

STORAGE NAME: h0933.rpp

DATE: March 3, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
ANALYSIS**

BILL #: HB 933

RELATING TO: Guardianship

SPONSOR(S): Representative Littlefield

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE
 - (2) JUDICIARY
 - (3) CRIMINAL JUSTICE APPROPRIATIONS
 - (4)
 - (5)
-

I. SUMMARY:

This bill modifies guardianship practice and procedure, as follows:

- Requires an emergency temporary guardian to file an inventory and a final report;
- Prohibits any person with “a criminal record” or any person who holds a health care surrogate agreement or power of attorney for the individual for whom such person desires to serve as guardian from being appointed as a guardian;
- Requires that a credit and criminal history background check of a guardian be conducted every 5 years;
- Requires that a petition to determine incapacity must include information regarding advance directives;
- Requires that a fee application from a member of the examining committee or from the attorney appointed to represent the alleged incapacitated person must be filed with the court within 30 days after the court approves the initial guardianship report;
- Requires that a copy of the initial guardianship report must also be given to the ward’s next of kin, and permits the next of kin and law enforcement officers to inspect any report in the guardianship court file;
- Modifies accounting and reporting formats; requires that all accounting must conform to “generally accepted accounting and auditing standards”; and requires the same fee to be paid upon filing of any amended accounting, or filing of any addenda to the annual accounting, as is paid to file the annual accounting; and
- Establishes fines and penalties to be assessed against a guardian for violation of the Guardianship Act.

There are a number of technical and substantive concerns regarding this bill. Please refer to the italicized portion of the “Section-by-Section Analysis” for further detail.

This bill does not appear to have significant fiscal impact on state or local government.

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II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill creates additional requirements for guardians, increased responsibilities for clerks of court in monitoring guardians, and establishes fines and penalties.

B. PRESENT SITUATION:

See "Section-by-Section Analysis" for present situation specific to each section of this bill.

Guardianship law is found in the Guardianship Act ("Act") in Chapter 744, F.S. A "guardian" is "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."¹ A "ward" is "a person for whom a guardian has been appointed."² A person will only become a ward if that person is an "incapacitated person", which is "a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person."³ Guardianship is the legal process of determining the necessity of appointing a guardian for a ward, and monitoring and supervising that appointment. There are many variations in guardianship, including plenary,⁴ limited, nonprofit corporate, professional, or standby. While many wards are elderly, wards are also persons with developmental disabilities, persons with mental illness, and persons with severe medical problems.

In general, any adult person may be appointed as a guardian over a ward, except that appointment of a non-resident guardian is restricted and certain persons are prohibited from acting as a guardian.⁵ In many guardianships, a close relative or friend of the ward acts as guardian, often waiving the fees that they would be entitled to earn as guardian.

¹ Section 744.102(8), F.S.

² Section 744.102(19), F.S.

³ Section 744.102(10), F.S.

⁴ "Plenary" is defined by Black's Law Dictionary as "full, entire, complete, absolute, perfect, unqualified".

⁵ Section 744.309, F.S. Persons prohibited from acting as a guardian include convicted felons, persons with a record of abuse or neglect of children or of the elderly, and medical providers to the ward.

Where no friend or relative is available to act as guardian, and the assets of the ward are sufficient, a professional guardian may be appointed.

C. EFFECT OF PROPOSED CHANGES:

See "Section-by-Section Analysis".

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 744.3031, F.S., regarding emergency temporary guardianship.

Present Situation: Prior to appointment of a guardian, and after a petition for guardianship has been filed, a court may appoint an emergency temporary guardian if the court finds that there appears to be imminent danger to the physical or mental health or safety of the person upon whom a guardianship petition has been filed, or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.⁶ There is no requirement that an emergency temporary guardian prepare an inventory, although an emergency temporary guardian is required to file a final report with the court.⁷

Effect of Proposed Changes: This bill requires an emergency temporary guardian to file an inventory of the ward's property within 10 days of appointment, and requires an emergency temporary guardian to file a final report upon appointment of a guardian of the property or upon dismissal of the petition

Section 2. Amends s. 744.309, F.S., regarding who may be appointed guardian of a resident ward.

Present Situation: Section 744.309(3), F.S., prohibits certain persons from being appointed as a guardian, including any person who has been convicted of a felony, or any person who is incapable of discharging the duties of a guardian, or is otherwise unsuitable to perform the duties of a guardian.

Section 744.312, F.S., sets forth the considerations in appointment of guardians. A court must give preference to the appointment of a person who is related by blood or marriage to the ward,⁸ and must consider the wishes expressed by an incapacitated person as to who should be appointed as guardian.⁹

A health care surrogate is a person designated to make health care decisions on behalf of a person. The person designating a health care surrogate is known as the "principal".

⁶ Section 744.3031(1), F.S.

⁷ Section 744.527, F.S., requires a final report in all guardianship cases, and is applicable to emergency temporary guardianships. A final report must show receipts, disbursements, amounts reserved for unpaid and anticipated disbursements, costs, and fees, including costs and fees to be paid to the guardian and to the attorneys, accountants, or other agents employed by the guardian, and other relevant financial information from the date of the previous annual accounting, and a list of the assets to be turned over to the person entitled to them. Fla.Prob.R. 5.680(c).

⁸ Section 744.312(2)(a), F.S.

⁹ Section 744.312(3)(a), F.S.

Upon a finding of incapacity by a treating physician, a health care surrogate, if one has been appointed, may make medical decisions on behalf of the principal.¹⁰ A health care surrogate has authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal. A health care surrogate is to consult with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances, if the principal were capable of making such decisions. A health care surrogate may provide written consent to medical procedures, and must be provided access to the appropriate clinical records of the principal. A health care surrogate may also apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records, to the extent required to make application. A health care surrogate may authorize the release of information and clinical records to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or a nursing home. If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate.¹¹

A power of attorney is an "instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of [the] principal."¹² An ordinary power of attorney expires upon the death or incapacity of the principal. A durable power of attorney, however, does not expire upon the incapacity of the principal.

The designation of a health care surrogate, together with the appointment of an attorney in fact pursuant to durable power of attorney, are planning tools that together are often entered into for the purpose of avoiding guardianship. It is common for the same person to be designated as both health care surrogate and attorney in fact under a durable power of attorney; and these positions are typically held by a trusted spouse, close family member, or close friend.

Effect of Proposed Changes: This bill replaces the restriction against appointment of a person as a guardian who has previously been convicted of a felony, to a restriction against appointment of a person as a guardian who has "a criminal record." This bill also prohibits any person "who holds a health care surrogate agreement or power of attorney for the individual for whom such person desires to serve as guardian" from being appointed as a guardian. The restriction against appointing any person as guardian "who holds a health care surrogate or power of attorney" may conflict with the considerations for appointment of a guardian at s. 744.312, F.S.

The phrase "a criminal record" is not defined, and could conceivably mean any arrest, whether or not the case was dismissed or adjudication was withheld. The phrase also includes a misdemeanor conviction that is remote in time and which would not affect the ability of a person to perform the duties of a guardian.

¹⁰ Section 765.204, F.S.

¹¹ Section 765.205, F.S.

¹² Black's Law Dictionary, 6th Edition.

The phrase “holds a health care surrogate agreement or power of attorney” literally means a person who has physical possession of the health care surrogate agreement or power of attorney form. This bill perhaps intends that a person appointed as a health care surrogate or appointed as an attorney in fact under a power of attorney is to be prohibited from being appointed as a guardian over the person.

Many people appoint their spouse (or a close relative) to be their health care surrogate, and similarly appoint their spouse (or a close relative) as attorney in fact pursuant to a durable power of attorney. These are both positions of great power and great trust, appointed by a person while that person is able to make the choice. The powers over property that a person appointed as an attorney in fact has are nearly the same as the powers of a guardian of the property. The powers over health care decisions that a person appointed as a health care surrogate has are nearly the same as the powers of a guardian of the person. The effect of this bill may be to disqualify a person’s spouse, or their closest friend or relative, from being appointed to the sensitive position of guardian and thereby performing the duties that the ward intended for that person to perform, in conflict with the considerations in appointment of a guardian at s. 744.312, F.S. It is unclear why this bill establishes this prohibition.¹³

Section 3. Amends s. 744.3135, F.S., regarding credit and criminal investigations.

Present Situation: Section 744.3135, F.S., provides that a court may require a nonprofessional guardian and shall require a professional guardian to submit to a credit and criminal history background check at the guardian’s expense. There is no requirement to check this information periodically.

Effect of Proposed Changes: This bill requires that a credit and criminal history background check be conducted every 5 years.

There is a concern that this provision as worded may prohibit a court from requiring a credit or criminal history background check more often than every 5 years. For instance, one Florida judicial circuit requires professional guardians to submit to these checks every six months.¹⁴

Section 4. Amends s. 744.3201, F.S., regarding the petition to determine incapacity.

Present Situation: Section 744.3201, F.S., lists the information that must be included in a petition to determine incapacity (which is the document that initiates a guardianship case).

An “advance directive” is “a witnessed written document or oral statement in which instructions are given by a principal or in which the principal’s desires are expressed concerning any aspect of the principal’s health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift”.¹⁵ In every

¹³ Some persons involved in the guardianship process believe that this would be detrimental to the process. Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, 17th Judicial Circuit, Florida, February 28, 2000.

¹⁴ *Id.*

¹⁵ Section 765.101(1), F.S.

guardianship, the court is required to determine whether the ward, prior to incapacity, has executed any valid advance directive. If any such advance directive exists, the court shall specify in its order and letters of guardianship what authority, if any, the guardian shall exercise over the surrogate.¹⁶ However, the law does not require the petitioner in a guardianship case to inform the court of the existence of advance directives.

Effect of Proposed Changes: This bill adds a requirement that a petition to determine incapacity must contain all information, if any, compiled after a diligent search by the petitioner, relating to advance directives.

There is a concern that perhaps this provision should specify “advance directives of the alleged incapacitated person”.

Section 5. Amends s. 744.331, F.S., regarding procedure to determine incapacity.

Present Situation: To determine incapacity, a court must appoint an examining committee to examine the alleged incapacitated person. After examining the person, the committee makes a recommendation to the court about whether the alleged incapacitated person should be placed in guardianship. The alleged incapacitated person is also entitled to an appointed attorney.¹⁷ The attorney and the members of the committee are entitled to reasonable fees to be determined by the court.¹⁸ There is no set time limit for filing the fee application.

Effect of Proposed Changes: This bill requires that a fee application from a member of the examining committee or from the attorney appointed to represent the alleged incapacitated person must be filed with the court within 30 days after the court approves the initial guardianship report, and would accordingly prohibit an award of fees if a timely application is not filed.

Section 6. Amends s. 744.362, F.S., regarding initial guardianship report.

Present Situation: A guardian must file with the court an initial guardianship report within 60 days of when the letters of guardianship are signed. A copy of the report is to be given to the ward and to the attorney for the ward.¹⁹ The initial guardianship report must contain a verified inventory and a guardianship plan.²⁰ There is no requirement that a copy of the report be provided to any other person, and unless otherwise ordered by the court, any initial, annual, or final guardianship report or amendment thereto is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and the guardian's attorney, the ward (unless the ward is a minor or has been determined to be totally incapacitated), and the ward's attorney.²¹ The term “next of kin” means “those persons who would be heirs at law of the ward or alleged incapacitated person if such person were

¹⁶ Section 744.3115, F.S.

¹⁷ Section 744.331, F.S.

¹⁸ Section 744.331(7), F.S.

¹⁹ Section 744.362, F.S.

²⁰ Section 744.362(1), F.S.

²¹ Section 744.3701, F.S.

deceased and includes the lineal descendants of such ward or alleged incapacitated person.”²²

Effect of Proposed Changes: This bill requires that a copy of the initial guardianship report must also be given to the ward’s next of kin.

There is a concern that it may be inappropriate for the next of kin to be given a copy of the initial guardianship report, as the report contains financial and medical information that a ward may prefer to remain confidential.

Section 7. Amends s. 744.3678, F.S., regarding annual accounting of a guardian.

Present Situation: A guardian of the property must file an annual accounting of income, expenses, and assets of the ward. With the annual accounting, the guardian must also file a copy of the annual or year-end statement from any cash account.

Effect of Proposed Changes: This bill adds a requirement that the annual accounting must include the beginning and ending dates of the accounting period, and that copies of all statements for the time period of the accounting from any cash account must be attached to the accounting.

Present Situation: A guardian must pay to the clerk of the court a fee for filing the annual accounting, which fee is calculated based upon the value of the estate. There is no fee for filing an amended accounting or any addenda to an annual accounting.

Effect of Proposed Changes: This bill requires that the same fee for filing of any amended accounting, or filing of any addenda to the annual accounting, as is assessed against the annual accounting.

Section 8. Amends s. 744.368, F.S., regarding responsibilities of a clerk of court.

Present Situation: A guardian is required to file an initial guardianship report that includes an inventory of the ward’s assets.²³ A guardian is also required to file an annual guardianship report that includes assets, income, and expenses.²⁴ A guardian filing such reports may utilize any format or layout that the guardian wishes. The clerk of court must, within 90 days of receiving an initial or annual guardianship report, audit that report.

Effect of Proposed Changes: This bill requires a guardian to utilize forms adopted by the clerk, and requires the forms and the audit to conform to “generally accepted accounting and auditing standards”.

²² Section 744.102(12), F.S.

²³ Section 744.362(1), F.S.

²⁴ Section 744.3678, F.S.

There is a concern that the phrase “generally accepted accounting and auditing standards” is inappropriate. The usual phrase is “generally accepted accounting principals”.²⁵

There is a concern that because many guardians are laypersons, not accountants, they may not know or understand generally accepted accounting principles, and thus they may have to employ an accountant (an additional cost) or they may be subject to repeatedly filing amended accounting statements, thereby incurring additional filing fees.

There is a concern that this requirement may result in the 67 counties creating 67 different sets of accounting forms.²⁶

There is a concern that the process of developing standard forms more appropriately belongs to the judiciary, not the clerks of court.²⁷

Section 9. Creates s. 744.3691, regarding penalties that may be assessed against a guardian.

Present Situation: A court may remove a guardian for cause, the statutes list 19 separate reasons warranting removal of a guardian.²⁸ A court has the inherent power to hold persons in contempt of court, but the Legislature may limit the enforcement of contempt and may limit the penalties that may be imposed.²⁹

Effect of Proposed Changes: This bill adds a new section to the law that would require penalties to be assessed against a guardian for violation of the Guardianship Act.

- First offense \$ 500
- Second offense 1,500
- Third offense 2,500
- Fourth or subsequent May result in disqualification of the guardian from acting as a guardian in any case.

There is a concern that the penalties are mandatory and fixed, giving no discretion to the court to determine an appropriate penalty. For instance, an appropriate penalty for an especially grievous first offense may lead a court to the conclusion that the appropriate penalty is disqualification of the person from acting as a guardian in any case within the court’s jurisdiction. The proposed enumeration of

²⁵ “Generally Accepted Accounting Principals” refers to the combined pronouncements of the Financial Accounting Standards Board. See, Preface to *Wiley GAAP 2000*, published by the American Institute of Certified Public Accountants.

²⁶ Florida Lawyers Support Services, Inc., a non-profit corporation affiliated with the Real Property, Probate, and Trust Law Section of the Florida Bar, promulgates suggested forms for use in guardianship cases.

²⁷ Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, 17th Judicial Circuit, February 28, 2000.

²⁸ Section 744.474, F.S.

²⁹ Walker v. Bentley, 678 So.2d 1265 (Fla. 1996).

*penalties may limit the current broad discretion of a judge to punish a guardian by contempt, to remove a guardian from a case under s. 744.474, F.S., or to enter an injunction prohibiting a person from acting as a guardian in any case within the jurisdiction of the court.*³⁰

Section 10. Amends s. 744.3701, F.S., regarding inspection of guardianship reports.

Present Situation: A guardian must file with the court an initial guardianship report within 60 days of the date that the letters of guardianship are signed.³¹ The initial guardianship report must contain a verified inventory and a guardianship plan.³² A guardian must file with the court an annual guardianship report which must contain an annual accounting and an annual guardianship plan.³³ A guardian must “promptly” file with the court a final guardianship report upon termination of the guardianship.³⁴ There is no requirement that a copy of any of these reports be provided to any person other than the ward and the ward’s attorney. Any initial, annual, or final guardianship report or amendment thereto is subject to inspection only by the court, the clerk or the clerk’s representative, the guardian and the guardian’s attorney, the ward (unless the ward is a minor or has been determined to be totally incapacitated), and the ward’s attorney.³⁵ The “next of kin” means “those persons who would be heirs at law of the ward or alleged incapacitated person if such person were deceased and includes the lineal descendants of such ward or alleged incapacitated person.”³⁶ Because access to guardianship files is restricted by law, a law enforcement officer requesting to review a guardianship file must obtain a search warrant.

Effect of Proposed Changes: This bill provides that the ward’s next of kin, and “all law enforcement agencies of the state and agencies with direct affiliation to the court acting in an official capacity” may additionally inspect any initial, annual, or final guardianship report.

There is a concern that it may be inappropriate for the next of kin to be allowed to review guardianship reports, as the reports contain financial and medical information that a ward may prefer to remain confidential.

Section 11. Provides an effective date of October 1, 2000.

³⁰ Telephone conference with the Honorable Mel Grossman, Administrative Judge of the Probate Division, 17th Judicial Circuit, February 28, 2000.

³¹ Section 744.362, F.S.

³² Section 744.362(1), F.S.

³³ Section 744.367, F.S.

³⁴ Section 744.527(1), F.S.

³⁵ Section 744.3701, F.S.

³⁶ Section 744.102(12), F.S.

III. 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:

This bill sets forth a schedule of fines for offenses committed by guardians. The possible fiscal impact is a function of the willingness of courts to impose the fines. The fiscal impact is indeterminate and likely minimal.

2. Expenditures:

The Florida Association of Court Clerks and Comptrollers states that the changes provided by this bill represent a "minimal impact" on the operation of clerks, and that accordingly this bill does not have any fiscal impact on clerks.³⁷ No county or municipal agency other than clerks of the court are affected by the provisions of this bill; thus, this bill does not appear to have any negative fiscal impact on counties or municipalities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Under current law, a guardianship estate pays one fee per year for filing the annual accounting. This bill increases the fee in those instances where a guardian must file amended or corrected annual accounting. This bill also mandates fines in certain circumstances and mandates that guardians, at their expense, submit to credit and criminal history background checks every 5 years.

D. FISCAL COMMENTS:

none

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

³⁷ Telephone conference with Elizabeth Allman, of the Florida Association of Court Clerks & Comptrollers, February 23, 2000.

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

none

B. RULE-MAKING AUTHORITY:

none

C. OTHER COMMENTS:

See "Section-by-Section Analysis".

This bill is identical to SB 1804.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

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