bill to specify the powers and duties of an emergency temporary guardian. The emergency temporary guardian is a fiduciary of the ward and is limited to exercising only those rights that the court has removed from the ward and delegated to the guardian.

The emergency temporary guardian:

- Shall act within the scope of authority granted by the circuit court and as provided by law;
- Shall act in good faith;
- May not act contrary to the ward's best interests;
- Shall use his or her special skills or expertise for the ward.

If the emergency temporary guardian is granted authority over the ward's person and the circumstances require, the emergency temporary guardian shall:

- Consider the expressed desires of the ward when making decisions that affect the ward;
- Allow the ward to maintain contact with family and friends unless those contacts would be harmful;
- Not restrict the physical liberty of the ward any more than is reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease;
- Assist the ward in developing or regaining capacity, if medically possible;
- Notify the court if he or she believes the ward has regained capacity and one or more of the ward's removed rights should be restored;
- Make provision for the medical, mental, rehabilitative, or personal care services for the ward's welfare;
- Acquire a clear understanding of risks and benefits of a recommended health care treatment before making that decision for the ward;
- Evaluate the ward's medical and health care options, financial resources, and desires when making residency decisions for the needs of the ward; and
- Advocate on the ward's behalf when the ward is in an institutional or residential setting.

Advance Directives (Section 3)

This bill amends s. 44.3115, F.S., to provide that, in circumstances in which the ward executed any advance directive before his or her incapacity, the court must specify in the order and letters of guardianship what authority the guardian may exercise over the ward regarding health care decisions and what authority, if any, the surrogate shall continue to exercise over the ward regarding health care decisions. If the court determines that the guardian will be responsible for making health care decisions for the ward, the guardian will assume the surrogate's responsibilities.

Considerations When Appointing a Guardian (Section 4)

This bill amends the existing group of factors a court must consider when appointing a guardian to state that the court may not give preference to a person based solely on the fact that he or she was appointed as the emergency temporary guardian.

Reenactments (Sections 5, 6, 7, 8 and 9)

These sections of the bill reenact ss. 744.344(4), 765.205(3), 744.304(4), 744.3045(7), and 744.308(6), F.S., to incorporate the amendments made to specified sections in this bill. No additional changes are made to the reenacted statutes.

Effective Date

This bill takes effect July 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not appear to affect the spending, revenues, or tax authority of cities or counties. As such, the bill does not appear to be a mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None

C. Government Sector Impact:

None

VI. Technical Deficiencies:

There seems to be some logistical drafting errors for the emergency temporary guardian who fails to file a timely final report. The broad array of sanctions in this section need to be addressed and clarified.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 744.3031, 744.3115, and 744.312.

This bill creates s. 744.3032, Florida Statutes.

This bill reenacts the following sections of the Florida Statutes: 744.344, 765.205, 744.304, 744.3045, and 744.308.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.