

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/SB 994

INTRODUCER: Judiciary Committee and Senator Passidomo and others

SUBJECT: Guardianship

DATE: January 29, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Hendon</u>	<u>CF</u>	Favorable
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 994 revises the guardianship statutes to ensure that a ward's personal and property interests are carefully protected by and from a guardian. The bill:

- Requires a court, when appointing a guardian, to inquire into and consider potential disqualifications and conflicts of interest;
- Specifies that a guardian must obtain court approval before consenting to or obtaining an order not to resuscitate a ward, and requires a court to issue a determination within 72 hours after a verified petition is filed;
- Mandates that a petition for appointment of a guardian or professional guardian disclose certain background information about the guardian seeking appointment and whether a less restrictive arrangement, other than a guardianship, could meet the needs of the ward;
- Defines the term "alternatives to guardianship;"
- Prohibits a professional guardian from petitioning for appointment unless the petitioner is a relative of the alleged incapacitated person or minor or the petitioner is a public guardian who seeks appointment for a person of limited financial means and the public guardian will be paid by the Office of Public and Professional Guardians or a local government;
- Specifies that the initial guardianship plan and each annual guardianship plan must include a list of preexisting orders not to resuscitate or preexisting advance directives and certain information about those documents;
- Requires that, in the annual guardianship report, a guardian report any payments or remuneration received from any source for services rendered for the ward;

- Prohibits a guardian from offering, paying, soliciting, or receiving a commission, benefit, or split-fee arrangement in return for engaging in a transaction for goods or services on behalf of an alleged incapacitated person or minor or a ward; and
- Prohibits a guardian from having an interest in a business transaction or activity with certain individuals unless prior approval is granted by a court order or the relationship existed before the guardian was appointed.

The bill could have an indeterminate fiscal impact on the state court system and has an effective date of July 1, 2020.

II. Present Situation:

Guardianship

A guardian may be described as someone who has been given the legal duty and authority to care for another person or his or her property because of that person's infancy, disability, or incapacity.¹ Guardianships are trust relationships designed to protect vulnerable members of society who do not have the ability to protect themselves. The person for whom a guardian is appointed is called a "ward."² 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.³ Guardianships are generally disfavored because the ward loses his or her individual and civil rights. A guardian may be appointed only if the court finds there is no less restrictive alternative to guardianship.

Two Forms of Guardianship

There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.⁴ 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.⁵

Fiduciary Duty

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.⁶ 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.⁷ 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

¹ BLACK'S LAW DICTIONARY, 11th edition, 2019.

² Section 744.102(22), F.S.

³ Section 744.102(9), F.S.

⁴ See generally, s. 744.102(9), F.S. A plenary guardian exercises all delegable rights and powers of the ward after a court has determined that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property.

⁵ See generally, s. 744.102(12), F.S.

⁶ *In re Guardianship of Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

⁷ *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

interest of the ward, and must disclose material facts.⁸ 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,⁹ an annual guardianship report,¹⁰ and an annual accounting of the ward's property.¹¹ The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.¹²

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.¹³

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.¹⁴ A professional guardian must register annually with the Statewide Public Guardianship Office.¹⁵ 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.¹⁶

A professional guardian is subject to a level 2 background check,¹⁷ an investigation of the guardian's credit history,¹⁸ and is required to demonstrate competency to act as a professional guardian by taking an examination approved by the DOEA.¹⁹ 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;

⁸ *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

⁹ Section 744.362, F.S.

¹⁰ Section 744.367, F.S.

¹¹ Section 744.3678, F.S.

¹² Section 744.368, F.S.

¹³ Section 744.446(4), F.S.

¹⁴ Section 744.102(17), F.S.

¹⁵ Section 744.2002(1) F.S.

¹⁶ Section 744.2003(3), F.S.

¹⁷ Section 744.2003(5), F.S. Level 2 screenings are more thorough than level 1 screenings because they apply to positions of responsibility or trust, often with more vulnerable people, such as children, the elderly, or the disabled. Level 2 screenings require a security background investigation that includes fingerprint-based searches for statewide criminal history records through FDLE and a national criminal history records check through the Federal Bureau of Investigation. It may also include local criminal records checks. Section 435.04, F.S.

¹⁸ Section 744.2003(4), F.S.

¹⁹ Section 744.2003(6), F.S.

- 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.²⁰

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.²¹

In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.²² 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.²³ 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.²⁴

Court Proceedings

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.²⁵ 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.²⁶

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.²⁷ Fees and costs incurred are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.²⁸

²⁰ Section 744.2003(10), F.S.

²¹ Section 744.331(1), F.S.

²² Section 744.331(5)(c), F.S.

²³ Section 744.331(6), F.S.

²⁴ Section 744.331(6)(b), F.S.

²⁵ Section 744.372, F.S.

²⁶ Section 744.3715, F.S.

²⁷ Section 744.108(1), F.S.

²⁸ Section 744.108(8), F.S.

A ward has the right to be restored to capacity at the earliest possible time.²⁹ 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.³⁰ 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.³¹ 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.³²

Guardian Compensation

The 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 for services rendered and reimbursement for costs incurred on behalf of the assets of the guardianship estate unless the court finds the requested compensation to be substantially unreasonable.³³ Before the fees may be paid, a petition for fees or expenses must be filed with the court and accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.³⁴ When fees for a guardian or an attorney are submitted to the court for determination, the court shall consider:

- The time and labor required;
- The novelty and difficulty of the questions involved and the skill required to perform the services properly;
- The likelihood that the acceptance of the particular employment will preclude other employment of the person;
- The fee customarily charged in the locality for similar services;
- The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
- The results obtained;
- The time limits imposed by the circumstances;
- The nature and length of the relationship with the incapacitated person; and
- The experience, reputation, diligence, and ability of the person performing the service.³⁵

Conflict of Interest

Unless the court gives prior approval, or the relationship existed prior to the appointment of the guardian and is disclosed to the court in the petition for appointment of a guardian, a guardian may not:

- Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;
- Acquire an ownership, possessory, security, or other monetary interest adverse to the ward;

²⁹ Section 744.3215(1)(c), F.S.

³⁰ Section 744.464(2)(b), F.S.

³¹ Section 744.464(2)(d), F.S.

³² Section 744.464(2)(e), F.S.

³³ Section 744.108(1) and (8), F.S.

³⁴ Section 744.108(5), (7), F.S.

³⁵ Section 744.108(2), F.S.

- Be designated as a beneficiary on any life insurance policy, pension, or benefit plan of the ward unless such designation was made by the ward prior to adjudication of incapacity; and
- Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity that the guardian, or the guardian's spouse or family, is an officer, partner, director, shareholder, or proprietor, or has any financial interest.³⁶

A guardian with such a conflict of interest may be removed from the guardianship by the court.³⁷

End of Life Decision-Making

Florida law defines an advance directive as a witnessed, oral statement or written instruction that expresses a person's desires about any aspect of his or her future health care, including the designation of a health care surrogate, a living will, or an anatomical gift.³⁸ Designation of each of these can serve different purposes and have their own unique requirements and specifications under the law.

One type of advance directive, a "do not resuscitate order" (DNRO) results in the withholding of cardiopulmonary resuscitation (CPR) from an individual if a DNRO is presented to the health care professional treating the patient. For the DNRO to be valid, it must be on the form adopted by the Department of Health, signed by the patient's physician and by the patient, or if the patient is incapacitated, the patient's health care surrogate or proxy, court-appointed guardian, or attorney in fact under a durable power of attorney.³⁹ Florida's DNRO form is printed on yellow paper.⁴⁰ It is the responsibility of the Emergency Medical Services provider to ensure that the DNRO form or the patient identification device, which is a miniature version of the form, accompanies the patient.⁴¹ A DNRO may be revoked by the patient at any time, if signed by the patient, or the patient's health care surrogate, proxy, court-appointed guardian or a person acting under a durable power of attorney.⁴²

Recent Investigations Into Guardianship Abuse

The abuses of professional guardian Rebecca Fierle began surfacing in the spring of 2019⁴³ and have revealed several weaknesses in the guardianship statutes. For example, Steven Stryker, a ward of Ms. Fierle's, died in May 2019 in a Tampa hospital after choking on food. Hospital staff could not perform lifesaving procedures on the 75-year-old due to a "do not resuscitate" order executed by Ms. Fierle. Testimony revealed that Ms. Fierle refused to remove the order even though Mr. Stryker had never expressed a desire to forego life-saving measures and die.⁴⁴

³⁶ Section 744.446, F.S.

³⁷ *Id.*

³⁸ Section 765.101, F.S.

³⁹ Section 401.45(3), F.S.

⁴⁰ Rule 64J-2.018, F.A.C.

⁴¹ *Id.*

⁴² *Id.*

⁴³ J.D. Peacock II, Clerk of the Circuit Court and Comptroller for Okaloosa County, Florida, *OPPG Investigation Case Number 19-064* (July 9, 2019) (on file with the Senate Committee on Judiciary).

⁴⁴ Monivette Cordeiro, ORLANDO SENTINEL, *Man died after Orlando legal guardian filed 'do not resuscitate' order against his wishes, investigation finds/Exclusive* (July 15, 2019) <http://www.orlandosentinel.com/news/os-ne-man-died-after-orlando-guardian-filed-dnr-order-20190715-nnggrqhainedzce4j74oshar2y-story.html>.

An investigation by the Orange County Comptroller's office concluded that Ms. Fierle was assigned to almost 100 Orange County guardianship cases in July 2019. In reviewing the 6,936 invoices that Ms. Fierle submitted to AdventHealth through her companies, it was determined that she submitted invoices of at least \$3,956,325 between January 2009 and June 2019. AdventHealth reported payments of \$3,706,609 since 2014. Those invoices represented services she allegedly provided to 682 patients. Of the 682 patients, 210 related to current or previous guardianship cases.

The Orange County Comptroller's investigation concluded that:

- Payments of \$2,514,715 were not reported to the court as required by statute;
- In bypassing the court for the approval of her fees, Ms. Fierle's hourly rates greatly exceeded the amounts that were determined to be reasonable by the court;
- Ms. Fierle appeared to maintain business relationships with her wards that were not disclosed or even approved by the court;
- Ms. Fierle double-billed AdventHealth and her wards' assets for identical services and fees;
- Previous relationships between Ms. Fierle and wards were not disclosed to the court as required by law;
- Petitions were submitted by Ms. Fierle requesting that she be appointed to the case as guardian;
- Bills were submitted for services provided before a guardianship case was initiated;
- Many invoices were paid twice resulting in multiple reimbursements for the same invoices;
- Ms. Fierle submitted invoices for cases that were not assigned to her but to a different guardian.⁴⁵

It was also reported by the media that Ms. Fierle developed relationships and conflicts of interest with people who were appointed to serve on a three member guardianship examining committee that was used to determine the incapacity of a person.⁴⁶

In July, an Orange County circuit judge found that Ms. Fierle had abused her powers as a guardian and removed Ms. Fierle from 98 cases in Orange and Osceola counties. A Seminole County judge followed suit that same week. The courts also revoked any do not resuscitate orders that Ms. Fierle may have filed.⁴⁷ Ms. Fierle filed an appeal to the Fifth District Court of Appeal in hopes that the lower court decisions would be overturned. The court denied her petition although she currently has at least one other petition pending in the Fifth District Court of Appeal.⁴⁸

⁴⁵ Phil Diamond, CPA County Comptroller of Orange County Florida, *Investigation of Payments Made to Professional Guardian – Rebecca Fierle by AdventHealth, Report 479*, (Sept. 2019) <https://www.occompt.com/download/Audit%20Reports/rpt479.pdf>.

⁴⁶ Monivette Cordeiro, *Florida's troubled guardianship system riddled with conflicts of interest, critics claim | Special Report*, ORLANDO SENTINEL (Aug. 14, 2019), <https://www.orlandosentinel.com/news/florida/guardians/os-ne-guardianship-examining-committee-conflicts-20190814-osbekpwlnfezneolyxtvzmrhy-story.html>.

⁴⁷ Greg Angel, *Watchdog Update: 2nd Judge Removes Guardian From Cases After Man's Death*, Orlando Spectrum News 13, (July 19, 2019) <https://www.mynews13.com/fl/orlando/news/2019/07/19/watchdog-update--2nd-judge-removes-guardian-after-man-s-death>.

⁴⁸ Florida Fifth District Court of Appeal Docket, Case Number: 5D19-3013 (reviewed on Jan. 22, 2020) <http://onlinedocketsdca.flcourts.org/DCAResults/LTCases?CaseNumber=3013&CaseYear=2019&Court=5>

Ms. Fierle resigned her position as a registered professional guardian on July 25, 2019, and sought discharge from all of her cases. The Florida Department of Law Enforcement confirmed that a search warrant was executed on Ms. Fierle's Orlando office on August 5, 2019. The cremated remains of nine people were recovered, one of which remains unidentified. The criminal investigation against Ms. Fierle and her business is ongoing.⁴⁹

III. Effect of Proposed Changes:

Considerations When Appointing a Guardian

Section 1 amends s. 744.312, F.S., to place additional responsibilities on a court before appointing someone to serve as a guardian. The court must inquire into and consider a guardian's potential disqualification under s. 744.309, F.S., which outlines who may be appointed as a guardian for a ward, or potential conflicts of interest under s. 744.446, F.S., which requires that a guardian be independent, impartial, and maintain a fiduciary relationship to the ward.

Orders Not to Resuscitate a Ward

Section 2 amends s. 744.3215, F.S., to specifically address do-not-resuscitate (DNR) orders. A guardian may not consent to, or sign on behalf of a ward, a do-not-resuscitate order without first obtaining court approval. A court must make a determination whether to grant the order within 72 hours after the verified petition is filed by the petitioner. Additionally, the verified petition must state:

- The petitioner's interest in obtaining the DNR order;
- The specific authority that the petitioner is seeking;
- The facts that are the basis for requesting the DNR; and
- That the authority being requested from the court is in the best interest of the ward.

Petitions for Appointment of a Guardian or Professional Guardian

Section 3 amends s. 744.334, F.S., to require that a petition for the appointment of a guardian state the reasons why an individual should be appointed guardian and whether he or she is a professional guardian. The bill also adds the word "alleged" before "incapacitated person or minor," and provides that the petition must explain if any other type of guardianship exists under part III of Chapter 744 (Types of Guardianship) or "alternatives to guardianship," which it defines as an advance directive, a durable power of attorney, a representative payee, or a trust instrument. The bill requires the petition to state why a guardian advocate or other alternatives to guardianship, which are less restrictive than a guardianship, are insufficient to meet the needs of the alleged incapacitated person or minor. The bill further provides that if the petitioner is a professional guardian, he or she may not petition for his or her own appointment unless the petitioner is a relative of the alleged incapacitated person or minor or is seeking appointment for a person of limited financial means and the guardian will be paid by either the Office of Public and Professional guardians or by a local government.

⁴⁹ FDLE Office of Public Information, *FDLE Statement Regarding Remains in the Rebecca Fierle Investigation* (Jan. 8, 2020) (on file with the Senate Committee on Judiciary).

Initial Guardianship Plan and Annual Guardianship Plan

Section 4 amends s. 744.363, F.S., and **Section 6** amends s. 744.3675, F.S., to specify that the initial guardianship plan and each annual guardianship plan must include a list of preexisting orders not to resuscitate and preexisting advance directives and the date an order or directive was signed, whether the document has been suspended by the court, and a description of the steps taken to identify and locate the document. These requirements are additions to other existing elements that must be included in the plans.

A Guardian's Payments and Benefits Must be Included in an Annual Guardianship Report

Section 5 amends s. 744.367, F.S., to require that guardians disclose to the court in the annual guardianship report all remuneration received by the guardian from any source for services rendered to or on behalf of the ward. This requirement applies to both guardians of the person and guardians of the property. The bill also defines remuneration as any payment or other benefit made directly or indirectly, overtly or covertly, or in cash or in kind to the guardian.

Additional Conflicts of Interests and Prohibited Activities for a Guardian

Section 7 amends s. 744.446, F.S., relating to conflicts of interest. The bill renumbers subsections (2), (3), and (4), and adds a new subsection (2), to more specifically prohibit guardians from offering, paying, soliciting, or receiving a commission, benefit, bonus, rebate, or kickback, directly or indirectly, overtly or covertly, or in cash or in kind, or engaging in split-fee arrangements in return for referring, soliciting, or engaging in a transaction for goods or services on behalf of an alleged incapacitated person or minor, or a ward, for past or future goods or services.

Additionally, the bill specifies that, unless prior approval is granted by a court order or the relationship existed before the guardian was appointed and was disclosed to the court in the petition for appointment of guardian, a guardian may not have any interest, financial or otherwise, in a business transaction or activity with the ward, the judge presiding over the case, any member of the appointed examining committee, any court employee involved in the guardianship process, or the attorney for the ward.

Section 8 provides an effective date of July 1, 2020.

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:

None.

C. Government Sector Impact:

The State Courts Administrator predicts a likely increase in workload and judicial time as a result of modifying screening and monitoring requirements of guardians and guardianship plans. The fiscal impact, however, cannot be accurately determined at this time due to the unavailability of data needed to establish the increase in the judicial workload.⁵⁰

The Florida Court Clerks and Comptrollers (Clerks) estimates that there will be an increase in the number of items the Clerk's staff will need to review, but the impact is indeterminate. The Clerks also estimate there will be an increase in auditing if additional complaints are received relating to DNROs, assuming the number of court hearings do not increase. If the number of court hearings do increase, there will be an impact due to court docketing and related duties.⁵¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁵⁰ Office of the State Courts Administrator, *SB 994 Judicial Impact Statement* (Jan. 13, 2020) <http://abar.laspbs.state.fl.us/ABAR/Attachment.aspx?ID=30133>.

⁵¹ Florida Court Clerks and Comptrollers, *HB 709, FCCC Bill Analysis* (Dec. 19, 2019) <http://abar.laspbs.state.fl.us/ABAR/Document.aspx?id=25301&yr=2020>.

VIII. Statutes Affected:

This bill substantially amends sections 744.312, 744.3215, 744.334, 744.363, 744.367, 744.3675, and 744.446 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 Judiciary on January 28, 2020:

Two additional provisions were added to the bill which:

- Require a court to rule within 72 hours after a petition is filed to obtain a do-not-resuscitate order. The petition must disclose the petitioner's interest in the proceeding, clarify what specific authority is requested, state the facts that constitute the basis for the relief sought, and state that the requested authority is in the ward's best interest; and
- Permit a public guardian to petition for appointment as a guardian if he or she is seeking appointment for a person of limited financial means and he or she will be compensated from the Office of Public and Professional Guardians or by a local government.

- B. **Amendments:**

None.