

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 437 Guardians for Dependent Children who are Developmentally Disabled or Incapacitated

SPONSOR(S): Civil Justice Subcommittee; Children, Families & Seniors Subcommittee; Adkins and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 496

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Tuszynski	Brazzell
2) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
3) Health Care Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill creates a framework for identifying and appointing guardian advocates, limited guardians, and plenary guardians for developmentally disabled children who may require decision-making assistance beyond their 18th birthday. It also authorizes guardianship courts to exercise jurisdiction over dependent children nearing their 18th birthday to appoint guardian advocates, limited guardians, and plenary guardians. The bill:

- Requires an annual review of the continued necessity of a guardianship for young adults in extended foster care who already have a guardian advocate or guardian;
- Requires development of an updated case plan for any child who may require the assistance of a guardian advocate, limited guardian, or plenary guardian;
- Provides that upon a judge's finding that no less restrictive decision-making assistance will meet the child's needs:
 - The Department of Children and Families (DCF) must complete a report and identify individuals who are willing to serve as a guardian advocate or as a plenary or limited guardian; and
 - Proceedings for the appointment of a guardian advocate, plenary guardian, or limited guardian may be initiated in a separate proceeding in guardianship court within 180 days of the child's 17th birthday.
- Provides that a minor who is 17 and one-half years of age and is subject to guardianship proceedings must receive all the due process rights of an adult; and
- Provides that a child's parents are considered to be the child's natural guardians, unless the dependency or guardianship court determines it is not in the child's best interest or the parents' rights have been terminated.

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

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

When a minor¹ with developmental disabilities or some level of incapacity ages out of the dependency system, there is a gap between the time he or she turns 18 years of age and the time a guardian advocate, plenary guardian, or limited guardian is appointed.² This creates a period in which the individual who may be in need of a guardian is considered an adult (*sui juris*, or "of one's own right")³ but likely unable to adequately make decisions for himself or herself. Two separate issues create this gap. First, the lack of a procedure within the dependency system to identify adults willing to serve as guardians or guardian advocates for these minors as they reach 18 years of age; and second, a jurisdictional issue in which probate courts will only exercise jurisdiction and begin guardianship proceedings after the child reaches 18 years of age. There is a distinction in current law between adult guardianships and guardianships for minors. This distinction is the largest barrier to getting guardians for minors who need them when they turn 18.⁴

While both the dependency and probate courts are circuit courts in the state with general jurisdiction, each operates under different rules of procedure and areas of statute. Dependency courts work primarily within ch. 39, F.S., handling cases that deal with the abandonment, abuse, and neglect of children, whereas probate court works primarily with chs. 731 through 735, 744, and 747, F.S., dealing with wills, trusts, estates, guardianships, conservatorships, and other property and succession matters.

Guardianships

There is a wide range of options to provide decision-making assistance to people with developmental disabilities or other incapacity that are not as restrictive as guardianships.⁵ Examples include a power of attorney to officially act for the owner of a bank account;⁶ general powers of attorney;⁷ durable powers of attorney;⁸ representative payee of benefits; advance directives; medical proxies; trusts; and guardian advocates (a less restrictive form of guardianship that does not require an adjudication of incapacity).⁹ Guardianships that place decision-making authority for property and person with another individual require an examining committee to determine that the alleged incapacitated adult lacks decision-making capacity, and requires an adjudication of incapacity by a judge.¹⁰ This form of guardianship is considered the most restrictive and generally a last resort because it removes fundamental and civil rights of an individual to make decisions concerning his or her property and, in the most restrictive cases, his or her own care.¹¹ The level of decision-making assistance should not be more restrictive than required for that particular individual's needs and capacity.

For adult guardianships, current law requires an adjudication of incapacity based on the recommendation of an examining committee, the adult must have an attorney appointed to represent him or her, and the adult must be present at the hearing before appointing a guardian.¹² For a

¹ Any person who has not attained the age of 18 years, s. 1.01(13), F.S.

² Email from Alan Abramowitz, Executive Director of the Statewide Guardian ad Litem Program, on November 7, 2014; on file with Children, Families & Seniors Subcommittee staff.

³ Section 743.07(1), F.S.

⁴ Abramowitz, *supra* note 2.

⁵ *Lighting the Way to Guardianship and Other Decision-Making Alternatives: A Manual for Individuals and Families*, 2010, Florida Developmental Disabilities Council, Inc.

⁶ Ch. 709, F.S.

⁷ *Id.*

⁸ *Id.*

⁹ Section 744.3085, F.S.

¹⁰ Section 744.331, F.S.

¹¹ *Lighting the Way to Guardianship*, *supra* note 5

¹² Section 744.331, F.S.

guardianship of a minor, an adjudication of incapacity is not required, an attorney is not required, nor is the minor required to be present at the hearing.¹³ The waiver of these due process protections for minors is because the minor is not *sui juris*, and the guardianship of a minor terminates by law upon reaching this distinction.

Under current law, probate courts will not entertain a petition for an adult guardianship for a minor. According to the Guardian ad Litem program, based on their discussions with the judiciary and probate practitioners, without amending current law it is unlikely that probate courts will engage in providing adult guardianships to minors in anticipation of the minor turning 18.¹⁴ Currently, for those minors who have been identified as needing a guardianship as an adult, DCF recruits pro bono attorneys with the requisite experience to file a guardianship petition.

Effect of Proposed Changes:

The bill creates a procedure for DCF and circuit courts regarding those children within the dependency system that have been identified as possibly requiring some form of legal guardianship when they reach 18 years of age.

The bill amends s. 39.6251, F.S., to require annual reviews of the continued necessity of a guardianship for a young adult¹⁵ in extended foster care for whom a guardian advocate or guardian has already been appointed. The review must also address whether restoration of guardianship proceedings are needed when the child reaches 22 years of age.

The bill amends s. 39.701, F.S., to require DCF to create an updated case plan for any child that meets the requirements for the appointment of a guardian or guardian advocate. The updated case plan must be based on a face-to-face conference with the child and, if appropriate, the child's attorney, any court-appointed guardian ad litem, the temporary custodian of the child, and the parent, if the parent's rights have not been terminated.

If the court determines at the first judicial review hearing after the child's 17th birthday that there is a good faith basis to believe that the child qualifies for appointment of a guardian advocate, limited guardian, or plenary guardian and that no less restrictive decision-making assistance will meet the child's needs, then:

- 1) DCF must complete a multidisciplinary report, which must include, a psychosocial evaluation if one has not been completed within the previous two years.
- 2) DCF must identify individuals who are willing to serve as the guardian advocate, plenary guardian, or limited guardian. The child's parents may not be considered unless the court enters a written order finding such an appointment is in the child's best interest; and
- 3) Guardianship proceedings may be initiated within 180 days after the child's 17th birthday. The bill encourages the use of pro bono representation to initiate the guardianship proceedings.

In the event that another interested party, such as a pro bono attorney, initiates guardianship proceedings, the bill requires DCF to provide all necessary documentation and information to the petitioner within 45 days after the first judicial review hearing after the child's 17th birthday.

The bill also provides that the guardianship proceedings must be conducted in separate proceedings in the guardianship court, not the dependency court.

The bill amends s. 393.12, F.S., to authorize the guardianship court to take jurisdiction of a minor who is the subject of a ch. 39, F.S., proceeding and initiate guardianship proceedings once the minor reaches the age of 17 years and 6 months or anytime thereafter. The minor must be provided the same due process rights as an adult.

¹³ Sections 744.3021 and 744.342, F.S.

¹⁴ Abramowitz, *supra* note 2.

¹⁵ "Young adult" is defined as " an individual who has attained 18 years of age but who has not attained 21 years of age."

Section 39.6251(1), F.S.

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The bill amends s. 744.301, F.S., to provide that if a parent's rights have been terminated, the parent is not the natural guardian of the minor. If the minor is the subject of a ch. 39, F.S., proceeding, the parents retain their rights as natural guardians unless the court finds that it is not in the child's best interest.

The bill amends s. 744.3021, F.S., requiring minors who are the subject of a ch. 39, F.S., proceeding and aged 17 years and 6 months be given the same due process rights as an adult. It also requires the order of adjudication of incapacity and the letters of limited or plenary guardianship to issue upon the minor's 18th birthday or as soon thereafter as possible.

B. SECTION DIRECTORY:

Section 1 amends s. 39.6251, F.S., relating to continuing care for young adults.

Section 2 amends s. 39.701, F.S., relating to judicial review.

Section 3 amends s. 393.12, F.S., relating to capacity; appointment of guardian advocate.

Section 4 amends s. 744.301, F.S., relating to natural guardians.

Section 5 amends s. 744.3021, F.S., relating to guardians of minors.

Section 6 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The 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.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 17, 2015, the Children, Families & Seniors Subcommittee adopted a strike-all amendment. The amendment made the following changes:

- Amends s. 39.6251, F.S., to require annual review of the continued necessity of guardianship for a young adult in extended foster care already appointed a guardian advocate or guardian.
- Changes language to incorporate the requirements of ch. 744, F.S., and s. 393.12, F.S., to determine any child that may require the appointment of a guardian advocate or guardian, removing the language specifying, “developmentally disabled or incapacitated.”
- Adds language requiring a court to determine a good-faith basis for requesting appointment of a guardian advocate or guardian as well as a determination that no less restrictive decision-making assistance will meet the child’s needs.
- Removes language requiring the DCF to initiate guardianship proceedings in probate court.

The bill was reported favorably as a committee substitute.

On March 4, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Specifies that the proceedings seeking appointment of a guardian advocate or guardian be conducted separately from any other proceeding;
- Removes references to local rules of judicial administration and the Florida Probate Rules;
- Removes the requirement that guardianship proceedings be initiated if the court determines that the child qualifies for appointment of a guardian advocate, limited guardian, or plenary guardian and that no less restrictive decision-making assistance will meet the child’s needs;
- Encourages the use of pro bono representation to initiate guardianship proceedings; and
- Requires guardian advocate and guardianship proceedings be conducted in guardianship court rather than probate court.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.