

**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: SB 1338

INTRODUCER: Senator Rodriguez

SUBJECT: Guardianship

DATE: March 15, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	<b>Favorable</b>
2.	_____	_____	CF	_____
3.	_____	_____	RC	_____

---

**I. Summary:**

SB 1338 amends three provisions of the Florida Guardianship Law. The bill makes minor or technical changes to the venue provision in s. 744.3701(1)-(4), F.S., clarifying that venue for purposes of appointing a guardian applies to minors as well as incapacitated persons. Additionally, the bill makes technical changes to s. 744.3701(1), F.S., to clarify that only the enumerated list of persons or agency representatives may inspect a confidential guardianship report or settlement agreement unless a court order based on good cause or another statutory provision permits others to inspect these documents.

Most significantly, the bill changes the standard and procedures for the mandatory dismissal of a petition to determine incapacity by a court under s. 744.331(4), F.S. Under existing law, a court *must* dismiss a petition if at least two of the three members of an examining committee conclude that the alleged incapacitated person is not incapacitated in any respect. Under the bill, a court must dismiss the petition only if the committee unanimously concludes the incapacitated person is not incapacitated in any way. However, the bill provides interested parties an opportunity to object to the dismissal by filing a timely verified motion making a reasonable showing, by evidence in the record or proffered, that the hearing is necessary. However, a party that files the motion in bad faith is subject to sanctions.

The bill also provides that it is effective upon becoming a law and applies retroactively to pending cases under the Florida Guardianship Law.

**II. Present Situation:**

**Guardianship**

Guardianships are trust relationships designed to protect vulnerable members of society who do not have the ability to protect themselves, such as minor children and incapacitated adults. Under

a guardianship, a “guardian” is appointed to act on behalf of the vulnerable person, also called a “ward.”<sup>1</sup> There are two main forms of guardianship: (1) guardianship over the person and (2) guardianship over the property, which may be limited or plenary.<sup>2</sup> A guardian is given the legal duty and authority to care for the ward and his or her property during the ward’s infancy, disability, or incapacity.<sup>3</sup>

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.<sup>4</sup> Once an adult is adjudicated incompetent, then a guardian may be appointed.<sup>5</sup>

For **minors**, i.e., an unmarried person under the age of 18,<sup>6</sup> no petition to determine incapacity need be filed<sup>7</sup> because minors are presumptively lacking in capacity by operation of law. Minors are treated differently “based upon the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing.”<sup>8</sup> For instance, minors are deemed not to have legal capacity to initiate legal proceedings<sup>9</sup> or enter contracts.<sup>10</sup>

The process to determine incapacity and the appointment of a guardian begins with a petition filed in the appropriate circuit court.

### **Procedures to Determine Incapacity and Appoint a Guardian**

“Guardianships are governed by a comprehensive statutory code and set of procedural rules.”<sup>11</sup> “The guardianship statutes and rules complement one another. The guardianship statutes set out the substantive law in this area and the Florida Probate Rules set out ‘the procedure in all probate and guardianship proceedings.’”<sup>12</sup> Because guardianship proceedings seek to protect the ward,<sup>13</sup> unlike most other types of litigation, guardianship proceedings are not adversarial.<sup>14</sup>

---

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

<sup>2</sup> Section 744.102(9), F.S.

<sup>3</sup> BLACK’S LAW DICTIONARY, 10th edition, 2014.

<sup>4</sup> See generally, s. 744.102(12), F.S.

<sup>5</sup> *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).

<sup>6</sup> Section 744.102(13), F.S.

<sup>7</sup> Fla. Prob. R. 5.555(a)-(b).

<sup>8</sup> 25 Fla. Jur 2d Family Law § 252

<sup>9</sup> *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).

<sup>10</sup> 25 Fla. Jur 2d Family Law § 495.

<sup>11</sup> *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 506 (Fla. 2006) (quoting Fla. Prob. R. 5.010).

<sup>12</sup> *Id.*

<sup>13</sup> Section 744.1012, F.S.

<sup>14</sup> *Hayes* at 505.

### ***Appropriate Court Venue***

Venue is “[t]he proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant.”<sup>15</sup> Venue for alleged incapacitated adults is determined under s. 744.1097, F.S.<sup>16</sup> The statute treats proceedings to declare a person incapacitated and proceedings to appoint a guardian as two separate proceedings for purposes of venue.

For proceedings to declare a person incapacitated, the venue is the court where either (1) the incapacitated adult resides or (2) the incapacitated adult is found.<sup>17</sup>

For proceedings to appoint a guardian, the venue depends on whether the incapacitated person is a state resident or non-state resident:

- If a state resident, then venue is the county where the incapacitated person resides.<sup>18</sup>
- If the person is not a state resident, however, then venue is any county where the incapacitated person’s property is located.<sup>19</sup>
- If the person is not a state resident and owns no property, then venue is in the county where any debtor of the incapacitated person resides.<sup>20</sup>

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 to a minor is determined under ch. 744 in the same manner.<sup>21</sup>

### ***Petition to Determine Incapacity and Appoint a Guardian***

A petition to determine incapacity 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.<sup>22</sup>

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

---

<sup>15</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>16</sup> The venue provision does not apply to veterans. *See* s. 744.1097(1), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> Section 744.1097(2)(a), F.S.

<sup>19</sup> Section 744.1097(2)(b), F.S.

<sup>20</sup> Section 744.1097(2)(c), F.S.

<sup>21</sup> Fla. Prob. R. 5.555 (“COMMITTEE NOTES: The provisions of chapter 744, Florida Statutes, 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.”).

<sup>22</sup> Section 744.331(1), F.S.

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.<sup>23</sup>

Depending on the recommendations of the committee, the petition may either be dismissed or proceed to an adjudicatory hearing.

### ***Dismissal of Petitions to Determine Incapacity***

If a majority of the examining committee members, two of three, conclude the alleged incapacitated person is not incapacitated in any respect, section 744.331(4), F.S. states that the "court *shall* dismiss the petition." This provision was strictly construed in *Rothman v. Rothman*,<sup>24</sup> which held that a court had no discretion to hold a hearing and had to dismiss the petition in that case, notwithstanding extrinsic evidence by the alleged incapacitated person's grandson that tended to call into doubt the reports received by the examining committee.<sup>25</sup>

### ***Adjudicatory Hearing***

The adjudicatory hearing must be conducted no more than 30 days after the filing of the last examining committee member's report.<sup>26</sup> In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

An order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated.<sup>30</sup> 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.<sup>31</sup>

---

<sup>23</sup> Section 744.331(3), F.S.

<sup>24</sup> 93 So 3d 1052 (4<sup>th</sup> DCA 2012).

<sup>25</sup> *Id.* at 1053.

<sup>26</sup> Section 744.331(5)(a), F.S.

<sup>27</sup> Section 744.331(5)(c), F.S.

<sup>28</sup> Section 744.331(6), F.S.

<sup>29</sup> Section 744.331(6)(b), F.S.

<sup>30</sup> Section 744.344(3), F.S.

<sup>31</sup> Section 744.344(4), F.S.

### ***Minors***

For minors, only a petition to appoint a guardian is filed. A petition to determine incapacity is not necessary.<sup>32</sup>

### **Guardians**

Once a guardian is appointed by the court, the guardian serves as a surrogate decision-maker and makes personal or financial decisions, or both, for the ward.<sup>33</sup> Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.

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.<sup>37</sup>

### ***Confidentiality of Guardianship Reports***

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. For instance, a guardian must file with the court an initial guardianship report,<sup>38</sup> an annual guardianship report,<sup>39</sup> and an annual accounting of the ward's property.<sup>40</sup> The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.<sup>41</sup>

---

<sup>32</sup> Fla. Prob. R. 5.555 (a)-(b), F.S..

<sup>33</sup> Section 744.102(9), F.S.

<sup>34</sup> *In re Guardianship of Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

<sup>35</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>36</sup> *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

<sup>37</sup> Section 744.446(4), F.S.

<sup>38</sup> Section 744.362, F.S.

<sup>39</sup> Section 744.367, F.S.

<sup>40</sup> Section 744.3678, F.S.

<sup>41</sup> Section 744.368, F.S.

The guardianships reports as well as settlement agreements are deemed confidential information under s. 744.3701, F.S., and may only be shared with specific, enumerated individuals or agency representatives, or when authorized by a court order.<sup>42</sup>

### **Continuing Court Jurisdiction**

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> Fees and costs incurred are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>46</sup>

A ward has the right to be restored to capacity at the earliest possible time.<sup>47</sup> 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.<sup>48</sup>

### **III. Effect of Proposed Changes:**

SB 1338 amends three provisions of Florida's Guardianship Law. The changes in Sections 1 and 3 appear to be more minor or technical in nature, while the change in Section 2 substantively changes the standard and procedures for the dismissal of a petition to determine incapacity.

#### *Minor or Technical Changes*

**Section 1** makes technical changes to s. 744.1097, F.S., concerning how venue is determined in two types of proceedings: (1) proceeding for declaration of incapacity, and (2) proceeding for the appointment of a guardian. For the second type of proceeding, appointment of a guardian, the bill adds the word "minor" to clarify that the venue determination applies to minors as well as incapacitated persons. This appears to bring the statutory language in line with current practice.

Additionally, the bill adds the word minor to clarify that the provisions requiring a change of venue (either by virtue of a petition from the guardian or by virtue of the ward being "found" in a different county than the county of residence) applies to minors as well as incapacitated persons.

---

<sup>42</sup> See also Fla. R. Jud. Admin. 2.420 (d)(1)(xv)(requiring clerks of court to maintain confidentiality of "[g]uardianship reports, orders appointing court monitors, and orders relating to findings of no probable cause in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.").

<sup>43</sup> Section 744.372, F.S.

<sup>44</sup> Section 744.3715, F.S.

<sup>45</sup> Section 744.108(1), F.S.

<sup>46</sup> Section 744.108(8), F.S.

<sup>47</sup> Section 744.3215(1)(c), F.S.

<sup>48</sup> Section 744.464(2)(b), F.S.

**Section 2** makes technical changes to s. 744.3701(1), F.S.:

- Removing a comma in the first sentence to clarify that the court's order to permit inspection of confidential guardianship reports and settlement agreements must be based on a showing of good cause.
- Adding language directly after the comma to clarify that confidential guardianship reports and settlement agreements may also be inspected if "otherwise provided by this chapter."
- Reformatting and creating a list of the existing enumerated persons and agency representatives who may inspect confidential guardianship reports and settlement agreements without a court order based on good cause or some other statutory authorization.

### ***Substantive Changes***

**Section 3** of the bill substantively amends the standard and procedures for dismissal of petitions to determine capacity in s. 744.331(4), F.S. Currently, a court is *required* to dismiss a petition if a *majority* (2 out of 3) of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect. This provision has been construed in *Rothman v. Rothman* as an absolute, non-discretionary requirement by a court, notwithstanding any other extrinsic evidence.

The bill amends the standard for dismissal of petitions to require to court to dismiss a petition if the examining committee *unanimously* (3 out of 3) concludes the alleged incapacitated person is not incapacitated in any respect.

However, the bill also provides an *exception*, permitting an interested person to challenge the unanimous determination and essentially object to dismissal of the petition. The procedures governing this exception provide that 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 on the petition is *necessary* based on evidence already in the record or proffered evidence.

When a verified motion is filed, the court must rule on it as soon as practicable. There is also an inference that the verified motion must be filed in good faith based on the bill's provision that the court may imposed sanction under s. 744.331(7)(c)2, F.S if it finds the verified motion was filed in bad faith.

### ***Immediate Effective Date and Retroactivity***

**Section 4** provides that the bill applies retroactively to all pending proceedings under the Florida Guardianship Law.

**Section 5** provides the bill is effective upon becoming law.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

## D. State Tax or Fee Increases:

None.

## E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

The bill, particularly the new standard and procedure for dismissal of a petition, may increase costs associated with court proceedings. Many of these costs will be borne by the alleged incapacitated person. However, it may also protect more incapacitated, vulnerable individuals and their assets from those seeking to take advantage of the incapacity by ensuring the courts still have discretion and are not bound by potentially improper reports given to the examining committee. Additionally, the bill provides for the threat of sanctions for any verified motions challenging the examining committee's conclusions filed in bad faith.

## C. Government Sector Impact:

The additional hearing authorized by the bill will result in an increase in judicial workloads.

**VI. Technical Deficiencies:**

None.



**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 744.1097, 744.331, and 744.3701, Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---