

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 Fiscal Policy

BILL: CS/SB 1226

INTRODUCER: Fiscal Policy Committee and Senator Detert

SUBJECT: Guardianship

DATE: April 22, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Crosier</u>	<u>Hendon</u>	<u>CF</u>	Favorable
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	Fav/CS

I. Summary:

CS/SB 1226 amends and reorganizes the Guardianship chapter, ch. 744, F.S. The Statewide Public Guardianship Office, which currently exists within the Department of Elder Affairs (DOEA) and has oversight for public guardians for indigent people in the state, is expanded and renamed the Office of Public and Professional Guardians. In its new capacity, the office is given the additional responsibility of administering professional guardians who have not previously been closely regulated by the state. The newly titled office remains housed within the DOEA.

The executive director of the new Office of Public and Professional Guardians remains an appointee of the Secretary of the DOEA, but with expanded responsibilities. The bill establishes the additional duties and responsibilities of the executive director and requires the annual registration of professional guardians. The DOEA sets the fee for registration and certification of a professional guardian, which may not exceed \$500.

The Office of Public and Professional Guardians is directed to adopt rules to establish disciplinary oversight, conducting hearings, and taking 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 the 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 registry, unless the court makes a finding on the record to appoint a professional guardian out of order.

The bill provides \$821,670 in recurring funds from the General Revenue Fund to the DOEA and 6 FTE for the purpose of carrying out all oversight and monitoring responsibilities of the Office of Public and Professional Guardians (see Section V.).

II. Present Situation:

Guardianship

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 are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only 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.¹ 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.²

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.³ 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 relationship.⁴ 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.⁵ 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 with the court an initial guardianship report,⁶ an annual guardianship report,⁷ and an annual accounting of the ward’s property.⁸ The reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties.⁹

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.” In the event

¹ See generally, Section 744.102(9), F.S.

² See generally, Section 744.102(12), F.S.

³ *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

⁴ *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

⁵ *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

⁶ Section 744.362, F.S.

⁷ Section 744.367, F.S.

⁸ Section 744.3678, F.S.

⁹ Section 744.368(1), F.S.

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.¹⁰

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.¹¹ A professional guardian must register annually with the Statewide Public Guardianship Office.¹² Currently, there are 465 professional guardians registered with the Statewide Public Guardianship Office.¹³ 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.¹⁴

Professional guardians are subject to a level 2 background check,¹⁵ an investigation of the guardian's credit history,¹⁶ and are required to demonstrate competency to act as a professional guardian by taking an examination approved by DOEA.¹⁷ 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;
- 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.¹⁸

Public Guardianship Act

The Public Guardianship Act is recognized in s. 744.701, F.S. The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.¹⁹ 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 a judicial circuit.²⁰ 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.²¹ A person serving as a public guardian is considered a professional guardian for

¹⁰ Section 744.446(4), F.S.

¹¹ Section 744.102(17), F.S.

¹² Section 744.1083(1) and (2), F.S.

¹³ Children and Families, and Elder Affairs Committee staff telephone conversation with the Department of Elder Affairs on March 9, 2015.

¹⁴ Section 744.1085(3), F.S.

¹⁵ Section 744.1085(5), F.S.

¹⁶ Section 744.1085(4), F.S.

¹⁷ Section 744.1085(6), F.S.

¹⁸ Section 744.1085(10), F.S.

¹⁹ Chapter 99-277 L.O.F.

²⁰ Section 744.703(1), F.S.

²¹ Section 744.704(1), F.S.

purposes of regulation, education, and registration.²² Public guardianship offices are in all 20 judicial circuits in the state.²³

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 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.²⁴

In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.²⁵ 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.²⁶ 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.²⁷

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.²⁸ 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.²⁹

Court Proceedings

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.³⁰ 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

²² Section 744.102(17), F.S.

²³ Children, Families, and Elder Affairs Committee staff meeting with the Department of Elder Affairs on February 2, 2015.

²⁴ Section 744.331(1), F.S.

²⁵ Section 744.331(5)(c), F.S.

²⁶ Section 744.331(6), F.S.

²⁷ Section 744.331(6)(b), F.S.

²⁸ Section 744.344(3), F.S.

²⁹ Section 744.344(4), F.S.

³⁰ Section 744.372, F.S.

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.³¹

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.³² Fees and costs incurred are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.³³

A ward has the right to be restored to capacity at the earliest possible time.³⁴ 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 appoint a physician to examine the ward. The physician must examine the ward and file a report with the court within 20 days.³⁵ 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.³⁶ 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.³⁷ 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.³⁸

Media Reports

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.³⁹ 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.⁴⁰ The paper also concluded that "monitoring elders and

³¹ Section 744.3715, F.S.

³² Section 744.108(1), F.S.

³³ Section 744.108(8), F.S.

³⁴ Section 744.3215(1)(c), F.S.

³⁵ Section 744.464(2)(b), F.S.

³⁶ Section 744.464(2)(c),(d)

³⁷ Section 744.464(2)(e), F.S.

³⁸ 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).

³⁹ Barbara Peters Smith, *The Kindness of Strangers – Inside Elder Guardianship in Florida*, HERALD TRIBUNE (December 6, 2014), available at <http://extra.heraldtribune.com/2014/12/06/well-oiled-machine/> (last visited April 14, 2015).

⁴⁰ *Id* at 2.

tapping their assets is a growth business: In 2003, there were 23 registered professional guardians in Florida, according to the [DOEA]. Today there are more than 440 – an increase greater than 1,800 percent in 11 years.”⁴¹

III. Effect of Proposed Changes:

The bill renames the Statewide Public Guardianship Office and significantly expands its duties. The office is renamed the Office of Public and Professional Guardians and, as its name implies, now has oversight for both public and professional guardians. While public guardians, who provide services for indigent people, have been regulated by the state, professional guardians have not been as closely regulated.

This bill establishes the regulation and supervision of professional guardians by giving the DOEA the authority to discipline professional guardians for misconduct.

Legislative Intent (Section 4)

The bill amends the legislative intent language in s. 744.1012, F.S., and finds that alternatives to guardianship and less intrusive means of assistance should always be explored before an individual’s rights are removed through an adjudication of incapacity.

The legislative intent also includes the finding 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 intends, through establishing the Office of Public and Professional Guardians, to permit the establishment of public guardians to provide services for incapacitated persons when no private guardian is available. The public guardian must be provided only to those persons whose needs cannot be met through less drastic means of intervention.

Office of Public and Professional Guardians (Section 8)

The bill creates the Office of Public and Professional Guardians within the DOEA. The executive director of the Office of Public and Professional Guardians has oversight responsibilities over all public and private guardians. The executive director must review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida.

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

- Developing and implementing a monitoring tool to use for periodic monitoring activities of professional guardians; however, this monitoring tool may not include a financial audit as required to be performed by the clerk of the circuit court under s. 744.368, F.S.;

⁴¹ *Id.*

- Developing 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;
- Establishing disciplinary proceedings, conducting hearings, and taking administrative action under ch. 120, F.S.; and
- Assisting the chief judge in each circuit to establish a registry to allow for the appointment of a professional guardian on a rotating basis.

Regulation of Professional Guardians (Section 10)

The bill clarifies that the DOEA or its contractor must charge a fee for registration and certification of professional guardians which may not exceed \$500.

Discipline of Professional Guardians (Section 11)

The bill creates s. 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;
- 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 professional guardians to participate in additional educational courses;
 - Imposing additional monitoring of the guardianships being served by the professional guardian; and
 - Suspending and revoking the guardian's registration. If the final determination from a disciplinary proceeding is to suspend or revoke the guardian's registration, the determination must be provided to any court that oversees any guardianship to which the professional guardian is appointed.

Professional Guardian Registry (Section 12)

The bill creates a registry of professional guardians for a court to use when 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 of Public and Professional Guardians to be included on the registry. The court must appoint professional guardians in the order the names appear and may appoint a professional guardian out of order only upon entering a finding of good cause into the record.

Access to Records by the Office of Public and Professional Guardians (Section 20)

Under current law, any confidential or exempt information provided to the Statewide Public Guardianship Office (renamed by the bill to the Office of Public and Professional Guardians) continues to be held confidential or exempt as otherwise provided by law. Current law also provides that all records relating to the medical, financial, or mental health of vulnerable adults as defined in ch. 415, F.S., persons with a developmental disability as defined in ch. 393, F.S., or

persons with a mental illness as defined in ch. 394, F.S., are confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a) of the Florida Constitution.

The bill provides the Office of Public and Professional Guardians access to all court records relating to the guardianship cases for which a professional guardian is appointed and allows access to these records through whatever means or systems are available, including, but not limited to, electronic access through the Florida Courts E-Portal.

Joining Forces for Public Guardianship (Section 22)

The bill provides the purpose for establish the Joining Forces for Public Guardianship matching grant program is to assist counties in establishing and funding community-supported public guardianship programs.

Organizational Changes (Remaining Sections)

The remaining sections of the bill make technical changes and relocate what is currently part II, Venue, to part I, General Provisions, retitles part II as Public and Professional Guardians and makes other conforming changes to carry out the intent of the act.

Appropriation (Section 36)

The bill provides for FY 2015-2016, 6 full-time equivalent positions and \$821,670 in recurring funds from the General Revenue Fund to the DOEA for the purpose of carrying out all oversight and monitoring responsibilities of the Office of Public and Professional Guardians.

Effective Date (Section 37)

The bill is effective January 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not affect counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Professional guardians will be regulated by the DOEA.

C. Government Sector Impact:

The bill provides for FY 2015-2016, 6 full-time equivalent (FTE) positions and \$821,670 in recurring funds from the General Revenue Fund to the DOEA for the purpose of carrying out all oversight and monitoring responsibilities of the Office of Public and Professional Guardians. According to the DOEA, the bill would increase the monitoring duties of the Office of Public and Professional Guardians and would require contracting with forensic auditors to investigate potential issues. This contracting is estimated to initially cost \$500,000, which is contained in the recurring funds appropriated by the bill. Additionally, the DOEA estimated costs of \$100,000 to develop a computer system to track complaints and activities. The 6 FTE consist of 5 complaint investigators and 1 senior attorney.⁴²

According to the Office of the State Court Administrator, the bill will increase the judicial workload, however the exact fiscal impact cannot be determined due to the unavailability of data.⁴³

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Office of Public and Professional Guardians is directed to adopt rules concerning professional guardians to establish disciplinary oversight, including conducting hearings and taking administrative action pursuant to ch. 120, F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 20.415, 400.148, 415.1102, 744.1012, 744.1083, 744.1085, 744.201, 744.202, 744.2025, 744.7021, 744.344, 744.703, 744.704, 744.705, 744.706, 744.707, 744.708, 744.709, 744.7081, 744.7082, 744.712, 744.713, 744.714, 744.715, 744.3135, 744.331, and 744.524.

⁴² 2015 Department of Elder Affairs Bill Analysis, *Senate Bill 1226*, (April 16, 2015) (on file with the Senate Fiscal Policy Committee).

⁴³ Office of the State Courts Administrator 2015 Judicial Impact Statement, *Senate Bill 1226*, (March 15, 2015) (on file with the Senate Fiscal Policy Committee).

This bill creates section 744.2004 of the Florida Statutes.

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.)

CS by Fiscal Policy on April 20, 2015:

The committee substitute:

- Removes the provision authorizing the DOEA to investigate public and private guardians.
- Clarifies that a professional guardian must be certified instead of licensed.
- Provides the Office of Public and Professional Guardians access to all court records relating to the guardianship cases for which a professional guardian is appointed and allows access to these records through whatever means or systems are available.
- Makes technical changes.
- Provides 6 full-time equivalent positions and \$821,670 in recurring funds from the General Revenue Fund, to the DOEA for the purpose of carrying out all oversight and monitoring responsibilities of the Office of Public and Professional Guardians.

B. Amendments:

None.