

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 441 Elder-focused Dispute Resolution Process

**SPONSOR(S):** Judiciary Committee, Civil Justice & Property Rights Subcommittee, Hage

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 368

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	18 Y, 0 N, As CS	Brascomb	Jones
2) Children, Families & Seniors Subcommittee	16 Y, 0 N	Morris	Brazzell
3) Judiciary Committee	18 Y, 0 N, As CS	Brascomb	Kramer

### SUMMARY ANALYSIS

As the country's "baby-boom" population reaches retirement age and life expectancy increases, the nation's elder population is projected to increase from 49.2 million in 2016 to 77 million by 2034. In 2018, Florida had an estimated 4.3 million people age 65 and older, approximately 20 percent of the state's population. By 2030, this number is projected to increase to 5.9 million, meaning the elderly will make up approximately one quarter of the state's population and will account for most of the state's growth.

Eldercaring coordination is an alternative dispute resolution process for high-conflict cases, where a specialized coordinator assists elders, legally authorized decisionmakers, and others who participate by court order or invitation to resolve family disputes while considering the elder's needs for autonomy and safety. Eldercaring coordination can assist elders, family members, and other parties by:

- Resolving non-legal issues outside of court;
- Fostering a need for self-determination among both elders and family members;
- Monitoring high-risk situations for signs of elder abuse, neglect, or exploitation; and
- Offering an additional source of support during times of transition.

CS/CS/HB 441 creates an alternative dispute resolution option in which court-appointed eldercaring coordinators assist elders, their legally authorized decision makers, and their family members in resolving high-conflict disputes that can impact an elder's safety and autonomy. The bill authorizes the court to refer certain cases to eldercaring coordination and establishes a specified framework for the referral process. The bill prohibits the referral of certain cases where a party has a history of domestic violence or exploitation of an elderly person, unless the parties consent to the referral and the court considers certain factors.

The bill also:

- Requires an eldercaring coordinator to satisfy specified qualifications, including, in part:
  - Professional requirements, including good standing status with the applicable professional licensing or certification board;
  - Minimum requirements related to the number of years of post-licensure or post-certification practice; and
  - Training in certain topics.
- Provides specified procedures for an eldercaring coordinator's disqualification, suspension, or removal.
- Requires fees to be paid in equal portion by each party referred, subject to an exception.
- Requires all communications made during eldercaring coordination to be kept confidential, subject to enumerated exceptions.

The bill may have an indeterminate fiscal impact on state government, but does not appear to have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

As the country's "baby-boom" population reaches retirement age and life expectancy increases, the nation's elder population is projected to increase from 49.2 million in 2016<sup>1</sup> to 77 million by 2034.<sup>2</sup> Florida has long been a destination state for senior citizens and has the highest percentage of senior residents in the entire nation.<sup>3</sup> In 2018, Florida had an estimated 4.3 million people age 65 and older, approximately 20 percent of the state's population.<sup>4</sup> By 2030, this number is projected to increase to 5.9 million, meaning the elderly will make up approximately one quarter of the state's population and will account for most of the state's growth.<sup>5</sup>

#### Guardianship and Guardianship Alternatives

When an individual is legally incapable of making decisions for himself or herself, a guardian may be appointed to make decisions on behalf of that individual. 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, property, or both.<sup>6</sup> Once an individual has been adjudicated incapacitated and a guardian is deemed necessary, such individual no longer holds certain civil and legal rights.<sup>7</sup> Accordingly, 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>8</sup>

Less restrictive alternatives to guardianship include durable powers of attorney,<sup>9</sup> trusts, banking services, advance directives,<sup>10</sup> medical proxies,<sup>11</sup> and representative payees.<sup>12</sup>

#### Alternative Dispute Resolution

Alternative dispute resolution (ADR) refers to any means of settling disputes outside of the courtroom.<sup>13</sup> As increasing court dockets, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programs.<sup>14</sup> Some of these programs are voluntary; others

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<sup>1</sup> Press Release, U.S. Census Bureau, *The Nation's Older Population is Still Growing*, Census Bureau Reports (June 22, 2017), Release Number: CB17-100, <https://www.census.gov/newsroom/press-releases/2017/cb17-100.html> (last visited Apr. 6, 2021).

<sup>2</sup> Press Release, U.S. Census Bureau, *Older People Projected to Outnumber Children for First Time in U.S. History* (revised Oct. 8, 2019), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> (last visited Apr. 6, 2021).

<sup>3</sup> *Where Do the Oldest Americans Live?*, Pew Research Center, July 9, 2015, <https://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/> (last visited Apr. 6, 2021).

<sup>4</sup> U.S. Census Bureau, *Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States*, <https://www.census.gov/newsroom/press-kits/2018/estimates-characteristics.html> (last visited Apr. 6, 2021).

<sup>5</sup> Florida Office of Economic & Demographic Research, *Population Data: 2016, 2020, 2025, 2030, 2035, 2040, & 2045, County by Age, Race, Sex, and Hispanic Origin*, pp. 89-90 and 269-70, [http://edr.state.fl.us/Content/population-demographics/data/Medium\\_Projections\\_ARSH.pdf](http://edr.state.fl.us/Content/population-demographics/data/Medium_Projections_ARSH.pdf) (last visited Apr. 6, 2021); Florida Office of Economic & Demographic Research, *Econographic News: Economic and Demographic News for Decision Makers, 2019, Vol. 1.*: <http://edr.state.fl.us/content/population-demographics/reports/econographicnews-2019v1.pdf> (last visited Apr. 6, 2021).

<sup>6</sup> S. 744.102(9), F.S.

<sup>7</sup> S. 744.101(1), F.S.

<sup>8</sup> S. 744.101(2), F.S.

<sup>9</sup> s. 709.2102, F.S. A power of attorney (POA) is a writing that grants authority to an agent to act in the place of the principal, and a durable power of attorney is a POA which is not terminated by the principal's incapacity.

<sup>10</sup> See s. 765.101(1), F.S.

<sup>11</sup> See ss. 765.101(19) and 765.401, F.S.

<sup>12</sup> 42 U.S. Code § 1007. A representative payee is person deemed qualified by the Social Security Administration who manages the social security benefits of another person who is incapable of managing his or her own benefits.

<sup>13</sup> Legal Information Institute, *Alternative Dispute Resolution*, Cornell Law School, [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) (Last visited Apr. 6, 2021).

<sup>14</sup> *Id.*

are mandatory. There are several forms of ADR, but the two most common are arbitration<sup>15</sup> and mediation.<sup>16</sup>

Mediation is a process in which a neutral third person facilitates the resolution of a lawsuit or other dispute between two or more parties.<sup>17</sup> Current Florida law authorizes courts to use mediation to aid in resolving cases, but the statutes also provide that many of the procedural aspects of mediation are governed by the Florida Rules of Civil Procedure.<sup>18</sup> In a lawsuit for money damages, the court must refer the matter to mediation upon a party's request if the:

- Party is willing and able to pay the costs of the mediation; or
- Costs can be equitably divided between the parties.<sup>19</sup>

However, Florida law does not require a court to refer such a case to mediation if:

- The action is:
  - A landlord and tenant dispute that does not include a personal injury claim;
  - A debt collection action;
  - A medical malpractice claim; or
  - Governed by the Florida Small Claims Rules.
- The court determines that the action should be referred to nonbinding arbitration.
- The parties have agreed to:
  - Binding arbitration;
  - An expedited trial; or
  - Voluntary trial resolution pursuant to s. 44.104, F.S.<sup>20,21</sup>

Beyond cases that current law requires a court to refer to mediation, the court may, in general, refer all or part of any other filed civil action to mediation.<sup>22</sup>

### Parenting Coordination

In 2009, the Florida Legislature established a statutory framework for child-focused mediation known as parenting coordination,<sup>23</sup> wherein a court appoints a parenting coordinator to assist parents in developing, implementing, or resolving disputes in a parenting plan. The parenting coordinators help parents to resolve disputes by providing education, making recommendations, and making limited decisions within the scope of the court's referral order.<sup>24</sup> To be a qualified parenting coordinator, a person must complete training requirements and must be a:

- Licensed mental health professional;
- Licensed physician with certification by the American Board of Psychiatry and Neurology;
- Certified family law mediator with a master's degree related to mental health; or
- Member of the Florida Bar.<sup>25</sup>

Additionally, a parenting coordinator must complete:

- Three years of post-licensure or post-certification practice;

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<sup>15</sup> Arbitration is an ADR method in which one or more decision-makers, or arbitrators, hears a dispute and renders a binding decision. An agreement to arbitrate disputes can be made before or after a specific dispute arises. Since the parties can agree to the rules of arbitration, they can save costs as compared to litigation. Legal Information Institute, *Arbitration*, Cornell Law School, <https://www.law.cornell.edu/wex/arbitration> (Last visited Apr. 6, 2021).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> S. 44.1011(2), F.S.; See also Fla. Jur. 2d, Arbitration and Award s. 113.

<sup>18</sup> S. 44.102(1), F.S.

<sup>19</sup> S. 44.102(2)(a), F.S.

<sup>20</sup> Voluntary trial resolution, or a private trial, is a type of alternative dispute resolution that allows two parties to come to an agreement by way of a third party acting as a judge and offering a verdict. Ned I. Price, *Binding Arbitration, Voluntary Trial Resolution, and MED-ARB Proceedings in Family Law*, 86 Fla. B. J. 48 (Nov. 2012), <https://www.floridabar.org/the-florida-bar-journal/binding-arbitration-voluntary-trial-resolution-and-med-arb-proceedings-in-family-law/> (last visited Apr. 6, 2021).

<sup>21</sup> *Id.*

<sup>22</sup> S. 44.102(2)(b)-(d), F.S. Additionally, a court is required or authorized to refer certain family law and dependency matters to litigation, as specified in s. 44.102(2)(c) and (d), F.S.

<sup>23</sup> Ch. 2009-180, L.O.F.

<sup>24</sup> S. 61.125(2) and (3), F.S.

<sup>25</sup> S. 61.152(5)(a)1., F.S.

- A family mediation training program certified by the Florida Supreme Court;
- A minimum of 24 hours of parenting coordination training;<sup>26</sup> and
- A minimum of 4 hours of training in domestic violence and child abuse which is related to parenting coordination.<sup>27</sup>

### Eldercaring Coordination

As parenting coordination has become a common method of dispute resolution in contentious child custody and visitation matters, courts and legal professionals have used the concept as a model to develop a similar option for disputes involving elders.<sup>28</sup>

Eldercaring coordination is an alternative dispute resolution process for high-conflict cases, where a specialized coordinator assists elders, legally authorized decisionmakers, and others who participate by court order or invitation to resolve family disputes while considering the elder's needs for autonomy and safety.<sup>29</sup> Eldercaring coordination complements—but doesn't replace—the services of mediators, financial advisors, lawyers, therapists, health care providers, or other professionals.<sup>30</sup> However, the process provides a supportive and holistic atmosphere for families to work through their difficulties.<sup>31</sup>

Eldercaring coordination can assist elders, family members, and other parties by:

- Resolving non-legal issues outside of court;
- Fostering a need for self-determination among both elders and family members;
- Monitoring high-risk situations for signs of elder abuse, neglect, or exploitation;
- Offering an additional source of support during times of transition.<sup>32</sup>

Currently, fourteen jurisdictions in five states are utilizing eldercare coordination pilot programs.<sup>33</sup>

### *Eldercaring Coordination in Florida*

While parties in child-related disputes in Florida use parenting coordination, there is currently no statewide alternative dispute resolution option to address cases involving elder-related issues.<sup>34</sup> In March 2013, the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC) created the Task Force on Eldercaring Coordination (FLAFCC Task Force), which developed a dispute resolution model for contentious cases involving elders, their family members, and other participants.<sup>35</sup>

The FLAFCC Task Force worked with the Association for Conflict Resolution's Task Force on Eldercaring Coordination (ACR Task Force), which provided general, non-state specific guidance and suggestions on eldercaring coordination best practices.<sup>36</sup> Based on the ACR Guidelines for Eldercaring

<sup>26</sup> The topics include parenting coordination concepts and ethics, family systems theory and application, family dynamics in separation and divorce, child and adolescent development, the parenting coordination process, parenting coordination techniques, and Florida family law and procedure. S. 61.125(5)(a)2.c., F.S.

<sup>27</sup> S. 61.125(5)(a)2., F.S.

<sup>28</sup> The Association for Conflict Resolution, *Guidelines for Eldercare Coordination* (Oct. 2014).

<https://ncpj.files.wordpress.com/2017/05/m4-fieldstone-morley-acr-guidelines-for-eldercaring-coordination.pdf> (last visited Apr. 6, 2021).

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Sue Bronson & Linda Fieldstone, *From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases*, American Bar Association (2015), [https://www.americanbar.org/groups/senior\\_lawyers/publications/experience/2015/fall-winter/friction-fireworks-focus-eldercaring-coordination-sheds-light-high-conflict-cases/](https://www.americanbar.org/groups/senior_lawyers/publications/experience/2015/fall-winter/friction-fireworks-focus-eldercaring-coordination-sheds-light-high-conflict-cases/) (last visited Apr. 6, 2021).

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

<sup>32</sup> *Id.*

<sup>33</sup> Karen Campbell, *Dispute Resolution Tactics Emerge to Aid the Elderly*, American Bar Association (July 2017),

[https://www.americanbar.org/groups/senior\\_lawyers/publications/experience/2017/june-july/#:~:text=Dispute-Resolution%20Tactics%20Emerge%20to%20Aid%20the%20Elderly%20By,families%20and%20legal%20professionals%20better%20manage%20today%E2%80%99s%20challenges](https://www.americanbar.org/groups/senior_lawyers/publications/experience/2017/june-july/#:~:text=Dispute-Resolution%20Tactics%20Emerge%20to%20Aid%20the%20Elderly%20By,families%20and%20legal%20professionals%20better%20manage%20today%E2%80%99s%20challenges). (last visited Apr. 6, 2021).

<sup>34</sup> Florida Chapter of the Association of Family and Conciliation Courts Task Force on Eldercaring Coordination, *Guidelines for Eldercaring Coordinators*, p. 3 (October 2014), [https://flafcc.org/wp-content/uploads/2020/08/flafcc\\_guidelines\\_for\\_eldercaring\\_coordination\\_website.pdf](https://flafcc.org/wp-content/uploads/2020/08/flafcc_guidelines_for_eldercaring_coordination_website.pdf) (last visited Apr. 6, 2021).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 4.

Coordinators, the FLAFCC Board of Directors approved their own, Florida-specific guidelines in 2014 which are utilized by eldercare coordinators in Florida.<sup>37</sup>

In 2015, eight of Florida's twenty judicial circuits were chosen to participate in a pilot program intended to provide eldercare coordination services: the Fifth, Seventh, Ninth, Twelfth, Thirteenth, Fifteenth, Seventeenth, and Eighteenth Circuits.<sup>38</sup> Court administrators representing the First, Sixth, Eighth, and Eleventh circuits have since expressed interest in becoming a part of the pilot.<sup>39</sup> Pilot programs were also created in four other states: Idaho, Indiana, Ohio, and Minnesota.<sup>40</sup> The pilot programs<sup>41</sup> assign eldercaring coordinators to elder law cases involving family dispute.<sup>42</sup> A total of approximately 75 cases have been referred to the eight Florida sites since their inception.<sup>43</sup>

### *Eldercaring Coordination Effectiveness*

Judges from the Probate and Guardianship Divisions of courts from each pilot site first evaluated and selected individuals to be trained as eldercaring coordinators.<sup>44</sup> Judges, eldercaring coordinators, and administrators were then trained on eldercaring coordination.<sup>45</sup> Cases were referred, and the FLAFCC has since reported the following findings from cases at the pilot sites:

- Fewer motions;
- Shorter, more efficient hearings;
- Reduced levels of family conflict, leading to minimized abuse, neglect, and exploitation of elders;
- A reduced need for guardianships and a reduced number of cases in need of final determinations of capacity; and
- An increased ability of elders and family members to respond to issues efficiently and without needing further judicial intervention.<sup>46</sup>

A non-Florida specific evaluation of eldercaring coordination by researchers at Virginia Tech published in 2019<sup>47</sup> reported surveying a small group<sup>48</sup> of eldercaring coordination participants, including eldercaring coordinators, judges, court administrators, and magistrates. Prior to taking part in eldercaring coordination, participants were asked to describe indicators of effective eldercaring coordination. Common responses included:<sup>49</sup>

- Improving elder well-being;
- Reducing family conflict;
- Improving family communication and problem solving;
- Reducing litigation;
- Finalizing decisions related to the elder; and
- Reaching agreements about what is in the elder's best interest.

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<sup>37</sup> *Id.*

<sup>38</sup> Jim Ash, 'Eldercaring' Program Serves the Courts and Florida's Aging Citizens, The Florida Bar News, October 15, 2018, <https://www.floridabar.org/the-florida-bar-news/eldercaring-program-serves-the-courts-and-floridas-aging-citizens/> (last visited Apr. 6, 2021).

<sup>39</sup> *Id.* See also The Office of the State Courts Administrator (OSCA), *Judicial Branch 2021 Legislative Agenda*, p. 18-19, (2021).

<sup>40</sup> *Id.*

<sup>41</sup> "Pilot site" is one judge or group of judges or magistrates that refer at least six cases for eldercaring coordination, or a group of attorneys that initiate at least six cases for eldercaring coordination through agreed order, where those families choose to participate in the independent research of the process. *Id.*

<sup>42</sup> *Supra* note 38.

<sup>43</sup> *Id.*

<sup>44</sup> The Office of the State Courts Administrator (OSCA), *Judicial Branch 2021 Legislative Agenda*, p. 19, (2021).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 19-20.

<sup>47</sup> Ashley A. King, et al, Preliminary Findings from an Evaluation of Eldercaring Coordination, [https://www.acresolution-digital.org/acresolutionmag/january\\_2020/MobilePagedArticle.action?articleId=1554009#articleId1554009](https://www.acresolution-digital.org/acresolutionmag/january_2020/MobilePagedArticle.action?articleId=1554009#articleId1554009) (last visited Apr. 6, 2021).

<sup>48</sup> Pretests included feedback from 17 elders or elder surrogates and 85 other participants representing 28 separate cases. This also included 18 eldercaring coordinators representing 40 eldercaring coordination cases; 9 judges representing 37 eldercaring coordination cases, 14 court administrators/magistrates representing 49 cases. Posttests included responses from seven eldercaring coordinators representing 18 cases, six judges representing 15 cases, and seven court administrators/magistrates representing 22 cases.

<sup>49</sup> *Supra*, note 47.

On intake surveys, when elders and participants were asked about their level of understanding and comfort with eldercaring coordination, their responses were mixed, with some indicating complete understanding and comfort with the process while others reported a lack of understanding, and feelings of discomfort.<sup>50</sup>

After taking part in eldercaring coordination, some judges, court administrators, and eldercaring coordinators were again surveyed. Results showed that families referred were high-conflict families with deeply entrenched, multigenerational patterns of interaction. About half of the eldercaring coordinators believed that, after eldercaring coordination, family relationships between the elder and other participants were unchanged, while about 25 percent believed family relationships had improved and about 25 percent felt that family relationships had deteriorated since beginning eldercaring coordination. All judges and the majority of court administrators and magistrates reported that eldercaring coordination was effective, though just half of eldercaring coordinators reported that the process was effective. For instance, some of the elders' issues were resolved, while others were not.<sup>51</sup>

While the success of eldercaring coordination requires families to be open to the process and actively participating in it, eldercaring coordinators reported that it could be challenging to get participants to "buy into" the process. Perceived burdens to the process included the difficulty associated with scheduling meetings, prohibitive fees, and overall time commitment. When eldercaring coordination worked, it resulted in decisions being made in the best interest of the elder.<sup>52</sup>

The researchers indicated that eldercaring coordination has significant potential for filling the gap in services for families making decisions regarding an older adult. However, based on these findings, they recommend that more data is needed to determine the extent to which eldercaring coordination is able to achieve the goal of improving family relationships. Researchers made a variety of recommendations to improve eldercaring coordination:<sup>53</sup>

- Provide clear explanations of the process, ensure understanding, and address concerns;
- Develop strategies for handling resistance and conflict and enlist participation and cooperation;
- Establish realistic, achievable goals;
- Initiate outreach efforts to attorneys and other professionals to increase cooperation; and
- Explore ways to make eldercaring coordination less time intensive and complex.

Researchers did not survey elders or family participants after utilization of eldercaring coordination; therefore, the perspectives on the effectiveness of eldercaring coordination of such persons are unknown. Additionally, due to the study's design, it is unknown how these families' results and circumstances compare to families not involved in eldercaring coordination.<sup>54</sup>

### **Effect of Proposed Changes**

CS/CS/HB 441 creates s. 44.407, F.S., establishing a statutorily-authorized alternative dispute resolution option in which court-appointed eldercaring coordinators assist elders, their legally authorized decision makers, and their family members in resolving high-conflict disputes that can impact an elder's safety and autonomy.

### **Duties**

The bill requires an eldercaring coordinator to assist elders, decision makers, and other participants in resolving disputes related to the care and safety of an elder by:

- Facilitating more effective communication and negotiation and the development of problem-solving skills;
- Providing education about eldercare resources;

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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

- Facilitating the creation, modification, or implementation of an eldercaring plan and reassessing it as necessary;
- Making recommendations for dispute resolution related to the care and safety of the elder; and
- Making limited decisions with the prior approval of the parties or of the court.

### Referral Process

The bill authorizes a court to appoint an eldercaring coordinator and refer the parties to eldercaring coordination upon:

- Agreement of the parties;
- The court's own motion; or
- Any party's motion.

The bill establishes several actions which may be referred to eldercaring coordination:

- Determining if someone is or is not incapacitated;
- Appointing or removing a guardian or guardian advocate;
- Executing an investigation through adult protective services;
- Reviewing any action of a guardian;
- Entering an injunction to protect an elder;
- Following up on a complaint made to the Office of Public and Professional Guardians;
- Addressing advice from the clerk of the court regarding review of guardianship assets; and
- At the discretion of the judge, addressing other matters pending before the court related to the care and safety of an elder or the security of his or her property.

A court may only refer the parties to eldercaring coordination to address disputes regarding an elderly person's care and safety,<sup>55</sup> and may not refer the parties to eldercaring coordination in actions brought under chapters 732, 733, and 736, F.S., which relate to wills and trusts.

The bill prohibits the court from referring parties with a history of domestic violence or exploitation of an elder to eldercaring coordination absent the consent of all parties, including the elder. Further, the court must offer each party the opportunity to consult with either an attorney or a domestic violence advocate prior to accepting consent of the referral and the court is required to determine whether each party has given his or her consent freely and voluntarily.

When a court is determining whether to refer parties that may have an above-mentioned history that would otherwise preclude the referral, the court must consider whether a party has:

- Committed an act of exploitation<sup>56</sup> or domestic violence<sup>57</sup> against another party or any member of another party's family;
- Engaged in a behavioral pattern where power and control are used against another party and that could jeopardize another party's ability to negotiate fairly; or
- Behaved in a way that leads another party to reasonably believe he or she is in imminent danger of becoming a victim of domestic violence.

If the court refers a case to eldercaring coordination that involves a party who has any history of domestic violence or exploitation of an elder, the court must order necessary precautions to protect the safety of:

- All parties;
- All other participants;
- The elder; and
- The elder's property.

These precautions may include adherence to all provisions of an injunction for protection or conditions of bail, probation, a criminal sentence, and any other relevant precaution the court deems appropriate.

<sup>55</sup> Care and safety means the condition of the aging person's general physical, mental, emotional, psychological, and social well-being.

<sup>56</sup> See ss. 415.102(8) and 825.103(1), F.S.

<sup>57</sup> S. 741.28, F.S.

## Appointment and Qualifications of the Eldercaring Coordinator

The bill limits the court's appointment of an eldercaring coordinator for a term of up to two years. The court must conduct review hearings intermittently to determine whether it is appropriate to conclude or extend the term of the appointment. A party may move the court to terminate the appointment. Upon such a motion, the court must conduct a hearing and consider:

- The efforts and progress of eldercaring coordination in the action to date;
- The elderly person's preference if ascertainable; and
- Whether continuation of the appointment is in the elderly person's best interests.

The bill also sets the qualifications of eldercaring coordinators and identifies factors that disqualify a person from serving as an eldercaring coordinator. Specifically, the bill requires an eldercaring coordinator to be in good standing or in clear and active status with all professional licensing authorities or certification boards and to meet at least one of the following requirements related to professional training:

- Be a licensed mental health professional under ch. 491, F.S., and hold at least a master's degree in the professional field of practice;
- Be a licensed psychologist under ch. 490, F.S.;
- Be a licensed physician under ch. 458, or ch. 459, F.S.;
- Be a licensed nurse under ch. 464, F.S., and hold at least a master's degree;
- Hold a family mediator certification from the Florida Supreme Court and at least a master's degree;
- Be a member in good standing of the Florida Bar; or
- Serve as a professional guardian as defined in s. 744.102(17), F.S., and hold at least a master's degree.

The bill also requires an eldercaring coordinator to complete all of the following:

- Three years of post-licensure or post-certification practice;
- A Florida Supreme Court-certified family mediation training program;
- An elder mediation training program which adheres to the standards of the Florida Supreme Court;<sup>58</sup> and
- Eldercaring coordinator training totaling 44 or more hours and including the following training:
  - Advanced tactics for dispute resolution of issues related to aging, illness, incapacity, or other vulnerabilities associated with elderly people;
  - Elder, guardianship, and incapacity law and procedures and less restrictive alternatives to guardianship relating to eldercaring coordination;
  - Phases of eldercaring coordination;
  - The role and functions of an eldercaring coordinator;
  - The role of the elder in eldercaring coordination;
  - Family dynamics pertaining to eldercaring coordination;
  - Eldercaring coordination skills and techniques;
  - Multicultural competence and its use in eldercaring coordination;
  - A minimum of six hours on the implications of elder abuse, neglect, and exploitation and other safety issues pertinent to this training;
  - A minimum of four hours of ethical considerations related to eldercaring coordination;
  - The use of technology in eldercaring coordination; and
  - Court-specific eldercaring coordination procedures.

A prospective eldercaring coordinator must pass a Level 2 background screening pursuant to s. 435.04(2) and (3), F.S., or be exempt from disqualification under s. 435.07, F.S. The bill requires a prospective eldercaring coordinator to submit a full set of fingerprints to the court or statutorily-authorized agency. The court or agency must forward the fingerprints to the Florida Department of Law Enforcement (FDLE) for state processing, and FDLE must forward the fingerprints to the Federal

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<sup>58</sup> If the Florida Supreme Court has not yet adopted such standards, then the eldercaring coordinator must complete a program which adhered to the standards for elder mediation training adopted by the Association for Conflict Resolution.



Bureau of Investigation (FBI) for national processing. A prospective eldercaring coordinator must pay the fees for state and federal fingerprint processing.

Qualified eldercaring coordinators must also:

- Not have had a final order granting an injunction for protection against domestic, dating, sexual, or repeat violence or stalking or exploitation of an elder or a disabled person filed against them;
- Meet any additional qualifications required by the court to address party-specific issues.

If an eldercaring coordinator ceases to meet the minimum qualifications to serve as such or one of the disqualifying circumstances occurs, an eldercaring coordinator must resign and promptly notify the court. Further, the bill requires the court to remove an eldercaring coordinator upon his or her resignation or disqualification, or upon a finding of good cause.

Upon a motion of the court or any party, the court is authorized to suspend the authority of an eldercaring coordinator pending a hearing on the motion for removal. Notice of such a hearing must be timely served on the eldercaring coordinator and all other parties to the action. If a motion is made in bad faith, the court may award reasonable attorney fees and costs to a party or an eldercaring coordinator who prevails on a motion for removal, in addition to any other legal remedy.

When an eldercaring coordinator resigns, is removed, or is suspended, the court must appoint a successor qualified eldercaring coordinator agreed to by all parties, or another qualified eldercaring coordinator to serve for the remainder of the original term if the parties are unable to agree on a successor.

#### Fees and Costs for Eldercaring Coordination

The bill requires the eldercaring coordinator's fees to be paid in equal portion by each party referred to the eldercaring coordination process and requires the referral order to specify the percentage of eldercaring coordination fees each party must pay. The court may determine the allocation among the parties of fees and costs and may make an unequal allocation based on the financial circumstances of each party, including:

- Income;
- Assets and liabilities;
- Financial obligations; and
- Resources, including, but not limited to, whether the party can receive or is receiving trust benefits, whether the party is represented by and paying a lawyer, and whether paying the fees and costs of eldercaring coordination would create a substantial hardship.

If the court finds a party is indigent,<sup>59</sup> the court may not order eldercaring coordination unless public funds are available to pay the indigent party's portion or a non-indigent party agrees to pay the fees and costs.

#### Confidentiality of Eldercaring Coordination Communications

The bill protects the confidentiality of all communications by, between, or among the parties and the eldercaring coordinator during eldercaring coordination, and precludes the eldercaring coordinator from testifying or offering evidence unless:

- The parties mutually agree that the communications can be disclosed.
- The relevant communications are needed to:
  - Identify, authenticate, confirm, or deny a written and signed agreement which the parties entered into during the course of eldercaring coordination.
  - Identify an issue to be resolved by the court without disclosing any other communications made by any party or the eldercaring coordinator.
  - Determine whether the eldercaring coordinator is qualified or determine the immunity and liability of an eldercaring coordinator shown to have acted in bad faith or with

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<sup>59</sup> Under s. 57.082, F.S., an attorney may be appointed in certain civil cases when the court finds that a party is indigent.

malicious purpose or in a manner exhibiting wanton and willful disregard for the rights, safety, or property of the parties.

- Protect a person from future acts which would constitute domestic violence; child abuse, neglect, or abandonment; abuse, neglect, or exploitation of an elderly or disabled adult; or are required in an investigation conducted pursuant to s. 744.2004, F.S., or a review pursuant to s. 744.368(5), F.S.
- The relevant communications are limited to the subject of a party's compliance with the order of referral to eldercaring coordination, orders for psychological evaluation, court orders or health care provider recommendations for counseling, or court orders for substance abuse testing or treatment.
- An eldercaring coordinator needs to contact persons outside of the eldercaring coordination process to give or obtain information that furthers the eldercaring coordination process.
- Mandatory reporting is required pursuant to chapters 39 or 415, F.S.
- The relevant communications are offered to report, prove, or disprove professional misconduct or malpractice occurring during eldercaring coordination.
- The relevant communications were used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.

The bill provides that a party that discloses a privileged eldercaring coordination communication waives that privilege, but only to the extent necessary for the other party or parties to respond to the disclosure or representation. Any eldercaring coordination participant who knowingly discloses an eldercaring coordination communication is subject to remedies, including:

- Equitable relief.
- Compensatory damages.
- Contribution to the other party or parties' attorney's fees, the other party's portion of the eldercaring coordinator fees, and the other party's portion of the costs incurred in the eldercaring coordination process.
- Reasonable attorney's fees and costs incurred in the application for remedies.

The bill also limits the civil liability of an eldercaring coordinator who acts in good faith and requires the Florida Supreme Court to establish minimum standards and procedures for the training, ethical conduct, and discipline of eldercaring coordinators. The bill allows the Court to employ or appoint personnel to assist in carrying out these functions.

The bill also provides legislative findings.

The bill is effective July 1, 2021.

#### B. SECTION DIRECTORY:

**Section 1:** Creates s. 44.407, F.S., relating to elder-focused dispute resolution process.

**Section 2:** Provides an effective date of July 1, 2021.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

##### 1. Revenues:

None.

##### 2. Expenditures:

The Office of the State Courts Administrator (OSCA) anticipates that the bill will lead to a decreased workload for courts because cases which utilize eldercaring coordination generally have fewer motions filed, shorter hearings; and very few require emergency hearings.<sup>60</sup> The fiscal impact to the

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<sup>60</sup> The Office of the State Courts Administrator, Agency Analysis of 2021 House Bill 441, p. 2 (Mar. 10, 2021).

state is indeterminate because there is currently insufficient data to reliably calculate the effect of the bill on judicial workload.<sup>61</sup> However, some costs are anticipated to implement eldercaring coordination throughout the state.<sup>62</sup>

**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. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2021, the Civil Justice & Property Rights Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that:
  - A prospective eldercaring coordinator must submit a full set of fingerprints to the court or statutorily authorized agency.
  - The court or agency must forward the fingerprints to the Florida Department of Law Enforcement (FDLE) for state processing.
  - FDLE must forward the fingerprints to the Federal Bureau of Investigation (FBI) for national processing.
  - A prospective eldercaring coordinator must pay the fees for state and federal fingerprint processing.
- Made technical changes.

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<sup>61</sup> *Id.* at 3.

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

On April 6, 2021, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Specified that a court may not refer the parties to eldercaring coordination in actions brought under chapters 732, 733, and 736, F.S., which relate to wills and trusts.
- Authorized a party to move the court to terminate an eldercaring coordinator appointment.
- Amended eldercaring coordinator training requirements by requiring the training to:
  - Total 44 instead of 28 hours; and
  - Include the following coursework:
    - Advanced tactics for dispute resolution of issues related to aging, illness, incapacity, or other vulnerabilities associated with elderly people;
    - Six hours on the implications of elder abuse, neglect, and exploitation and other safety issues pertinent to this training; and
    - Four instead of 2 hours of ethical considerations.
- Specified that eldercaring coordinator's fees should be paid in equal portion by each party referred to the eldercaring coordination process.
- Required the referral order to specify the percentage of eldercaring coordination fees each party must pay.
- Provided that any eldercaring coordination participant who knowingly discloses an eldercaring coordination communication is subject to remedies.
- Made technical changes.

This analysis is drafted to the committee substitute as passed by Judiciary Committee.