

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1085 Guardianship Proceedings
SPONSOR(S): Civil Justice Subcommittee, Geller
TIED BILLS: IDEN./SIM. **BILLS:** SB 1338

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N, As CS	Rochester	Poche
2) Children, Families & Seniors Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A guardianship is a trust relationship that protects a vulnerable person, such as a minor child or an incapacitated adult. In a guardianship, a guardian is appointed to act on behalf of a vulnerable person (ward) by making health care or personal decisions, or managing the ward's money or property.

Venue is the proper place for a lawsuit to proceed. Venue for an incapacity determination proceeding is the court where the incapacitated adult either resides or is found. Venue for a guardian appointment proceeding depends on whether the incapacitated person is a state resident or non-state resident:

- If the person is a state resident, venue is in the county where the incapacitated person resides.
- If the person is not a state resident, venue is in a county where the incapacitated person's property is located.
- If the person is not a state resident and owns no property, venue is in the county where any debtor of the incapacitated person resides.

Current law does not provide venue for a minor's guardian appointment proceeding.

For a court to appoint a guardian for an adult, the court must first find that the adult is incapacitated. Within five days after a petition to determine incapacity has been filed, the court must appoint a three-member examining committee to evaluate the alleged incapacitated person. If a majority of the examining committee members conclude the alleged incapacitated person is not incapacitated, the court must dismiss the petition.

CS/HB 1085 clarifies that venue for appointing a guardian applies to minors and incapacitated persons. The bill also provides an interested party an opportunity to object to a petition to determine incapacity dismissal by filing a timely verified motion making a reasonable showing that a hearing is necessary. The bill authorizes the court to impose sanctions if it finds a verified motion was filed in bad faith.

The bill may have a negative indeterminate fiscal impact on state government.

The bill provides an effective date of upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Guardianship

A guardianship is a trust relationship that protects a vulnerable person, such as a minor child or an incapacitated adult. In a guardianship, a guardian is appointed to act on behalf of the vulnerable person (ward).¹ There are two types of guardianship:

- Guardianship over the person;² and
- Guardianship over the property,³ which may be limited or plenary.⁴

A guardian is authorized to care for the ward and his or her property during the ward's infancy, disability, or incapacity.⁵

For an adult, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her person or property. If an adult is incompetent, an involuntary guardianship may be established through an adjudication of incompetence, which is determined by a court appointed examination committee.⁶ Once an adult is adjudicated incompetent, then a guardian may be appointed.⁷ For a minor,⁸ a petition to determine incapacity does not need be filed because minors presumptively lack capacity by operation of law.⁹

Venue

Venue is the proper place for a lawsuit to proceed, usually because the place has a connection either to the events that gave rise to the lawsuit or to one of the parties.¹⁰ Venue for an incapacity determination proceeding is the court where the incapacitated adult either resides or is found.¹¹

Venue for a guardian appointment proceeding depends on whether the incapacitated person is a state resident or non-state resident:

- If the person is a state resident, venue is in the county where the incapacitated person resides.¹²
- If the person is not a state resident, venue is in a county where the incapacitated person's property is located.¹³
- If the person is not a state resident and owns no property, venue is in the county where a debtor of the incapacitated person resides.¹⁴

¹ S. 744.102(9), F.S.

² A guardian over the person is a person who makes health care and other personal decisions for a ward.

³ A guardian of property is someone the court names to manage money and property for a ward.

⁴ A limited guardianship is appropriate if the court finds the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property. A plenary guardian is a person appointed by the court to exercise all delegable legal rights and powers of the adult ward after the court makes a finding of incapacity. S. 744.102(9), F.S.

⁵ BLACK'S LAW DICTIONARY, 10th edition, 2014.

⁶ See generally, s. 744.102(12), F.S.

⁷ *D.H. v. Adept Cmty. Services, Inc.*, 43 Fla. L. Weekly S533 (Fla. Nov. 1, 2018), *reh'g denied*, SC17-829, 2018 WL 6264576 (Fla. Nov. 29, 2018) (quoting *Hayes v. Guardianship of Thompson*, 952 So.2d 498, 505 (Fla. 2006))(internal quotation marks omitted).

⁸ A minor is an unmarried person under the age of 18. Section 744.102(13), F.S.

⁹ Fla. Prob. R. 5.555(a)-(b).

¹⁰ BLACK'S LAW DICTIONARY (10th ed. 2014).

¹¹ *Id.*

¹² S. 744.1097(2)(a), F.S.

¹³ S. 744.1097(2)(b), F.S.

¹⁴ S. 744.1097(2)(c), F.S.

Although the venue statute does not currently include minors, the committee note to Florida Probate Rule 5.555 indicates that venue for purposes of appointing a guardian for a minor is determined in the same manner venue is determined for an incapacitated adult under ch. 744.¹⁵

Petition to Determine Incapacity and Appoint a Guardian

A petition to determine incapacity must include:

- The petitioner's name, age, and present address, and his or her relationship to the alleged incapacitated person (AIP);
- The AIP's name, age, county of residence, and present address;
- The AIP's primary language;
- A statement that the petitioner believes the AIP is incapacitated and factual basis that supports such a belief;
- The name and address of the AIP's attending or family physician, if known;
- Which rights the AIP is incapable of exercising; and
- The names, relationships, and addresses of the AIP's next of kin, if known.¹⁶

The notice and petition must be provided to the AIP's attorney and served on all next of kin identified in the petition.¹⁷

Within five days after the petition has been filed, the court must appoint an examining committee to evaluate the AIP and file a written report with the court. The examining committee consists of three members:

One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion. One of three members of the committee must have knowledge of the type of incapacity alleged in the petition.¹⁸

Depending on the committee's recommendation, the court may either dismiss the petition or proceed to an adjudicatory hearing.

Dismissal of a Petition to Determine Incapacity

If a majority of the examining committee members conclude the AIP is not incapacitated, the court must dismiss the petition. This provision was strictly construed in *Rothman v. Rothman*,¹⁹ where an AIP's grandson initiated guardianship proceedings with his siblings. The trial court appointed a committee to evaluate the AIP. Two committee members found the AIP capacitated and the third member recommended a limited guardianship, despite the AIP being found incapacitated in another jurisdiction

¹⁵ "COMMITTEE NOTES: The provisions of ch. 744, F.S, and the guardianship rules enacted in 1989 leave some uncertainty with respect to the procedural requirements in guardianships for minors who are not incapacitated persons. This rule is intended to address only certain procedures with respect to the establishment and administration of guardianships over minors. The committee believes that certain provisions of the guardianship law and rules apply to both guardianships of minors as well as guardianships of incapacitated persons and no change has been suggested with respect to such rules. Because no adjudication of a minor is required by statute, it is contemplated that appointment of a guardian for a minor may be accomplished without a hearing. Initial and annual guardianship reports for minors have been simplified where all assets are on deposit with a designated financial institution under applicable Florida law." Fla. Prob. R. 5.555.

¹⁶ S. 744.3201, F.S.

¹⁷ S. 744.331(1), F.S.

¹⁸ S. 744.331(3), F.S.

¹⁹ 93 So 3d 1052 (4th DCA 2012).

and having a long history of mental illness.²⁰ The court had no discretion to hold a hearing and had to dismiss the petition.²¹

Adjudicatory Hearing

An adjudicatory hearing must be conducted no more than 30 days after the last examining committee member's report is filed.²² A person's partial or total incapacity must be established by clear and convincing evidence.²³ A person is determined to be incapacitated only with respect to those rights specified in the court's order.²⁴ 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 does not exist, a guardian will be appointed.²⁵

An order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated.²⁶ If a guardianship appointment petition has not been filed at the time of the hearing on the petition to determine incapacity, the court may appoint an emergency temporary guardian.²⁷

Effect of Proposed Changes

CS/HB 1085 clarifies that the venue determination in s. 744.1097, F.S., applies to minors and incapacitated persons. Additionally, the bill clarifies that the provisions requiring a change of venue applies to minors and incapacitated persons. This change brings the statutory language in line with current practice.

The bill authorizes an interested person to challenge the examining committee determination and object to dismissal of the petition. The court must dismiss a petition unless a verified motion challenging the examining committee's unanimous conclusion is:

- Filed within 10 days after service of the last examining committee report; and
- Makes a reasonable showing that a hearing is necessary based on evidence already in the record or proffered evidence.

The bill authorizes the court to impose sanctions under s. 744.331(7)(c)2, F.S., if it finds a verified motion was filed in bad faith. Sanctions can include costs, attorney fees, and reimbursement of the examining committee fee.

The bill applies retroactively to all pending proceedings under Florida guardianship law. The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1: Amends s. 744.1097, F.S., relating to venue.

Section 2: Amends s. 744.331, F.S., relating to procedures to determine incapacity.

Section 3: Amends s. 744.3701, F.S., relating to confidentiality.

Section 4: Provides the bill is effective upon becoming law.

²⁰ *Id.*

²¹ *Id.* at 1053.

²² S. 744.331(5)(a), F.S.

²³ S. 744.331(5)(c), F.S.

²⁴ S. 744.331(6), F.S.

²⁵ S. 744.331(6)(b), F.S.

²⁶ S. 744.344(3), F.S.

²⁷ S. 744.344(4), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a negative indeterminate fiscal impact on state government. Courts may experience an increase in judicial workloads as a result of the additional hearing the bill authorizes.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 25, 2019, the Civil Justice & Claims Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment made technical changes to the title.

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