

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 232

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

SUBJECT: Guardianship

DATE: December 3, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	Fav/CS
2.	Davis	Cibula	JU	Fav/CS
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 232 expands and renames the Statewide Public Guardianship Office within the Department of Elder Affairs (DOEA) as the Office of Public and Professional Guardians. In its new capacity, the office is given the additional responsibility of administering the regulation of professional guardians who have not previously been closely regulated by the state. The newly titled office remains housed within the DOEA.

The executive director of the new Office of Public and Professional Guardians remains an appointee of the Secretary of the DOEA, but with expanded responsibilities. The bill establishes the additional duties and responsibilities of the executive director and requires the annual registration of professional guardians.

The Office of Public and Professional Guardians is directed to adopt rules to establish standards of practice for public and professional guardians, receive and investigate complaints, establish procedures for disciplinary oversight, conduct hearings, specify penalties, and take administrative action pursuant to ch. 120, F.S.

II. Present Situation:

Guardianship

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship.

There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.¹ For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, in situations where an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is based on the determination of a court appointed examination committee.²

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.³ A fiduciary relationship exists between two persons when one of them is under a duty to act or to give advice for the benefit of another upon matters within the scope of that relationship.⁴ The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.⁵ In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out his or her responsibilities in an informed and considered manner.

Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward and his or her overall physical and social health. A guardian must file with the court an initial guardianship report,⁶ an annual guardianship report,⁷ and an annual accounting of the ward’s property.⁸ The reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties.⁹

At the heart of a court’s interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446, F.S., explicitly states that the “fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law.” In the event

¹ See generally, Section 744.102(9), F.S.

² See generally, Section 744.102(12), F.S.

³ *In re Guardianship of Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

⁴ *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

⁵ *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

⁶ Section 744.362, F.S.

⁷ Section 744.367, F.S.

⁸ Section 744.3678, F.S.

⁹ Section 744.368(1), F.S.

of a breach by the guardian of the guardian's fiduciary duty, the court must take the necessary actions to protect the ward and the ward's assets.¹⁰

Professional Guardians

In Florida, a "professional guardian" means any guardian who has, at any time, rendered services to three or more wards as their guardian.¹¹ A professional guardian must register annually with the Statewide Public Guardianship Office.¹² Currently, there are 465 professional guardians who are registered with the Statewide Public Guardianship Office.¹³ Professional guardians must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 years after the initial educational requirement is met. The instruction and education must be completed through a course approved or offered by the Statewide Public Guardianship Office.¹⁴

Professional guardians are subject to a level 2 background check,¹⁵ an investigation of the guardian's credit history,¹⁶ and are required to demonstrate competency to act as a professional guardian by taking an examination approved by the DOEA.¹⁷ These requirements do not apply to a professional guardian or the employees of that professional guardian when that guardian is a:

- Trust company;
- State banking corporation;
- State savings association authorized and qualified to exercise fiduciary powers in this state;
- or
- National banking association or federal savings and loan association authorized and qualified to exercise fiduciary duties in this state.¹⁸

Public Guardianship Act

The Public Guardianship Act is codified in s. 744.701, F.S. The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.¹⁹ The executive director of the Statewide Public Guardianship Office, after consultation with the chief judge and other judges within the judicial circuit, may establish one or more offices of public guardian within a judicial circuit.²⁰ A public guardian may serve an incapacitated person if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian.²¹ A person serving as a public guardian is considered a professional guardian

¹⁰ Section 744.446(4), F.S.

¹¹ Section 744.102(17), F.S.

¹² Section 744.1083(1) and (2), F.S.

¹³ Children and Families, and Elder Affairs Committee staff telephone conversation with the Department of Elder Affairs on March 9, 2015.

¹⁴ Section 744.1085(3), F.S.

¹⁵ Section 744.1085(5), F.S.

¹⁶ Section 744.1085(4), F.S.

¹⁷ Section 744.1085(6), F.S.

¹⁸ Section 744.1085(10), F.S.

¹⁹ Ch. 99-277 Laws of Fla.

²⁰ Section 744.703(1), F.S.

²¹ Section 744.704(1), F.S.

for purposes of regulation, education, and registration.²² Public guardianship offices are located in all 20 judicial circuits in the state.²³

Determining Incapacity

The process to determine incapacity and the appointment of a guardian begins with a petition filed in the appropriate circuit court. A petition may be executed by an adult and must be served on and read to the alleged incapacitated person. The notice and copies of the petition must be provided to the attorney for the alleged incapacitated person and served on all next of kin identified in the petition. The notice must include:

- The time and place for the court hearing to inquire into the capacity of the alleged incapacitated person;
- That an attorney has been appointed to represent that person; and
- That, if he or she is determined to be incapable of exercising certain rights, a guardian will be appointed to exercise those rights on his or her behalf.²⁴

In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.²⁵ The court must enter a written order determining incapacity after finding that a person is incapacitated with respect to the exercise of a particular right or all rights. A person is determined to be incapacitated only with respect to those rights specified in the court's order.²⁶ When an order determines that a person is incapable of exercising delegable rights, the court must consider whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. If an alternative to guardianship will not sufficiently address the problems of the incapacitated person, a guardian will be appointed.²⁷

If a petition for appointment of a guardian has been filed, an order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated.²⁸ If a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine incapacity, the court may appoint an emergency temporary guardian.²⁹

Court Proceedings

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.³⁰ At any time, any interested person, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan or is exceeding his or her authority under the guardianship plan and is not acting in the best

²² Section 744.102(17), F.S.

²³ Children, Families, and Elder Affairs Committee staff meeting with the Department of Elder Affairs on February 2, 2015.

²⁴ Section 744.331(1), F.S.

²⁵ Section 744.331(5)(c), F.S.

²⁶ Section 744.331(6), F.S.

²⁷ Section 744.331(6)(b), F.S.

²⁸ Section 744.344(3), F.S.

²⁹ Section 744.344(4), F.S.

³⁰ Section 744.372, F.S.

interest of the ward. If the petition for review is found to be without merit the court may assess costs and attorney fees against the petitioner.³¹

A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee.³² Fees and costs incurred are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.³³

A ward has the right to be restored to capacity at the earliest possible time.³⁴ The ward, or any interested person filing a suggestion of capacity, has the burden of proving the ward is capable of exercising some or all of the rights which were removed. Immediately upon the filing of the suggestion of capacity, the court must appoint a physician to examine the ward. The physician must examine the ward and file a report with the court within 20 days.³⁵ All objections to the suggestion of capacity must be filed within 20 days after formal notice is served on the ward, guardian, attorney for the ward, if any, and any other interested persons designated by the court.³⁶ If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the court must set the matter for hearing.³⁷ The level of proof required to show capacity is not presently spelled out in the statute.

In a study and work group report by the Florida Developmental Disabilities Council, dated February 28, 2014, Palm Beach County court personnel performed a limited review of a random sample of 76 guardianship files for persons over the age of 18. Among these, over two thirds were of persons having age-related disabilities. After reviewing those files, the senior auditor for the circuit "reported that there were no cases where the guardianship plan recommended the restoration of any rights" of the incapacitated persons.³⁸

Media Reports

Beginning on December 6, 2014, the Sarasota Herald Tribune published a series of articles titled "The Kindness of Strangers – Inside Elder Guardianship in Florida," which detailed abuses occurring in guardianships. The paper examined guardianship court case files and conducted interviews with wards, family, and friends in the system.³⁹ The paper concluded that "Florida has cobbled together an efficient way to identify and care for helpless elders, using the probate court system to place them under guardianship." However, critics say this system "often ignores basic individual rights" and most often "plays out in secret, with hearings and files typically closed to

³¹ Section 744.3715, F.S.

³² Section 744.108(1), F.S.

³³ Section 744.108(8), F.S.

³⁴ Section 744.3215(1)(c), F.S.

³⁵ Section 744.464(2)(b), F.S.

³⁶ Section 744.464(2)(c),(d)

³⁷ Section 744.464(2)(e), F.S.

³⁸ Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, February 28, 2014 available at <http://www.bing.com/search?q=restoration+of+capacity+study+and+work+group+report&src=IE-TopResult&FORM=IETRO2&conversationid=>.

³⁹ Barbara Peters Smith, *The Kindness of Strangers – Inside Elder Guardianship in Florida*, HERALD TRIBUNE (December 6, 2014), available at <http://extra.heraldtribune.com/2014/12/06/well-oiled-machine/>.

the public.”⁴⁰ The paper also concluded that “monitoring elders and tapping their assets is a growth business: In 2003, there were 23 registered professional guardians in Florida, according to the [DOEA]. Today there are more than 440 – an increase greater than 1,800 percent in 11 years.”⁴¹

2015 Legislation (HB 5)

In the 2015 legislative session, the Legislature passed and the Governor later signed HB 5. The new statute allows for appointment of the office of criminal conflict and civil regional counsel as emergency court monitors, allows compensation for guardians and other certain individuals to be awarded by the court without receiving expert testimony, requires notice requirements for filing a petition for appointment of an emergency temporary guardian, adds for-profit corporate guardians existing under the laws of Florida as qualified to act as a guardian if certain requirements are met, and requires a court that does not use a rotation system for appointment of a professional guardian to make specific findings of fact stating why the person was selected as guardian in the particular guardianship case.

III. Effect of Proposed Changes:

The bill renames the Statewide Public Guardianship Office and significantly expands its duties. The office is renamed the Office of Public and Professional Guardians and, as its name implies, now has oversight for both public and professional guardians. While public guardians, who provide services for indigent people, have been regulated by the state, professional guardians have not been as closely regulated.

This bill establishes the regulation and supervision of professional guardians by giving the DOEA the authority to discipline professional guardians for misconduct.

Legislative Intent (Section 4)

The bill amends the legislative intent language in s. 744.1012, F.S., to express the Legislature’s intent that alternatives to guardianship and less restrictive means of assistance always be explored before an individual’s rights are removed through an adjudication of incapacity.

The legislative intent is amended to include the finding that private guardianship may be inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person and the person does not have adequate income or wealth for the compensation of the private guardian. The bill amends the legislative intent by establishing the Office of Public and Professional Guardians, to permit the establishment of public guardians to provide services for incapacitated persons when no private guardian is available. A public guardian must be provided only to those persons whose needs cannot be met through less restrictive means of intervention.

⁴⁰ *Id.*

⁴¹ *Id.*

Office of Public and Professional Guardians (Section 8)

The bill creates the Office of Public and Professional Guardians within the DOEA. The executive director of the Office of Public and Professional Guardians has oversight responsibilities over all public and professional guardians. The executive director must review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida.

The executive director's oversight responsibilities for professional guardians, include, but are not limited to:

- Establishing standards of practice for public and professional guardians;
- Reviewing and approving the standards and criteria for the education, registration, and certification of public and professional guardians in Florida;
- Developing a guardianship training program curriculum that may be offered to all public and private guardians;
- Developing and implementing a monitoring tool to use for periodic monitoring activities of professional guardians; however, this monitoring tool may not include a financial audit as required to be performed by the clerk of the circuit court under s. 744.368, F.S.;
- Developing procedures for the review of an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians;
- Establishing disciplinary proceedings, conduct hearings, and take administrative action under ch. 120, F.S.

Regulation of Professional Guardians (Section 10)

The bill provides that each professional guardian is required to demonstrate competency to act as a professional guardian by taking an examination approved by DOEA.

Discipline of Professional Guardians (Section 11)

The bill creates s. 744.2004, F.S., and directs the Office of Public and Professional Guardians to establish standards and procedures in rule by October 1, 2016, with a draft of the standards and procedures to be provided to the Governor, the Legislature, and the department secretary for review by August 1, 2016, to:

- Review, and if appropriate, investigate allegations that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians;
- Initiate an investigation no later than 10 business days after the Office receives a complaint;
- Complete and provide initial investigative findings and recommendations, if any, to the professional guardian and person filing the complaint within 60 days;
- Coordinate to the greatest extent possible with the clerks of the court to avoid duplication of duties;
- Establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S. Disciplinary actions may include, but are not limited to:
 - Requiring professional guardians to participate in additional educational courses;

- Imposing additional monitoring of the guardianships being served by the professional guardian; and
- Suspending and revoking the guardian's registration. If the final determination from a disciplinary proceeding is to suspend or revoke the guardian's registration, the determination must be provided to any court that oversees any guardianship to which the professional guardian is appointed.
- The court may only appoint a professional guardian that is registered by the department.

Grounds for Discipline, Penalties, and Enforcement (Section 12)

The bill provides that the following acts by a professional guardian constitute grounds for disciplinary action:

- Making misleading, deceptive, or fraudulent representations relating to guardianship work.
- Violating rules governing guardians and guardianships.
- Being convicted or found guilty, or entering a plea, regardless of adjudication, of a crime related to the practice or ability to practice as a professional guardian.
- Failing to comply with the educational course requirements.
- Having a registration, license, or authority to practice in a regulated profession removed.
- Knowingly filing a false report or complaint with the office against another guardian.
- Attempting to secure or renew a registration or license by bribery, fraudulent misrepresentation, or through an undisclosed error made by the office.
- Failing to report someone who the professional guardian knows is violating ch. 744, F.S., relating to guardianship, or rules of the office.
- Failing to perform professional guardian obligations.
- Making or filing a report or record known to be false or not filing a required report or record or impeding someone's effort to do so.
- Using the position of guardian for inappropriate financial gain.
- Violating a lawful order or failing to comply with a lawfully issued subpoena by the office.
- Improperly interfering with an investigation, inspection, or disciplinary proceeding.
- Using the guardian relationship to engage certain people in sexual activity.
- Failing to report to the office in writing within 30 days after being convicted or found guilty or entering a plea to a crime.
- Being unable to function as a professional guardian due to certain impediments.
- Failing to post and maintain the necessary blanket fiduciary bond.
- Failing to maintain records for a reasonable time after the court closes a guardianship.
- Violating provisions of ch. 744, F.S., relating to guardianship, or any rules adopted pursuant to the chapter.

The bill also provides penalties that the office may impose for a violation of the above and that the office may establish disciplinary guidelines by rule.

When recommending penalties for violations, an administrative law judge must follow the disciplinary guidelines and state in writing any mitigating or aggravating circumstance upon which a recommended penalty is based if he or she recommends a penalty not provided in the guidelines. The office may impose a penalty other than ones stated in the disciplinary guidelines if a specific finding is made in the final order of mitigating or aggravating circumstances. The

office is also authorized to seek an injunction or writ of mandamus against someone who violates the chapter or pertinent rules. If the office revokes a professional guardian's registration, the revocation is permanent. If the office suspends or revokes a professional guardian's registration, the office must provide its determination to the appropriate court for any guardianship case in which the guardian is appointed.

Access to Records by the Office of Public and Professional Guardians (Section 20)

Under current law, any confidential or exempt information provided to the Statewide Public Guardianship Office (renamed by the bill to the Office of Public and Professional Guardians) continues to be held confidential or exempt as otherwise provided by law. Current law also provides that all records relating to the medical, financial, or mental health of vulnerable adults as defined in ch. 415, F.S., persons with a developmental disability as defined in ch. 393, F.S., or persons with a mental illness as defined in ch. 394, F.S., are confidential and exempt from s. 119.07(1), F.S., and Article I, section 24(a) of the Florida Constitution.

The bill provides the Office of Public and Professional Guardians access to records held by an agency or the court and its agencies which are necessary as part of an investigation of a guardian as a result of a complaint filed with the Office.

Joining Forces for Public Guardianship (Section 22)

The bill provides that the purpose of the already existent Joining Forces for Public Guardianship matching grant program is to assist counties in establishing and funding community-supported public guardianship programs.

Credit and criminal investigations (Section 26)

The Office of Public and Professional Guardians shall adopt rules by October 1, 2016, that detail the acceptable methods for completing an electronic fingerprint criminal history record check and for completing a credit investigation for professional guardians and each employee of a professional guardian who has a fiduciary responsibility to the ward.

Organizational Changes (Remaining Sections)

The remaining sections of the bill make technical changes and relocate what is currently part II, Venue, to part I, General Provisions, retitles part II as Public and Professional Guardians and makes other conforming changes to carry out the intent of the act.

Effective Date (Section 37)

The bill is effective upon becoming a law.

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

The mandate restrictions do not apply because the bill does not affect counties and municipalities.

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:

Professional guardians may bear increased costs due to regulation by the Department of Elder Affairs.

C. Government Sector Impact:

The Department of Elder Affairs will see increased costs associated with regulating private guardians. The department would need budget and FTEs to perform the duties required by the bill. There would also be increased costs to the department's general counsel office as the professional guardians will be able to challenge decisions by the department under ch. 120, F.S. The department currently provides education to professional guardians statewide. There are approximately 456 such guardians that would be regulated under this bill. The number of wards represented by these guardians is unknown at this time and would need to be considered when estimating the cost of regulation.

The Office of the State Courts Administrator estimates that this bill will have little, if any, impact on the courts.⁴² Clerks of courts will sometimes be required to provide audits to the office for purposes of investigation, which might result in a minimal increase in work to produce the court records.

The Office of the State Courts Administrator also noted that the revenues to the State Courts' trust funds generated from civil filing fees cannot be determined at this time

⁴² Office of the State Courts Administrator, *2016 Judicial Impact Statement for CS/SB 232* (Dec. 1, 2016) (on file with the Senate Committee on Judiciary).

because the number of additional appellate cases produced by this bill is unknown. Similarly, the expenditures caused by appellate review cases cannot be accurately determined at this time.

D. Other Constitutional Issues:

Section 8 of the bill requires the executive director of the Office of Public and Professional Guardians to establish standards of practice by rule. The bill, however, does not give the office any further guidance on the issues that should be addressed by those standards of practice or how any such issue should be addressed. Accordingly, the Legislature may wish to revise the bill to add additional direction to guide the rulemaking process and ensure that the bill does not unlawfully delegate legislative authority in violation of Article II, s. 3 of the Florida Constitution.^{43, 44}

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Office of Public and Professional Guardians is directed to adopt rules concerning professional guardians to establish standards of practice, procedures for investigations and disciplinary oversight, including conducting hearings and taking administrative action pursuant to ch. 120, F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 20.415, 400.148, 415.1102, 744.1012, 744.1083, 744.1085, 744.201, 744.202, 744.2025, 744.7021, 744.344, 744.703, 744.704, 744.705, 744.706, 744.707, 744.708, 744.709, 744.7081, 744.7082, 744.712, 744.713, 744.714, 744.715, 744.3135, 744.331, and 744.524.

This bill creates the following sections of the Florida Statutes: 744.2004 and 744.20041.

This bill repeals the following sections of the Florida Statutes: 744.701, 744.702, 744.7101, and 744.711.

⁴³ Article II, s. 3 of the Florida Constitution states, “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”

⁴⁴ See also *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978). In *Cross Key Waterways*, the Florida Supreme Court explained that under the non-delegation doctrine established in Art. II, s. 3 of the Florida Constitution, fundamental and primary policy decisions must be made by the Legislature and the administration of legislative programs must be pursuant to minimal standards and guidelines.

IX. Additional Information:

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

CS/CS by Judiciary on December 1, 2015:

The committee substitute provides that a public guardian may also serve as a limited guardian or guardian advocate when the public guardian is the guardian of last resort.

A new section 12 enumerates grounds for disciplinary action against a professional guardian, penalties that may be imposed, the creation of disciplinary guidelines that must be followed by an administrative law judge and aggravating and mitigating circumstances to be considered. The Office of Public and Professional Guardians is authorized to file proceedings for violations of the chapter and if the office determines that a revocation of a professional guardian's registration is appropriate, the revocation is permanent. The office is authorized to adopt rules to administer the section.

CS by Children, Families, and Elder Affairs on October 8, 2015:

The committee substitute corrects a cross-reference.

- B. **Amendments:**

None.