

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 Children, Families, and Elder Affairs

BILL: CS/SB 730

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Margolis

SUBJECT: Professional Guardians

DATE: January 21, 2016

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 730 limits the number of wards a professional guardian can serve to 50.

The bill has no fiscal impact to the state and has an effective date of July 1, 2016.

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, when an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is determined by a court appointed examination committee.²

¹ See generally, s. 744.102(9), F.S.

² See generally, s. 744.102(12), F.S.

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 744.361, 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., 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 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 and 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

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, F.S.

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.

A professional guardian is subject to a level 2 background check,¹⁵ an investigation of the guardian's credit history,¹⁶ and is 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 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.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

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 Chapter 99-277 L.O.F.

²⁰ Section 744.703(1), F.S.

²¹ Section 744.704(1), F.S.

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.

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 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 specified 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

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.

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)(d), F.S.

³⁷ Section 744.464(2)(e), F.S.

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 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 (Ch. 2015-83, HB 5)

In 2015, the Legislature passed and the Governor signed HB 5. The new law:

- 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 expert testimony;
- Requires notice requirements for filing a petition for appointment of an emergency temporary guardian;
- Allows a for-profit corporate guardians existing under Florida law 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 instead make specific findings of fact stating why the guardian was selected in the particular guardianship case.⁴²

³⁸ Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, (February 28, 2014), available at <http://www.guardianship.org/IRL/Resources/Handouts/Charting%20a%20New%20Course%20Restoration%20Report.pdf> (last visited January 7, 2016).

³⁹ Barbara Peters Smith, *The Kindness of Strangers – Inside Elder Guardianship in Florida*, HERALD TRIBUNE (February 9, 2015), available at <http://guardianship.heraldtribune.com/> (last visited January 7, 2016).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Florida Senate, 2015 Bill Summary, *CS/CS/CS HB 5 – Guardianship Proceedings*, available at <http://www.flsenate.gov/Committees/billsummaries/2015/html/969> (last visited January 10, 2016).

III. Effect of Proposed Changes:

Section 1 creates s. 744.1087, F.S., to place limits on professional guardians. The bill limits the number of wards a professional guardian can serve to 50. The bill allows for this limit to be achieved after July 1, 2016 through attrition.

Section 2 provides an effective date of July 1, 2016.

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

None.

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 would be limited to 50 wards per professional guardian. This would negatively impact the fees awarded to professional guardians.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill contains no enforcement mechanisms. If the professional guardians are members of the Florida Bar, the Bar could sanction attorneys acting as professional guardians who violate the provisions of the bill.

VIII. Statutes Affected:

This bill creates section 744.1087 of the Florida Statutes.

IX. Additional Information:

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

CS by Children, Families, and Elder Committee on January 20, 2016:

The CS removes the limit for banks and trust companies from having more than 50 wards per professional guardian. The CS removes the provisions that prohibited professional guardians from conducting additional business with the ward. This is currently prohibited by s. 744.446, F.S., relating to conflicts of interest.

- B. **Amendments:**

None.