

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: SB 1226

INTRODUCER: Senator Detert

SUBJECT: Guardianship

DATE: March 5, 2015

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	<b>Favorable</b>
2.			JU	
3.			FP	

**I. Summary:**

SB1226 expands the Statewide Public Guardianship Office (Office) within the Department of Elder Affairs (DOEA) to oversee private, professional guardians, and repeals the statutes creating the Statewide Public Guardianship Office. The executive director of the new Office of Public and Professional Guardians is appointed by the Secretary of DOEA. The bill sets out the new duties and responsibilities of the executive director of the Office of Public and Professional Guardians. The duties include oversight of professional guardians' development of curriculum training, setting minimum requirements for instructional hours and examination score necessary for passage of the guardianship training. It also requires the annual registration of professional guardians. DOEA sets the fee for registration and licensing of a professional guardian but it may not exceed \$500.

The Office is to adopt rules to establish disciplinary oversight, including the receipt of and investigations into complaints, conduct hearings and take administrative action pursuant to ch. 120, F.S.

The bill also directs the chief judge in each judicial circuit to compile a list of professional guardians and provide such list to the clerk of the court. Professional guardians must be certified by the Office to be included on the list. The court appoints professional guardians in the order in which names appear on the applicable registry, unless the court makes a finding on the record to appoint a professional guardian out of order.

The bill is effective July 1, 2015. The bill will increase costs for the DOEA associated with regulating professional guardians.

## II. Present Situation:

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Guardianships<sup>1</sup> are generally disfavored due to the loss of individual civil rights and a guardian may only be appointed if the court finds there is no sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary. 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, in situations where an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is based on the determination of a court appointed examination committee.

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.<sup>2</sup> A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation.<sup>3</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>4</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner. Section 744.362, 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’s overall physical and social health. A guardian is also under a duty to file an initial guardianship report,<sup>5</sup> an annual guardianship report,<sup>6</sup> and an annual accounting of the ward’s property.<sup>7</sup> Such reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties.<sup>8</sup>

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., explicitly 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.” Section 744.446(4), F.S., also provides that in the event of “a breach by the guardian of the guardian’s fiduciary duty, the court shall take those necessary actions to protect the ward and the ward’s assets.”

In Florida, a “professional guardian” means any guardian who has at any time rendered services to three or more wards as their guardian.<sup>9</sup> A professional guardian must register with the

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

<sup>3</sup> *Doe v. Evans*, 814 so.2d 370, 374 (Fla. 2002).

<sup>4</sup> *Capital Bank v. MVP, Inc.* 644 So.2d 515, 520 (Fla. 3<sup>rd</sup> DCA 1994).

<sup>5</sup> Section 744.362, F.S.

<sup>6</sup> Section 744.367, F.S.

<sup>7</sup> Section 744.3678, F.S.

<sup>8</sup> Section 744.368, F.S.

<sup>9</sup> Section 744.102(17), F.S.

Statewide Public Guardianship Office annually.<sup>10</sup> There are currently 465 professional guardians registered with the Statewide Public Guardianship Office.<sup>11</sup> Professional guardians must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive 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.<sup>12</sup> Professional guardians are subject to level 2 background checks,<sup>13</sup> an investigation of the guardian's credit history,<sup>14</sup> and to demonstrate competency to act as a professional guardian by taking an examination approved by DOEA.<sup>15</sup> These requirements do not apply, however, to a professional guardian or the employees of that professional guardian when that guardian is a trust company, a state banking corporation, state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary duties in this state.<sup>16</sup>

In s. 744.701, F.S., the "Public Guardianship Act" was created. In 1999, the Legislature created the Statewide Public Guardianship Office to provide oversight for all public guardians.<sup>17</sup> The executive director of the Statewide Public Guardianship Office, after consultation with the chief judge and other judges within the judicial circuit may establish one or more office of public guardian within the judicial circuit.<sup>18</sup> A public guardian may serve an incapacitated person if there is no family member or friend, other person, bank or corporation willing and qualified to serve as guardian.<sup>19</sup> Persons serving as public guardians are considered a professional guardian for purposes of regulation, education, and registration.<sup>20</sup> Public guardianship offices are established in all 20 circuits in the state.<sup>21</sup>

The process to determine incapacity and an appointment of a guardian begins with petitions filed in the appropriate circuit court. The petitions must be served on and read to the alleged incapacitated person. The notice and copies of the petitioner must be provided to the attorney for the alleged incapacitated person, and served on all next of kin identified in the petition. The notice must include the time and place for the court hearing to inquire into the capacity of the alleged incapacitated person, that an attorney has been appointed to represent that person and that, if he or she is determined to be incapable of exercising certain rights, a guardian will be appointed to exercise those rights on his or her behalf.<sup>22</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>23</sup>

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<sup>10</sup> Section 744.1083(1) and (2), F.S.

<sup>11</sup> Telephone conversation with the Department of Elder Affairs on March 9, 2015.

<sup>12</sup> Section 744.1085(3), F.S.

<sup>13</sup> Section 744.1085(5), F.S.

<sup>14</sup> Section 744.1085(4), F.S.

<sup>15</sup> Section 744.1085(6), F.S.

<sup>16</sup> Section 744.1085(10), F.S.

<sup>17</sup> Section 744.7021, F.S.

<sup>18</sup> Section 744.703(1), F.S.

<sup>19</sup> Section 744.704(1), F.S.

<sup>20</sup> Section 744.102(17), F.S.

<sup>21</sup> Meeting with the Department of Elder Affairs on February 2, 2015.

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

<sup>23</sup> Section 744.331(5)(c), F.S.

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>24</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 that 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>25</sup> If a petition for appointment of a guardian has been filed, an order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated.<sup>26</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>27</sup>

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.<sup>28</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's fees against the petitioner.<sup>29</sup>

Section 744.108, F.S., governs the award of compensation to a guardian or attorney in connection with a guardianship. It provides that "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 for services rendered and reimbursement of costs incurred on behalf of the ward."<sup>30</sup>

Section 744.108(8), F.S., provides that fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>31</sup>

A ward has the right to be restored to capacity at the earliest possible time.<sup>32</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. Immediately upon the filing of the suggestion of capacity, the court shall appointment a physician to examine the ward. The physician must examine the ward and file a report with the court within 20 days.<sup>33</sup> 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.<sup>34</sup> If an objection is timely filed, or if the medical examination suggests that full restoration

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<sup>24</sup> Section 744.331(6), F.S.

<sup>25</sup> Section 744.331(6)(b), F.S.

<sup>26</sup> Section 744.344(3), F.S.

<sup>27</sup> Section 744.344(4), F.S.

<sup>28</sup> Section 744.372, F.S.

<sup>29</sup> Section 744.3415, F.S.

<sup>30</sup> Section 744.108(1), F.S.

<sup>31</sup> Section 744.108(8), F.S.

<sup>32</sup> Section 744.3215(1)(c), F.S.

<sup>33</sup> Section 744.464(2)(b), F.S.

<sup>34</sup> Section 744.464(2)(c),(d)

is not appropriate, the court must set the matter for hearing.<sup>35</sup> The level of proof required to show capacity is not presently spelled out in the statute. In a study and work group report by the Florida Developmental Disabilities Council, dated February 28, 2014, Palm Beach County court personnel performed a limited review of a random sample of 76 guardianship files for persons over the age of 18. Among these, over two thirds were of persons with age-related disabilities. After reviewing the files, the senior auditor for the circuit reported that there were no cases where the guardianship plan recommended the restoration of any rights” of the incapacitated persons.<sup>36</sup>

Beginning on December 6, 2014, the Sarasota Herald Tribune published a series of articles titled “The Kindness of Strangers – Inside Elder Guardianship in Florida,” which detailed abuses occurring in guardianships. The paper examined guardianship court case files and conducted interviews with wards, family and friends caught in the system against their will.<sup>37</sup> The paper concluded that Florida has cobbled together an efficient way to identify and care for helpless elders, using the probate court system to place them under guardianship. However, critics say this system often ignores basic individual rights and most often plays out in secret, with hearings and files typically closed to the public.<sup>38</sup> The paper also concluded that monitoring assets and tapping their assets is a growth business: In 2003, there were 23 registered professional guardians in Florida, according to the Department of Elder Affairs. Today there are more than 440 – an increase greater than 1,800 percent in 11 years.<sup>39</sup>

### III. Effect of Proposed Changes:

**Section 1** directs the Division of Law Revision and Information to add sections to the Florida Statutes created by this bill.

**Section 2** directs the Division of Law Revision and Information to retitle Part II of Chapter 744, F.S., from “Venue” to “Public and Professional Guardians”.

**Section 3** directs the Division of Law Revision and Information to remove part IX of Chapter 744, F.S.

**Section 4** amends s. 744.1012, F.S., to provide that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person and such person does not have adequate income or wealth for the compensation of the private guardian. The Legislature establishes the Office of Public and Professional Guardians which allows the establishment of public guardians to provide services for incapacitated persons when no private guardian is available and that a public guardian must be provided only to those persons whose needs cannot be met through less drastic means of intervention.

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<sup>35</sup> Section 744.464(2)(e), F.S.

<sup>36</sup> Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, February 28, 2014 (on file with the Senate Committee on Children, Families and Elder Affairs).

<sup>37</sup> Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida*, December 6, 2014, available at <http://extra.heraldtribune.com/2014/12/06/well-oiled-machine/>

<sup>38</sup> *Id* at page 2.

<sup>39</sup> *Id*.

**Section 5** renumbers s. 744.201, F.S., as s. 744.1096, F.S.

**Section 6** renumbers s. 744.202, F.S., as s. 744.1097, F.S.

**Section 7** renumbers s. 744.2025, F.S., as s. 744.1098, F.S.

**Section 8** renumbers s. 744.7021, F.S. as s. 744.2001, F.S. and amends s. 744.2001, F.S. to direct the executive director of the Office of Public and Professional Guardians to review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida. The executive director is directed to develop a guardianship training program curriculum to be offered to all guardians, whether public or private.

The executive director's oversight responsibilities for professional guardians, include, but are not limited to:

- The development and implementation of a monitoring tool to use for regular monitoring activities of professional guardians; however, this monitoring tool does not include a financial audit as required to be performed by the clerk of the circuit court under s. 744.368, F.S.
- The development or procedures for the review of an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians.
- The establishment of disciplinary proceedings, including the authority to conduct investigations and take appropriate administrative action under ch. 120, F.S.
- Assist the chief judge in each circuit to establish a registry to allow for the appointment of a professional guardian on a rotating basis.

**Section 9** renumbers s. 744.1083, F.S., as s. 744.2002, F.S. and amends s. 744.2002, to conform cross references and remove the reference to Statewide Public Guardianship Office and insert the name of the new Office of Public and Professional Guardians.

**Section 10** renumbers s. 744.1085, F.S. as s. 744.2003, F.S. and amends s. 744.2003, F.S., to conform cross-references and change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 11** creates 744.2004, F.S., and directs the Office of Public and Professional Guardians to adopt rules to review, and if appropriate, investigate allegations that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians. The Office is to also establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S. Disciplinary actions may include, but are not limited to, requiring guardians to participate in additional educational courses, impose additional monitoring of the guardianships being served by the professional guardian and suspension and revocation of the guardian's license. In the event the final recommendation is for the suspension or revocation of the guardian's license, the recommendation must be provided to any court that oversees any guardianship to which the professional guardian is appointment.

**Section 12** renumbers s. 744.344, F.S., as s. 744.2005, F.S., and amends s. 744.2005, F.S., to create a registry of professional guardians for use by the court in appointing guardians. The registry is to be compiled by the chief judge in each circuit and provided to and maintained by the clerk of the court in each county of the circuit. A professional guardian must be certified by the Office to be included on the registry. The court may appoint a professional guardian out of order only upon entering a finding of good cause into the record.

**Section 13** renumbers s. 744.703, F.S., as s. 744.2006, and amends s. 744.2006, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 14** renumbers s. 744.704, F.S., as s. 744.2007, F.S.

**Section 15** renumbers s. 744.705, F.S., as s. 744.2008, F.S.

**Section 16** renumbers s. 744.706, F.S., as s. 744.2009, F.S., and amends s. 744.2009, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 17** renumbers s. 744.707, F.S., as s. 744.2101, F.S., and amends s. 744.2021, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 18** renumbers s. 744.709, F.S., as s. 744.2102, F.S.

**Section 19** renumbers s. 744.708, F.S., as s. 744.2103, F.S., and amends s. 744.2103, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 20** renumbers s. 744.7081, F.S., as s. 744.2104, F.S., and amends s. 744.2014, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 21** renumbers s. 744.7082, F.S., as s. 744.2105, F.S., and amends s. 744.2105, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 22** renumbers s. 744.712, F.S., as s. 744.2106, F.S., and amends s. 744.2106, F.S. to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians and provide the legislative intent to establish the Joining Forces for Public Guardianship matching grant program to assist counties in establishing and funding community-supported public guardianship programs.

**Section 23** renumbers s. 744.713, F.S., as s. 744.2107, F.S., and amends s. 744.2107, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 24** renumbers s. 744.714, F.S., as s. 744.2108, F.S., and amends s. 744.2108, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 25** renumbers s. 744.715, F.S., as s. 744.2109, F.S. and amends s. 744.2109, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 26** repeals s. 744.701, F.S.

**Section 27** repeals s. 744.702, F.S.

**Section 28** repeals s. 744.7101, F.S.

**Section 29** repeals s. 744.711, F.S.

**Section 30** amends s. 400.148, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 31** amends s. 744.3135, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 32** amends s. 415.1102, F.S., to add that professional guardians may be members of adult protection teams.

**Section 33** amends s. 744.331, F.S., to change the name of the Statewide Public Guardianship Office to the Office of Public and Professional Guardians.

**Section 34** amends s. 20.415, F.S., to conform cross references.

**Section 35** amends s. 744.524, F.S., to conform cross-references.

**Section 36** provides an effective date of July 1, 2015.

#### **IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.



**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

B. Private Sector Impact:

Professional guardians will be regulated by DOEA.

C. Government Sector Impact:

The Department of Elder Affairs will see increased costs associated with regulating private guardians. The department would need budget and FTEs to perform the duties required by the bill. There would also be increased costs to the department's general counsel's office as the professional guardians will be able to challenge decisions by the department under ch. 120, F.S. The department currently provides education to professional guardians statewide and there are 456 such guardians that would be regulated under this bill. The number of wards represented by the 456 guardians is unknown as this time and would need to be considered when estimating the cost of regulation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 744.1012, 744.2001, 744.2002, 744.2003, 744.2005, 744.2006, 744.2009, 744.2101, 744.2103, 744.2104, 744.2105, 744.2106, 744.2107, 744.2108, 744.2109, 400.148, 744.3135, 415.1102, 744.331, 20.415 and 744.524.

This bill renumbers the following sections of the Florida Statutes: 744.1096, 744.1097, 744.1098, 744.7021, 744.1083, 744.1085, 744.344, 744.703, 744.704, 744.705, 744.706, 744.707, 744.709, 744.708, 744.7081, 744.7082, 744.712, 744.713, 744.714, and 744.715,

This bill creates the following sections of the Florida Statutes: 744.2004

This bill repeals the following sections of the Florida Statutes: 744.701, 744.702, 744.7101, and 744.711.

**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.

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

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