

## HOUSE OF REPRESENTATIVES FINAL BILL ANALYSIS

<b>BILL #:</b>	CS/CS/HB 437	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Civil Justice Subcommittee; Children, Families & Seniors Subcommittee; Adkins and others	115 Y's	0 N's
<b>COMPANION BILLS:</b>	CS/CS/CS/SB 496	<b>GOVERNOR'S ACTION:</b>	Approved

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### SUMMARY ANALYSIS

CS/CS/HB 437 passed the House on April 16, 2015. The bill was amended in the Senate on April 22, 2015, and subsequently passed the House on April 24, 2015.

When a minor with developmental disabilities or some level of incapacity ages out of the dependency system, there is a gap between the time he or she turns 18 years of age and the time a guardian advocate, limited guardian, or plenary guardian is appointed. This creates a period in which the individual who may be in need of a guardian is considered an adult (*sui juris*, or "of one's own right") but is likely unable to adequately make decisions for himself or herself.

The bill, entitled the "Regis Little Act," creates a framework for identifying and appointing guardian advocates, limited guardians, and plenary guardians for children who have a developmental disability or are incapacitated who may require decision-making assistance beyond their 18th birthday. It also authorizes guardianship courts to exercise jurisdiction over these children to appoint guardian advocates, limited guardians, and plenary guardians. The bill:

- Requires the court to conduct an annual review of the continued necessity of a guardianship for young adults in extended foster care who already have a guardian advocate or guardian;
- Requires the Department of Children and Families (DCF) to develop an updated case plan for any child 17 years of age or older who may require the assistance of a guardian advocate, limited guardian, or plenary guardian;
- Requires that upon a judge's finding that no less restrictive decision-making assistance will meet the child's needs, DCF must complete a report and identify individuals who are willing to serve as a guardian advocate or as a plenary or limited guardian;
- Allows guardianship courts to exercise jurisdiction over dependent children who are 17 ½ years of age for the purpose of appointing a guardian advocate, limited guardian, or plenary guardian and requires that the minor receive all the due process rights of an adult during the guardianship proceeding; and
- Allows the child's parents to remain the child's natural guardians unless the parents' rights have been terminated or the dependency or guardianship court determines it is not in the child's best interest.

The bill does not appear to have a fiscal impact on state or local government.

The bill was approved by the Governor on June 10, 2015, ch. 2015-112, L.O.F., and will become effective on July 1, 2015.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Present Situation

##### Guardianships

A guardianship is a legal arrangement in which one person, the guardian, has the legal right and duty to care for another, the ward, and his or her property.<sup>1</sup> Guardianships are established due to incapacity of the ward to make decisions regarding his or her care and/or property. This type of legal decision-making assistance requires an examining committee to determine that the alleged incapacitated adult lacks decision-making capacity and requires an adjudication of incapacity by a judge.<sup>2</sup> Guardianship is considered the most restrictive form of decision-making assistance and generally a last resort because it removes fundamental and civil rights of an individual to make decisions concerning his or her property and, in the most restrictive cases, his or her own care.<sup>3</sup>

##### *Alternatives to Guardianships*

There is a wide range of options to provide decision-making assistance to people with developmental disabilities or other incapacity that are not as restrictive as guardianships.<sup>4</sup> Examples include a power of attorney to officially act for the owner of a bank account;<sup>5</sup> general powers of attorney;<sup>6</sup> durable powers of attorney;<sup>7</sup> representative payee of benefits; advance directives; medical proxies; trusts; and guardian advocates (a less restrictive form of guardianship that does not require an adjudication of incapacity).<sup>8</sup> The level of decision-making assistance should not be more restrictive than required for that particular individual's needs and capacity.

##### *Guardianships for Children with Developmental Disabilities*

When a minor<sup>9</sup> with developmental disabilities or some level of incapacity ages out of the dependency system, there is a gap between the time he or she turns 18 years of age and the time a guardian advocate, limited guardian, or plenary guardian is appointed.<sup>10</sup> This creates a period in which the individual who may be in need of a guardian is considered an adult (*sui juris*, or "of one's own right")<sup>11</sup> but is likely unable to adequately make decisions for himself or herself.

Two separate issues create this gap: first, the lack of a procedure within the dependency system to identify adults willing to serve as guardians or guardian advocates for these minors as they reach 18 years of age; and second, a jurisdictional issue in which probate courts will only exercise jurisdiction and begin guardianship proceedings after the child reaches 18 years of age. The latter is because there is a distinction in current law between adult guardianships and guardianships for minors. This distinction is the most significant barrier to obtaining guardians for minors who need them when they turn 18.<sup>12</sup>

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<sup>1</sup> Black's Law Dictionary 489 (6th ed. 1991)

<sup>2</sup> S. 744.331, F.S.

<sup>3</sup> *Lighting the Way to Guardianship and Other Decision-Making Alternatives: A Manual for Individuals and Families*, 2010, Florida Developmental Disabilities Council, Inc.

<sup>4</sup> Id.

<sup>5</sup> Ch. 709, F.S.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> S. 744.3085, F.S.

<sup>9</sup> Any person who has not attained the age of 18 years, s. 1.01(13), F.S.

<sup>10</sup> Email from Alan Abramowitz, Executive Director of the Statewide Guardian ad Litem Program, on November 7, 2014; on file with Children, Families & Seniors Subcommittee staff.

<sup>11</sup> S. 743.07(1), F.S.

<sup>12</sup> Supra. at FN 9.

For adult guardianships, current law requires an adjudication of incapacity based on the recommendation of an examining committee, the appointment of an attorney to represent the adult, and the adult's presence at the hearing before appointing a guardian.<sup>13</sup> For a guardianship of a minor, an adjudication of incapacity, an attorney's appointment, and the minor's presence at the hearing are not required.<sup>14</sup> The waiver of these due process protections for minors is because the minor is not *sui juris*, and the guardianship of a minor terminates by law upon reaching age 18.

While both the dependency and probate courts are circuit courts in the state with general jurisdiction, each operates under different rules of procedure and areas of statute. Dependency courts work primarily within ch. 39, F.S., handling cases that deal with the abandonment, abuse, and neglect of children, whereas probate court works primarily with chs. 731 through 735, 744, and 747, F.S., dealing with wills, trusts, estates, guardianships, conservatorships, and other property and succession matters.

Under current law, probate courts will not entertain a petition for an adult guardianship for a minor. According to the Guardian ad Litem program, based on their discussions with the judiciary and probate practitioners, without amending current law it is unlikely that probate courts will engage in providing adult guardianships to minors in anticipation of the minor turning 18.<sup>15</sup> Currently, for those minors who have been identified as needing a guardianship as an adult, DCF recruits pro bono attorneys with the requisite experience to file a guardianship petition once they turn 18.

### **Effect of Proposed Changes:**

The bill creates a procedure for DCF and circuit courts regarding those children within the dependency system that have been identified as possibly requiring some form of legal guardianship when they reach 18 years of age.

The bill amends s. 39.701, F.S., to require DCF to create an updated case plan for any child that meets the requirements for the appointment of a guardian or guardian advocate. The updated case plan must be based on a face-to-face conference with the child and, if appropriate, the child's attorney, any court-appointed guardian ad litem, the temporary custodian of the child, and the parent, if the parent's rights have not been terminated.

If the court determines at the first judicial review hearing after the child's 17th birthday that there is a good faith basis to believe that the child qualifies for appointment of a guardian advocate, limited guardian, or plenary guardian, and that no less restrictive decision-making assistance will meet the child's needs, then:

- 1) DCF must complete a multidisciplinary report, which must include a psychosocial evaluation if one has not been completed within the previous two years;
- 2) DCF must identify individuals who are willing to serve as the guardian advocate, plenary guardian, or limited guardian. The child's parents may not be considered unless the court enters a written order finding such an appointment is in the child's best interest; and
- 3) Guardianship proceedings may be initiated within 180 days after the child's 17th birthday. The bill encourages the use of pro bono representation to initiate the guardianship proceedings.

In the event that another interested party, such as a pro bono attorney, initiates guardianship proceedings, the bill requires DCF to provide all necessary documentation and information to the petitioner within 45 days after the first judicial review hearing after the child's 17th birthday.

The bill also provides that the guardianship proceedings must be conducted in separate proceedings in the guardianship court, not the dependency court.

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<sup>13</sup> S.744.331, F.S.

<sup>14</sup> SS. 744.3021 and 744.342, F.S.

<sup>15</sup> Supra. at FN 10.

The bill amends s. 393.12, F.S., to authorize the guardianship court to take jurisdiction of a minor who is the subject of a ch. 39, F.S., proceeding and initiate guardianship proceedings once the minor reaches the age of 17 years and 6 months or anytime thereafter. The minor must be provided the same due process rights as an adult.

The bill amends s. 744.301, F.S., to provide that if a parent's rights have been terminated, the parent is not the natural guardian of the minor. If the minor is the subject of a ch. 39, F.S., dependency proceeding, the parents retain their rights as natural guardians unless the dependency or guardianship court finds that it is not in the child's best interest.

The bill amends s. 744.3021, F.S., requiring that minors who are the subject of a ch. 39, F.S., dependency proceeding and aged 17 years and 6 months be given the same due process rights as an adult. It also requires the order of adjudication of incapacity and the letters of limited or plenary guardianship to issue upon the minor's 18th birthday or as soon thereafter as possible.

The bill amends s. 39.6251, F.S., to require annual reviews of the continued necessity of a guardianship for a young adult<sup>16</sup> in extended foster care for whom a guardian advocate or guardian has already been appointed. The review must also address whether restoration of guardianship proceedings are needed when the young adult reaches 22 years of age.

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

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

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

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

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<sup>16</sup> "Young adult" is defined as "an individual who has attained 18 years of age but who has not attained 21 years of age." S. 39.6251(1), F.S.