

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	HB 6057	<b>FINAL HOUSE FLOOR ACTION:</b>		
<b>SUBJECT/SHORT TITLE</b>	Office of Public and Professional Guardians Direct-Support Organizations	112	Y's 1	N
<b>SPONSOR(S):</b>	Fischer	<b>GOVERNOR'S ACTION:</b>		Approved
<b>COMPANION BILLS:</b>	SB 498			

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**SUMMARY ANALYSIS**

HB 6057 passed the House on February 21, 2018, as SB 498.

A guardian is someone who is appointed by the court to act on behalf of a ward (an individual who has been adjudicated incapacitated) regarding his or her person or property or both. The Office of Public and Professional Guardians (OPPG) appoints local public guardian offices to provide guardianship services to individuals who do not have adequate income or assets to afford a private guardian and have no willing family or friend to serve.

Direct-support organizations (DSOs) are statutorily-authorized entities that are generally required to be non-profit organizations and may carry out specific tasks in support of public entities or public causes. Current law sets a repeal date for all DSOs of October 1 of the fifth year after the DSO's enactment unless the DSO is reenacted by the Legislature.

Section 744.2105, F.S., authorizes a DSO to support the OPPG. This section requires the OPPG DSO to be:

- A non-profit under Chapter 617, F.S.;
- Organized and operated to conduct programs and activities and generate funding for the OPPG; and
- Determined by the OPPG to be consistent with the goals of the office, in the best interest of the state, and in accordance with the adopted goals and mission of the Department of Elder Affairs (DOEA) and the OPPG.

The OPPG DSO is scheduled for repeal October 1, 2018. The bill removes the scheduled repeal date for the DSO for the OPPG within the DOEA.

This bill has a significant, positive fiscal impact on the OPPG and the local Offices of Public Guardianship.

The bill was approved by the Governor on March 19, 2018, ch. 2018-20, L.O.F., and will become effective on July 1, 2018.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h6057z.CFS

**DATE:** March 21, 2018

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Background**

##### Guardianship

When an individual is unable to make legal decisions regarding his or her person or property, a guardian may be appointed to act on his or her behalf. A guardian is someone who is appointed by the court to act on behalf of a ward (an individual who has been adjudicated incapacitated) regarding his or her person or property or both.<sup>1</sup> Adjudicating a person totally incapacitated and in need of a guardian deprives a person of his or her civil and legal rights.<sup>2</sup> The Legislature has recognized that the least restrictive form of guardianship should be used to ensure the most appropriate level of care and the protection of that person's rights.<sup>3</sup>

The process to determine an individual's incapacity and the subsequent appointment of a guardian begins with a verified petition detailing the factual information supporting the reasons the petitioner believes the individual to be incapacitated, including the rights the alleged incapacitated person is incapable of exercising.<sup>4</sup> Once a person has been adjudicated incapacitated (termed a "ward"), the court appoints a guardian, and the letters of guardianship are issued.<sup>5</sup> The order appointing a guardian must be consistent with the ward's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the ward the right to make decisions in all matters commensurate with his or her ability to do so.<sup>6</sup>

#### *Who Can Be Appointed Guardian*

The following may be appointed guardian of a ward:

- Any resident of Florida who is 18 years of age or older and has full legal rights and capacity;
- A nonresident if he or she is related to the ward by blood, marriage, or adoption;
- A trust company, a state banking corporation, or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in Florida;
- A nonprofit corporation organized for religious or charitable purposes and existing under the laws of Florida;
- A judge who is related to the ward by blood, marriage, or adoption, or has a close relationship with the ward or the ward's family, and serves without compensation;
- A provider of health care services to the ward, whether direct or indirect, when the court specifically finds that there is no conflict of interest with the ward's best interests; or
- A for-profit corporation that meets certain qualifications, including being wholly owned by the person who is the circuit's public guardian in the circuit where the corporate guardian is appointed.<sup>7</sup>

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<sup>1</sup> s. 744.102(9), F.S.

<sup>2</sup> s. 744.101(1), F.S.

<sup>3</sup> s. 744.101(2), F.S.

<sup>4</sup> s. 744.3201, F.S.

<sup>5</sup> ss. 744.3371-744.345

<sup>6</sup> s. 744.2005, F.S.

<sup>7</sup> s. 744.309, F.S.

## *Relationship Between Guardian and Ward*

The relationship between a guardian and his or her ward is a fiduciary one.<sup>8</sup> A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.<sup>9</sup> The guardian, as fiduciary, must:

- Act within the scope of the authority granted by the court and as provided by law;
- Act in good faith;
- Not act in a manner contrary to the ward's best interests under the circumstances; and
- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.<sup>10</sup>

Additionally, s. 744.446, F.S., states that there is a fiduciary relationship between the guardian and the ward and that such relationship may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law. As such, the guardian must act in the best interest of the ward and carry out his or her responsibilities in an informed and considered manner. Should a guardian breach his or her fiduciary duty to the ward, the court is authorized to intervene.<sup>11</sup>

Guardians are subject to the requirements of ch. 744, F.S. There are three main types of guardians: family or friends of the ward, professional guardians, and public guardians.<sup>12</sup> The two types of guardians overseen by the Department of Elder Affairs (DOEA) are public and professional guardians.<sup>13</sup>

### Public Guardianship

In 1999 the Legislature created the "Public Guardianship Act" and established the Statewide Public Guardianship Office.<sup>14</sup> By December 2013, the OPPG had expanded public guardianship services to cover all 67 counties.<sup>15</sup> In 2016, the Legislature renamed the Statewide Public Guardianship Office within the DOEA as the Office of Public and Professional Guardians (OPPG). The OPPG appoints local public guardian offices to provide guardianship services to people who have neither adequate income or assets to afford a private guardian, nor any willing family or friend to serve.<sup>16</sup> The executive director of the OPPG is responsible for the oversight of all public guardians.<sup>17</sup>

The executive director appoints a public guardian for each Office of the Public Guardian that is established under the OPPG.<sup>18</sup> There are currently 17 local offices throughout Florida that contract with the OPPG.<sup>19</sup> The public guardian must maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions.<sup>20</sup>

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<sup>8</sup> *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.

<sup>9</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>10</sup> s. 744.361(1), F.S.

<sup>11</sup> s. 744.446(4), F.S.

<sup>12</sup> ch. 744, F.S.

<sup>13</sup> s. 744.2001, F.S.

<sup>14</sup> s. 744.701, F.S. (1999).

<sup>15</sup> Florida is the only state, except for Delaware (which has three counties), to provide public guardian services in every county. Florida Department of Elder Affairs, Summary of Programs and Services, February, 2014, available at [http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2014/2014%20SOPS\\_complete.pdf](http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2014/2014%20SOPS_complete.pdf) (last visited March 16, 2016).

<sup>16</sup> Department of Elder Affairs, Office of Public and Professional Guardians, available at <http://elderaffairs.state.fl.us/doea/spgo.php> (last visited January 8, 2018).

<sup>17</sup> s. 744.7021(2), F.S.

<sup>18</sup> s. 744.2006(1), F.S.

<sup>19</sup> Department of Elder Affairs, Office of Public and Professional Guardians, available at <http://elderaffairs.state.fl.us/doea/spgo.php> (last visited January 8, 2018).

<sup>20</sup> *Id.*

The OPPG monitors the public guardians by conducting in-depth investigations into the local programs<sup>21</sup> administration and use of financial resources. The OPPG's fiscal monitoring includes investigating whether public guardians are spending state resources and wards' assets reasonably. The OPPG reviews the case files and notes if there are any show cause orders or other issues that need to be addressed; additionally, the OPPG conducts random site visits for at least 20% of the wards belonging to each public guardian.<sup>22</sup>

A public guardian may serve as a guardian of a person adjudicated incapacitated under Chapter 744, F.S., if there is no other family member or friend, bank, or corporation willing to serve as a guardian.<sup>23</sup> Public guardians primarily serve incapacitated persons who are of limited financial means, as defined by contract with or rule by the DOEA.<sup>24</sup> A public guardian may serve incapacitated persons of greater financial means at the DOEA's discretion.<sup>25</sup>

### Powers and Duties of the Guardian

The guardian of an incapacitated person may exercise only those rights removed from the ward and delegated to the guardian.<sup>26</sup> The guardian has a great deal of power when it comes to managing the ward's estate. Some of these powers require court approval before they may be exercised.

Examples of Powers That May Be Exercised By a Guardian	
Upon Court Approval <sup>27</sup>	Without Court Approval <sup>28</sup>
<ul style="list-style-type: none"> <li>• Enter into contracts that are appropriate for, and in the best interest of, the ward.</li> <li>• Perform, compromise, or refuse performance of a ward's existing contracts.</li> <li>• Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein</li> <li>• Borrow money to be repaid from the property of the ward or the ward's estate.</li> <li>• Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward.</li> <li>• Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate.</li> <li>• Exercise any option contained in any policy of insurance payable to the ward.</li> <li>• Make gifts of the ward's property to members of the ward's family in estate and income tax planning.</li> <li>• Pay reasonable funeral, interment, and grave marker expenses for the ward.</li> </ul>	<ul style="list-style-type: none"> <li>• Retain assets owned by the ward.</li> <li>• Receive assets from fiduciaries or other sources.</li> <li>• Insure the assets of the estate against damage, loss, and liability.</li> <li>• Pay taxes and assessments on the ward's property.</li> <li>• Pay reasonable living expenses for the ward, taking into consideration the ward's current finances.</li> <li>• Pay incidental expenses in the administration of the estate.</li> <li>• Prudently invest liquid assets belonging to the ward.</li> <li>• Sell or exercise stock subscription or conversion rights.</li> <li>• Consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise of the ward.</li> <li>• Employ, pay, or reimburse persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties.</li> </ul>

<sup>21</sup> These are entities that have contracted with OPPG to provide public guardian services.

<sup>22</sup> Email from Department of Elder Affairs, *FW: DOEA Summary of Programs and Services (override)*, March 16, 2015. (on file with Children, Families, & Seniors Subcommittee staff).

<sup>23</sup> s. 744.2007(1), F.S.

<sup>24</sup> s. 744.2007(3), F. S.

<sup>25</sup> *Id.*

<sup>26</sup> s. 744.361(1), F.S.

<sup>27</sup> s. 744.441, F.S.

<sup>28</sup> s. 744.444, F.S.

## Direct-Support Organizations (DSOs)

Direct-support organizations (DSOs) are statutorily sanctioned entities that are generally required to be non-profit organizations<sup>29</sup> and are authorized to carry out specific tasks in support of public entities or public causes. In 2014, the Legislature conducted a review of the relationships between DSOs and the government entities they support.<sup>30</sup> The review prompted the creation of s. 20.058, F.S. This section serves two important functions: it establishes a comprehensive set of transparency and reporting requirements for DSOs, and it sets a repeal date of October 1 of the fifth year after enactment unless the DSO is reenacted by the Legislature.<sup>31</sup>

### *Reporting and Audit Requirements for DSOs*

Each DSO must annually submit by August 1 the following information to the agency it supports:<sup>32</sup>

- The name, mailing address, telephone number, and website address of the DSO;
- The statutory authority or executive order that created the DSO;
- A brief description of the mission of, and results obtained by, the DSO;
- A brief description of the DSO's plans for the next three fiscal years;
- A copy of the DSO's code of ethics; and
- A copy of the DSO's most recent Internal Revenue Service (IRS) Form 990.

This information must be made available by the agency receiving the information through its website.<sup>33</sup> The agency must also provide a link to the organization's website, if one exists.<sup>34</sup> Any contract between an agency and a DSO is contingent upon the DSO's submission of this information and the subsequent online posting by the agency.<sup>35</sup> The agency head may terminate a contract if an organization fails to submit the required information for two consecutive years.<sup>36</sup>

By August 15<sup>th</sup> every year, the agency must report the information provided by the DSO to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Office of Program Policy Analysis and Government Accountability.<sup>37</sup> The agency report must also include the agency's recommendation, with supporting rationale, to continue, terminate, or modify the agency's association with each DSO.<sup>38</sup>

In addition to these reporting requirements, DSOs are subject to audits by the Auditor General<sup>39</sup> and are subject to public records requirements.

### *Department of Elder Affairs DSO Authorization*

Section 744.2105, F.S., authorizes a direct-support organization to support the OPPG. This section requires the DSO to be:

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<sup>29</sup> Ch. 617, F.S.

<sup>30</sup> s. 20.058, F.S.

<sup>31</sup> *Id.*

<sup>32</sup> s. 20.058(1), F.S.

<sup>33</sup> s. 20.058(2), F.S.

<sup>34</sup> *Id.*

<sup>35</sup> s. 20.058(4), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> s. 20.058(3), F.S.

<sup>38</sup> *Id.*

<sup>39</sup> s. 11.45(3), F.S.

- A non-profit under Chapter 617, F.S.;
- Organized and operated to conduct programs and generate funding for the OPPG; and
- Determined by the OPPG to be consistent with the goals of the office, in the best interest of the state, and in accordance with the adopted goals and mission of the DOEA and the OPPG.<sup>40</sup>

The DSO operates under a written contract with the OPPG that ensures that the DSO is complying with the intended goals and purposes of the office and in the best interest of the state.<sup>41</sup> If the DSO ceases to exist, the money and property it holds in trust must be reverted to the OPPG.<sup>42</sup> The DOEA Secretary appoints the board of directors for the DSO from a list of nominees submitted by the executive director of the OPPG.<sup>43</sup> The DOEA may allow the DSO to use its facilities at the agency's discretion.<sup>44</sup> All money held by the DSO must be held in a separate account in the name of the DSO, and must be expressly used to support the OPPG, and not for lobbying.<sup>45</sup> The DSO must provide for an annual financial audit in accordance with s. 215.981, F.S.<sup>46</sup> The DSO is repealed October 1, 2018, unless it is reviewed and saved from repeal.<sup>47</sup>

#### Foundation for Indigent Guardianship, Inc. (FIG)

The Foundation for Indigent Guardianship, Inc. (FIG) is a DSO established in 2002 to support the OPPG within the DOEA. In 2006, FIG founded the Florida Guardianship Pooled Special Needs Trust (Trust). The Trust provides support to the OPPG by directing residual funds from the trust account of a deceased beneficiary to the OPPG.<sup>48</sup>

#### *Pooled Special Needs Trusts*

Special needs trusts are established under federal law specifically to benefit beneficiaries who have a mental illness or are disabled and are under age 65.<sup>49</sup> These trusts are designed to sequester the assets of beneficiaries so they are still financially eligible for government assistance such as Medicaid and SSI benefits. The beneficiary's own money, or money given by a family member or other person, may be included in a special needs trust.<sup>50</sup> The funds held in special needs trusts may only be used to provide beneficiaries with comforts that Medicaid and SSI do not offer.<sup>51</sup> When a beneficiary passes away, the remaining funds in his or her special needs trust account are used to off-set the Medicare and SSI money that states provided to the beneficiary during his or her life.<sup>52</sup>

To reduce the administrative costs related to operating a trust, a beneficiary may choose to keep his or her money in a pooled special needs trust. These trusts are administered by non-profit organizations, and manage separate accounts for each beneficiary (called "trust sub accounts" or "TSAs").<sup>53</sup> Each

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<sup>40</sup> s. 744.2105(1), F.S.

<sup>41</sup> s. 744.2105(2), F.S.

<sup>42</sup> *Id.*

<sup>43</sup> s. 744.2105(3), F.S.

<sup>44</sup> s. 744.2105(4), F.S.

<sup>45</sup> s. 744.2105(5), F.S.

<sup>46</sup> s. 744.2105(7), F.S.

<sup>47</sup> s. 744.2105(8), F.S.

<sup>48</sup> s. 744.2105, F.S.

<sup>49</sup> 42 U.S.C. § 1396p(d)(4)

<sup>50</sup> *Id.*

<sup>51</sup> National Academy of Elder Law Attorneys, Inc., *Special Needs Trust Fairness Act (H.R. 670/S. 349)*, <https://www.naেলা.org/NAELADocs/114th%20SNNTFA%20Updated%201pger.pdf> (last visited 1/11/2018).

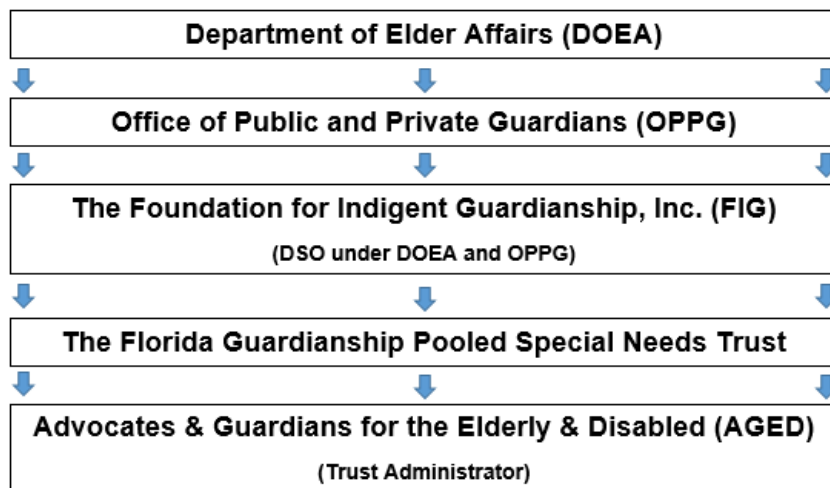
<sup>52</sup> 42 U.S.C. § 1396p(d)(4).

<sup>53</sup> 42 U.S.C. § 1396p(d)(4)(C).

beneficiary also has his or her own trustee, who manages the assets and disbursements related to the trust account.<sup>54</sup>

#### *The Florida Guardianship Pooled Special Needs Trust*

The Trust has two purposes: to ensure that Trust beneficiaries qualify for government assistance, and to enable FIG to further its not-for-profit purpose of providing funding to the OPPG.<sup>55</sup> FIG is the Founding Trustee.<sup>56</sup> As of November 28, 2016, Advocates & Guardians for the Elderly & Disabled, Inc., (AGED), a non-profit organization under Chapter 617, F.S., became the administrative trustee.<sup>57</sup> In this capacity, AGED is authorized to manage and administer the Trust and its separate TSAs.<sup>58</sup> The amount of fees, costs, and expenses associated with each TSA is determined by AGED and set out in its fee schedule.<sup>59</sup> There are currently 70 beneficiaries in the Trust.



#### *Funds Provided to OPPG*

When a beneficiary in the Trust passes away, AGED uses the remainder of the funds in his or her personal account to pay back the state for the government assistance paid to the beneficiary during his or her life. Any residual funds after this pay-back are deposited in the FIG operating account.<sup>60</sup> Of these residual funds, 10% remain in the operating account, 10% are transferred to the FIG emergency account, and 80% are awarded to OPPG.<sup>61</sup>

According to DOEA, once residual funds become available, FIG notifies the local Office of Public Guardianship in the circuit where the residual funds originated of the available funds and requests information as to how the local office proposes to use the funds. The local Office of Public Guardianship then responds to FIG with an itemization of how the funds would be spent.<sup>62</sup> The FIG Board of Directors reviews the itemized request to ensure funds would be used to help non-recurring “public guardianship” services. After the FIG Board approves the expenditure, it forwards the itemized request to the OPPG Director for final review and approval. After the OPPG Director approves the request, FIG requests that

<sup>54</sup> *Id.*

<sup>55</sup> *Amended and Restated Master Trust Declaration of The Florida Public Guardianship Pooled Special Needs Trust*, Art.2 Sec.8 Purpose, Intent and Design (on file with Children, Families, & Seniors Subcommittee staff).

<sup>56</sup> *Id.* at Art.1 Sec.4.

<sup>57</sup> *Id.* at Art.1 Sec.1.

<sup>58</sup> *Id.* at Art.2 Sec.6.

<sup>59</sup> *Id.* at Art.6 Sec.4.

<sup>60</sup> Email from Jon Conley, Director of Legislative Affairs, Department of Elder Affairs, RE: DSO Follow-up, (Dec. 21, 2017) (on file with Children, Families, & Seniors Subcommittee staff).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

a check for the award be mailed to the local Office of Public Guardianship.<sup>63</sup> One example of these awards is a disbursement of \$5,487.59 to Seniors First, Inc., to modernize its equipment and expand the capacity of the guardianship department.<sup>64</sup> FIG's trust income since 2009 is as follows:<sup>65</sup>

- 2009: \$136,338
- 2010: \$687,217
- 2011: \$433,055
- 2012: \$200,062
- 2013: \$103,280
- 2014: \$ 18,681
- 2015: \$274,597

Beginning in Fiscal Year 2016-2017, FIG established a new Emergency Fund Award opportunity to help local Offices of Public Guardianship when an unbudgeted need arises. A local Office of Public Guardianship may request an Emergency Fund Award from FIG at any time by providing an itemized request of how funds will be spent. Examples of these requests are travel for educational purposes, hurricane relief, and equipment failure. The FIG Board of Directors also reviews these itemized requests.<sup>66</sup>

#### *Other Services Provided by FIG*

FIG provides other resources to OPPG besides funds from the Trust, including complimentary educational opportunities for the staff of public guardianship programs, as well as other projects to educate the public about the needs of public guardians and those they serve.<sup>67</sup>

#### *Oversight of FIG and the Trust*

According to FIG, it has been audited every year since its inception, and copies of its audits are provided to the DOEA as required by statute. No issues or findings by the auditing firms have been reported thus far.<sup>68</sup> Since the Amended and Restated Master Trust Declaration went into effect in 2016 transferring administrative trustee responsibilities to its current trust administrator, the FIG Board has not seen a need to conduct an audit of the special needs trust accounts.<sup>69</sup> To facilitate oversight of the trust administrator, since 2017, AGED provides monthly reports to all FIG Board members. These monthly reports list each subaccount by name and account number as well as county of origin and total cash value.<sup>70</sup>

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None. However, public guardianship programs contracting with DOEA will continue to receive additional revenue from the DSO. See Fiscal Comments.

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<sup>63</sup> *Id.*

<sup>64</sup> Letter from OPPG to FIG President, December 14, 2017 (on file with Children, Families, & Seniors Subcommittee staff).

<sup>65</sup> *Id.*

<sup>66</sup> *Supra.* n. 60

<sup>67</sup> Department of Elder Affairs, Agency Analysis of 2018 House Bill 6057, p. 4 (Dec. 14, 2017).

<sup>68</sup> Email from Vicki Simmons, FIG Executive Director, January 5, 2018, FW: Additional Information for House Staff RE DSO Re-authorization, (Jan. 5, 2018).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*



2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Since inception in 2006, FIG has distributed over \$1 million to OPPG-contracted public guardianship programs through revenues generated by the Trust.<sup>71</sup> Of the residual funds from trust accounts that are collected by FIG when a beneficiary passes away, 10% remain in the operating account, 10% are transferred to the emergency account, and 80% are awarded to OPPG.<sup>72</sup> The amount of money received by FIG varies from year to year, depending on how many trust beneficiaries pass away and the assets they have. FIG's trust income since 2009 is as follows:<sup>73</sup>

- 2009: \$136,338
- 2010: \$687,217
- 2011: \$433,055
- 2012: \$200,062
- 2013: \$103,280
- 2014: \$ 18,681
- 2015: \$274,597

Removing the repeal will allow the local offices of public guardianship to continue receiving this revenue from FIG.

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<sup>71</sup> Department of Elder Affairs, Agency Analysis of 2018 House Bill 6057, p. 4 (Dec. 14, 2017)(on file with Children, Families, & Seniors staff).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*