

**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 Appropriations Subcommittee on Criminal and Civil Justice

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BILL: SB 1002

INTRODUCER: Senator Passidomo

SUBJECT: Guardianship

DATE: February 6, 2018      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 1002 identifies several specific actions that circuit court clerks may take when reviewing guardianships. The bill also expressly authorizes designees in the Office of Public and Professional Guardians to receive otherwise confidential documents when investigating guardianships. The circuit court clerks serve as the custodians of guardianship files and must review certain reports to ensure that guardians are correctly performing their responsibilities. The Office of Public and Professional Guardians is authorized to appoint certain types of guardians and investigate and, when appropriate, discipline guardians who violate their statutory duties.

The bill does not affect state revenues or expenditures.

The bill takes effect July 1, 2018.

**II. Present Situation:**

**Guardians**

A guardian may be described as someone who has been given the legal duty and authority to care for another person or his or her property because of that person’s infancy, disability, or incapacity.<sup>1</sup> Guardianships are trust relationships designed to protect vulnerable members of society who do not have the ability to protect themselves. The person for whom a guardian is appointed is called a “ward.”<sup>2</sup> Once a guardian is appointed by the court, the guardian serves as a

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<sup>1</sup> BLACK’S LAW DICTIONARY, 10th edition, 2014.

<sup>2</sup> Section 744.102(22), F.S.

surrogate decision-maker and makes personal or financial decisions, or both, for the ward.<sup>3</sup> In Florida, guardianship matters are governed and controlled exclusively by statute.<sup>4</sup>

### **Annual Accounting**

Each guardian of the property of a ward must file an annual accounting with the court.<sup>5</sup> The annual accounting must include a full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period. However, the requirement for an accounting does not apply to any property or trust of which the ward is a beneficiary but which is not under the control or administration of the guardian.<sup>6</sup> The guardian must obtain a receipt, cancelled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward. The guardian must preserve all evidence of payment, together with any substantiating papers, for 3 years after his or her discharge as a guardian. These items do not need to be filed with the court but must be made available for inspection and review as the court may order.<sup>7</sup>

### **Responsibilities of the Clerk of the Court to Review Guardianship Reports**

The State Constitution establishes the office of clerk of the circuit court in each county. This provision is contained in Article 5, section 16, the article that establishes the Judiciary. The duties of the clerk may be detailed by special or general law.

In addition to the duty to serve as the custodian of the guardianship files, the clerk must review each initial and annual guardianship report to ensure it contains information about the ward that addresses mental and physical health care, physical and mental health examinations, personal and social services, residential setting, the application of insurance, private and government benefits, and the initial verified inventory or the annual accounting.<sup>8</sup>

The clerk has 30 days after the initial or annual reports are filed to complete a review of the report. He or she has 90 days after the verified inventory and accounts are filed to audit those submissions. The clerk must advise the court of the results of the audit and report to the court when a report is not timely filed.<sup>9</sup>

In 2014, the Legislature expanded the authority and responsibilities of the clerk as auditor of guardianship reports.<sup>10</sup> The statutes now provide that if the clerk believes that a further review is appropriate, he or she may request and review records and documents that reasonably impact the guardianship assets. These records and documents may include but are not limited to, the

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<sup>3</sup> Section 744.102(9), F.S.

<sup>4</sup> *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So. 2d 176, 182 (Fla. 2d DCA 1966); *Hughes v. Bunker*, 76 So. 2d 474, 476 (1954).

<sup>5</sup> Section 744.3678(1), F.S.

<sup>6</sup> Section 744.3678(2)(a), F.S.

<sup>7</sup> Section 744.3678(3), F.S.

<sup>8</sup> Section 744.368(1), F.S.

<sup>9</sup> Section 744.368(2), (3), and (4), F.S.

<sup>10</sup> Ch. 2014-124, Laws of Fla.

beginning inventory balance and any fees charged to the guardianship.<sup>11</sup> If a guardian does not produce records and documents to the clerk upon request, the clerk may request the court to enter an order by filing an affidavit that identifies the records and documents requested and shows good cause as to why those items requested are needed to complete the audit.<sup>12</sup>

The clerk may, upon application to the court and with a supporting affidavit, issue subpoenas to nonparties to compel the production of books, papers, and other documentary evidence. Before issuing a subpoena by affidavit, the clerk must serve notice on the guardian and the ward, unless the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.<sup>13</sup>

### **The Office of Public and Professional Guardians, Investigations, and Specialized Units**

The Office of Public and Professional Guardians (OPPG) is situated within the Department of Elder Affairs. It is responsible for appointing local public guardians to provide services to people who do not have enough income or assets to afford a private guardian and no family member or friend is willing to serve. The Office contracts with 17 local offices of public guardians and is responsible for registering and educating professional guardians in the state. In 2016, the Office's responsibilities were increased to include regulating professional guardians which involves investigating, and if appropriate, disciplining guardians who violate the law.<sup>14</sup> As part of its investigative responsibilities, OPPG is authorized to request and be provided records held by an agency, the court and its agencies, or financial audits prepared by a clerk and held by the court which are necessary as part of an investigation when a complaint is filed against a guardian.<sup>15</sup> If confidential or exempt information is provided to OPPG, it continues its status as confidential or exempt.<sup>16</sup>

Since OPPG began receiving complaints on October 1, 2017, it has referred 83 legally sufficient complaints for further investigation. In 30 of those cases, letters of concern were issued or discipline was imposed or the cases were determined to be unfounded. The remaining 53 cases are still open and ongoing.<sup>17</sup>

Seven clerk offices around the state have specialized units that are trained to provide independent investigative services of professional guardianships. The Office of Public and Professional Guardians has contracted with these accredited units to perform investigations of legally sufficient complaints regarding the conduct of professional guardians. These investigations are performed using professional investigative standards. The clerk investigative units compare professional guardians' conduct to Florida Guardianship Law, the Florida Criminal Code, and Standards of Practice for Professional Guardians. All facts and findings are reported to the OPPG for administrative complaints, and if necessary, a referral to a criminal justice agency. The Palm Beach County Clerk serves as the administrative coordinator and chief investigator. The

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<sup>11</sup> Section 744.368(5), F.S.

<sup>12</sup> Section 744.368(6), F.S.

<sup>13</sup> Section 744.368(7), F.S.

<sup>14</sup> Office of Public & Professional Guardians, Department of Elder Affairs, *Office of Public & Professional Guardians: Who We Are* <http://elderaffairs.state.fl.us/doea/spgo.php> (last visited Jan. 6, 2018).

<sup>15</sup> Section 744.2104(1), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> Telephone conversation with Carol Berkowitz, Executive Director of the Office of Public and Professional Guardians, Tallahassee, Fla. (Jan. 4, 2018).

remaining clerk offices are Pinellas County, Polk County, Okaloosa County, Lake County, Lee County, and Sarasota County.

### **Statistics of the Elderly in Florida**

According to statistics compiled for the State of Florida, 3,259,602 Floridians were age 65 and older in 2010. This number is projected to reach 4,390,788 by 2020, and 5,916,832 by 2030. Between 2010 and 2020, Florida's population age 85 and older is expected to increase by 36.1 percent.<sup>18</sup> These numbers indicate that there will likely be a significant increase in guardianships in the coming years.

### **Ex Parte Communications**

An ex parte communication is a one-sided communication that occurs between counsel and the court when the opposing counsel is not present. This form of communication is generally prohibited<sup>19</sup> because it removes the appearance of the court's impartiality in a proceeding and may likely prejudice a pending matter against the party not represented.

### **The Power of a Guardian to Act Without Court Approval**

Two types of guardians may act without court approval when dealing with the property of a ward.<sup>20</sup> Those types are a plenary guardian of the property or a limited guardian of the property.<sup>21</sup> As specified in statute, the guardian does not need court approval to conduct a list of activities,<sup>22</sup> including the authority to provide confidential information about a ward to a local or state ombudsman member conducting an investigation involving a long-term care facility.

## **III. Effect of Proposed Changes:**

This bill identifies specific actions that the circuit court clerks may take when reviewing guardianships. The bill also expressly authorizes designees of the Office of Public and

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<sup>18</sup> Florida Demographic Estimating Conference, February 2017 and the University of Florida, Bureau of Economic and Business Research, Florida Population Studies, Bulletin 178, June 2017. Available at [http://edr.state.fl.us/Content/population-demographics/data/pop\\_census\\_day-2016.pdf](http://edr.state.fl.us/Content/population-demographics/data/pop_census_day-2016.pdf) and <http://edr.state.fl.us/Content/population-demographics/data/index-floridaproducts.cfm>.

<sup>19</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>20</sup> Section 744.444, F.S.

<sup>21</sup> A plenary guardian is a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court finds that the ward lacks the capacity to perform all of the necessary tasks to care for his or her person or property. Section 744.102(9)(b), F.S. A limited guardian is a guardian appointed by the court to exercise the legal rights and powers specifically designated by the court after the court finds that the ward lacks the capacity to do some, but not all tasks, necessary to care for his or her person or property, or after he or she voluntarily petitions the court for appointment of a limited guardian.

<sup>22</sup> Those enumerated activities include the ability to: retain or receive assets, vote or not vote stocks or other securities, insure assets and himself or herself against liability, execute instruments, pay taxes, assessments, certain encumbrances, and reasonable living expenses, elect to dissent from a will, make an election, or assert certain rights, deposit or invest certain assets, pay incidental expenses for the administration of the estate, sell or exercise stock rights and consent to activities of a business enterprise, employ necessary persons to advise or assist in performing the guardian's duties, execute and deliver certain instruments to carry out court order, hold securities, and pay or reimburse costs incurred.

Professional Guardians to receive otherwise confidential documents when investigating guardianships.

**Section 1** amends s. 744.2104(1), F.S., which addresses the OPPG's ability to access records when a complaint is filed against a guardian and an investigation is initiated. In adding the words "or its designee," the bill clarifies that the seven specialized units that perform investigations of complaints at the direction of the OPPG are authorized to receive records held by the court or its agencies which are necessary as part of an investigation of a guardian.

**Section 2** amends s. 744.368, F.S., which addresses the responsibilities of the clerk of the circuit court to review guardianship reports. The language added to the statute expressly authorizes clerks, when conducting a further review of inventories and accountings, to conduct audits and cause initial and annual guardianship reports to be audited. The clerk must advise the court of the results of the audit. If a fee or cost is incurred by the guardian when he or she responds to the review or audit, it may not be paid or reimbursed using the ward's assets if the court finds an act of wrongdoing on the part of the guardian. The clerk's advice to the court regarding the audit may not be considered an ex parte communication, which is discussed in the Present Situation.

**Section 3** amends s. 744.3701, F.S., which pertains to the disclosure and confidentiality of guardianship inspections and reports. The bill provides that the clerk may disclose confidential information to the Department of Children and Families or law enforcement agencies "for other purposes," as provided by a court order. The confidential information described in s. 744.3701(3), F.S., which may not be disclosed unless specifically authorized, is a court record pertaining to the settlement of a ward's or minor's claim, including a petition for approval of a settlement, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf a ward of minor. What the "other purposes" are is not explained in the bill.

**Section 4** amends s. 744.444, F.S., which addresses the power of a guardian to act without court approval regarding the property of a ward. The bill expands the authority of a guardian to disclose confidential information about a ward to additional investigative entities. Specifically, the guardian is authorized to provide the confidential information to the court clerk or an investigator with the OPPG for investigations that arise under a review of records and documents involving assets, the beginning inventory balance, and fees charged to the guardianship. The clerk or investigator has a duty to maintain the confidentiality of that disclosed information.

The bill takes effect July 1, 2018.

#### **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:

None.

B. Private Sector Impact:

If the court finds a guardian guilty or wrongdoing in a report or audit, those costs or fees incurred by the guardian in responding must be borne by the guardian. The ward's assets may not be used for payment or reimbursement of the guardian.

C. Government Sector Impact:

The disclosure of confidential information about a ward to additional investigative entities may result in additional costs to those entities. However, the bill has no discernible impact on state expenditures or revenues.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 744.2104, 744.368, 744.3701, and 744.444.

**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.