

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1782

SPONSOR: Finance and Taxation Committee, Committee on Judiciary and Senator Saunders

SUBJECT: Guardianship

DATE: April 22, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Roberts</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u> </u>	<u> </u>	<u>CP</u>	<u>Withdrawn</u>
3.	<u>Keating</u>	<u>Johansen</u>	<u>FT</u>	<u>Fav/CS</u>
4.	<u> </u>	<u> </u>	<u>ACJ</u>	<u> </u>
5.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>
6.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

This bill revises the following provisions of the Florida Guardianship Law as it affects the practice and regulation of professional and public guardians:

- Places the Statewide Public Guardianship Office under the direct auspice and control of the Department of Elderly Affairs and the Secretary of Elderly Affairs.
- Requires the Department of Elderly Affairs to contract with the Florida Guardianship Foundation or another not-for-profit entity to perform functions associated with the registration, examination and training of professional guardians.
- Revises provisions for statewide registration of professional guardians and expands the registry requirement to public guardians.
- Provides that a financial institution may register as a professional guardian, but does not have to in order to serve as a professional guardian with all of the rights and privileges of a registered guardian.
- Provides that a state college or university or an independent college or university as described pursuant to s. 1009.98(3)(a), F.S., may, but shall not be required to, register as a public guardian.
- Requires professional and public guardians to undergo revised credit checks and criminal background screening and to take a state competency exam as a prerequisite to appointment.
- Allows plenary and limited guardians to employ case managers and to provide confidential ward information under specified terms to local ombudsman council members for investigative purposes.
- Requires guardians to obtain court approval of the annual accounting in order to pay or reimburse costs incurred and reasonable fees or compensation to persons, including attorneys, employed by the guardian, from assets of the guardianship estate.

- Revises the powers and duties of the public guardian including requiring a public guardian to submit confidential information regarding a ward during an ombudsman council investigation regarding a complaint from a resident or resident's representative about care in a nursing home or long-term care facility.
- Expands the criteria for those who may qualified to an appointed public guardian.
- Allows a professional guardian to serve as a public guardian
- Eliminates a provision that requires a public guardian's administrative costs to be paid from the Statewide Public Guardianship Office's budget.
- Creates a 10-member Guardianship Task Force and sets forth its duties including the submission of a preliminary and final report to the Governor and the Legislature regarding the status of the guardianship delivery system and recommendations for improvements.
- Provides that when court proceedings are instituted to review or determine a guardian's or an attorney's fees, such proceedings are part of the guardianship administration process and the costs, including fees for the guardian's attorney, shall be determined by the court and paid from the assets of the guardianship estate, unless the court finds the requested compensation unreasonable.
- Reduces the educational requirements for a person serving as a guardian for his or her own minor child from 8 hours to 4 hours.

This bill substantially amends the following sections of the Florida Statutes: 744.102, 744.108, 744.1083, 744.1085, 744.3135, 744.3145, 744.444, 744.534, 744.7021, 744.704, and 744.705.

II. Present Situation:

Florida Guardianship Law

Chapter 744, F.S., is the Florida Guardianship Law. This chapter establishes requirements for a variety of guardians including but not limited to, plenary, nonprofit corporate, limited, professional, private, public or standby. *See* §744.102, F.S. A *guardian* is generally defined as a someone who has been appointed by the court to act on behalf of a ward's person or property, or both. A guardian must be at least 18 years of age. *See* s. 744.309(1), F.S. The terms of a guardianship are outlined in letters of guardianship

Professional Guardians and the Registry

A "*professional guardian*" is a guardian who receives or has at any time received compensation for services rendered to more than two wards as their guardian. A person serving as guardian for two or more relatives . . . is not considered a professional guardian.¹ A professional guardian is required to file a fiduciary bond, complete a minimum of 40 hours of instruction and training, and receive 16 hours of continuing education every 2 years.² Additionally, a professional guardian is required to submit to credit and criminal investigation background screening including an investigatory check by the National Crime Information Center and the Florida Crime Information Center systems by means of fingerprint checks³ by the Department of Law Enforcement and the Federal Bureau of Investigation.⁴ *See* s. 744.3135, F.S.

¹ *See* s. 744.102(15), F.S.

² *See* s. 744.1085, F.S.

³ The clerks of the circuit courts are designated as the officials authorized to obtain fingerprint cards from the Federal Bureau of Investigation and to make such cards available to all guardians. Guardians who are either requested or required to undergo a criminal background check must have their fingerprints taken and submit the appropriate processing fee to the Florida

No state agency has oversight authority over the conduct of professional guardians, the only regulatory oversight is by the local circuit court. Inquires and complaints about professional guardians received from elders, family members, and the general public are typically referred to the respective judicial circuits in which the inquirer resides or the professional guardian is serving a ward. Until recently, it was not known how many professional guardians were even operating in the state.

As of January 1, 2003, all *professional guardians* with a few exceptions are required to register biennially with the State Public Guardianship Office (SPGO). No more than \$25 may be assessed for registration. Registration requirements are as follows for a professional guardian who is:

- A natural person to provide his or her name, address, date of birth and employer identification;
- A partnership or association to provide the name, address, date of birth of every member, and the employer identification number of the partnership or association;
- A corporation to provide the name, address and employer identification number of the corporation, the name, address and date of birth of each of its directors and officers; the name of its resident agent; and the name, address, and date of birth of each person having at least a 10-percent interest in the corporation.

The registration must also include: 1) the name, address, date of birth, and employer identification number, if applicable of each person employed or under contract with the professional guardian who is involved in providing financial or personal guardianship services for wards, and 2) documentation that the statutory bonding, educational and background screening requirements have been satisfied. Trust companies, state banking corporations and other types of financial institutes are exempt from registration requirements although if they want to register, they can.

Public Guardian and the Statewide Public Guardianship Office (SPGO)

A *public guardian* is someone who is appointed to represent the interests of a ward who is incapacitated and otherwise unable to obtain or pay for a private guardian. A public guardian is initially appointed if there is no family member or friend, or other person, bank or corporation willing and qualified to serve and if the ward's assets do not exceed the asset level for Medicaid eligibility. Moreover, the public guardian must determine within 6 months of appointment whether there is still no family member, friend, or other person or entity that is willing and qualified to serve as a successor guardian. The public guardian has a number of duties including maintaining a qualified professional staff of an attorney with experience in probate, and of a person with a master's degree in social work or trained as a gerontologist, psychologist or registered nurse or nurse practitioner. The public guardian must also keep and maintain records,

Department of Law Enforcement. However, only professional guardians are required to pay a \$5 fee to the clerk of the circuit court, in the judicial circuit in which they are applying to serve as a guardian, for the handling and processing of their files. The respective clerks of the circuit courts are designated as the recipients of fingerprint check results and are required to make the results available to their respective courts.

⁴ In 1999, this authority was expanded to include credit and criminal investigations of public guardians. The exemption from credit and criminal investigatory checks previously granted to spouses and children petitioning for guardianship of a relative was eliminated.

report within 6 months of appointment on the efforts to locate a friend, family member, person or corporation, or bank to serve as a guardian, and ensure a ward is seen by a professional staff person at least 4 times annually. A public guardian is selected by the executive director from a list of qualified candidates provided they are also at least 18 years old.

In 1999, the Legislature transferred judicial oversight of public guardians to oversight by the newly created the Statewide Public Guardianship Office (SPGO), housed administratively only in the Department of Elderly Affairs. *See* Chapter 99-277, *Laws of Florida*. An executive director heads the SPGO. The SPGO operates through branch offices within the state circuit court structure. The SPGO is also given broad authority to adopt other rules to implement Part XI of chapter 744. The SPGO is also responsible for paying all administrative costs associated with the public guardians. The SPGO was to develop a guardianship training program based on the efforts of a curriculum committee. Public guardians presumably take these training programs. Otherwise, the public guardian is only required to be at least 18 years old and have knowledge of the legal process and social services available to meet the ward's needs. There are no other specific statutory requirements for education and training.

III. Effect of Proposed Changes:

Section 1 amends s. 744.102, F.S., to allow a professional guardian to serve as a public guardian.

Section 2 amends s. 744.1083, F.S., to revise the biennial registration requirements for professional guardians and to expand the registration requirement to public guardians effective January 1, 2004. Specifically, the Department of Elderly Affairs (Department) is directed to contract with the Florida Guardianship Foundation or another not-for-profit entity to perform functions related to the registration, examination and training of professional guardians. In lieu of the specific registration information currently listed in law, the bill requires the registration to include sufficient information to identify the guardian, to classify whether the person or entity is serving as a professional or personal guardian, and to demonstrate that the guardian complied with statutory bonding, educational, testing, credit history and background screening requirements. It authorizes the department to assess a fee to be determined in rule for actual costs associated with registration, not to exceed \$100. This represents an increase from the current statutory cap of \$25. The entity with which the department contracts must provide the clerk of the court and the chief judge the information relating to the guardians registered.

The bill provides that a financial institution may register as a professional guardian, but does not have to in order to serve as a professional guardian with all of the rights and privileges of a registered guardian. In addition, the bill provides that a state college or university or an independent college or university as described pursuant to s. 1009.98(3)(a), F.S., may, but shall not be required to, register as a public guardian. If such a college or university elects to register as a public guardian, the registration shall include only the name, address, and employer identification number of the registrant.

Section 3 amends s. 744.1085, F.S., to revise specific requirements for professional guardians and make the revised criteria applicable to both public guardians and professional guardians. A professional or public guardian will be required to submit to a credit history check at his or her own expense. Such guardian must also submit to a level 2 background screening. After July 1,

2005, every professional and public guardian is required to take a state competency exam developed by the Department in conjunction with the not-for-profit entity. The Department shall charge an examination fee in the amount of the actual cost of developing and administering the exam, not to exceed \$500. With the exception of the mandatory passage of the portion of the exam dedicated to Florida laws and procedures, a professional or public guardian can satisfy this competency requirement by passing a national guardianship exam. A professional or public guardian can also seek a waiver of the competency requirement by submitting proof of practice for 5 years or more, and a letter from the chief judge of the judicial circuit regarding the guardian's competency. Effective July 1, 2004, the court can not appoint a professional or public guardian who does not satisfy these requirements.

A trust company, state banking corporation, state savings association or national banking association or federal savings and loan association serving as professional guardians are exempted from the bonding requirements, the educational requirements, and the state competency exam requirements.

Section 4 amends s. 744.3135, F.S., to exclude employees of professional guardians from the initial and biennial credit and criminal background checks required for professional and nonprofessional guardians. The court's discretionary authority to require a guardian to undergo a level 2 background screening is expanded to include authority to require such guardian to undergo a level 1 background screening.

Section 5 amends s. 744.444, F.S., relating to the powers of a plenary or limited guardian to act without court approval. Such guardians may also hire case managers in addition to the already authorized attorneys, advisors or agents to assist or advise with the case. In order to pay or reimburse costs incurred and reasonable fees or compensation to persons, including attorneys, employed by the guardian, from assets of the guardianship estate, the guardian must obtain court approval of the accounting.

Section 6 amends s. 744.534, F.S., relating to the disposition of unclaimed funds held by a guardian. To conform with other changes in the bill to shift authority from the Statewide Public Guardianship Office to the Department of Elderly Affairs, it reassigns the role of who shall determine how such unclaimed funds shall be used to the Secretary of Elderly Affairs.

Section 7 amends s. 744.7021, F.S., relating to the Statewide Public Guardianship Office, to conform with other changes in the bill which shift authority from the Statewide Public Guardianship Office to the Department of Elderly Affairs. It clarifies that the executive director must be not just a licensed attorney but a member of the Florida Bar in good standing. The executive director will now serve at the pleasure of the Secretary of the Department who either appoints such director or contracts with such director.

The current requirements to develop a guardianship training program remain unchanged other than requiring the executive director to consult with the entity with which the SPGO contracted to assist with training objectives.

Section 8 amends s. 744.704, F.S., relating to the powers and duties of a public guardian. The bill removes language which precludes the initial appointment of a public guardian if there is a

family member, friend, or other person or entity willing and able to serve and the ward's assets exceed an income threshold. It also removes a redundancy in law regarding a public guardian's duty to determine within six months of appointment whether there is a family member, friend or other person or entity willing and qualified to serve as a successor guardian. *See* s. 744.708(4), F.S.

It also expands the circumstances under which a public guardian may serve to include service primarily to incapacitated persons who are of limited financial means, as will be defined by contract or through department rule. A public guardian may actually be appointed to serve someone of greater financial means in accordance with department determination.

Section 9 amends s. 744.705, F.S., relating to the costs of a public guardian. Language requiring such costs to be paid from the SPGO's budget is eliminated.

Section 10 creates a 10-member Guardianship Task Force within the department to serve until May 6, 2005. The task force is to examine the guardianship delivery system and make recommendations for improvement. A preliminary report is to be submitted to the Governor and the Legislature on January 1, 2004, and a final report, no later than January 1, 2005.

Section 11 amends s. 744.108, F.S., providing that when court proceedings are instituted to review or determine a guardian's or an attorney's fees, such proceedings are part of the guardianship administration process and the costs, including fees for the guardian's attorney, shall be determined by the court and paid from the assets of the guardianship estate, unless the court finds the requested compensation unreasonable.

Section 12 amends s. 744.3145, F.S., reducing the educational requirements for a person serving as a guardian for his or her own minor child from 8 hours to 4 hours. The 4 hours of instruction must cover:

- The legal duties and responsibilities of the guardian of the property;
- The preparation of the initial inventory and annual guardianship accountings for the ward's property; and
- Use of guardianship assets.

Section 13 provides an effective date of July 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The bill increases the statutory cap on the registration fee from \$25 to \$100 and directs the Department of Elderly Affairs to impose an examination fee for both public and professional guardians in the amount of the actual cost of developing and administering the exam, not to exceed \$500.

According to a representative of the State-wide Public Guardianship Office (SPGO), there are currently nine public guardians in Florida, with six newly appointed public guardians. In addition, there are 185 professional guardians registered with the SPGO. The SPGO does not plan to increase the \$25 registration fee at this time. The fiscal impact of this bill is estimated to be insignificant.

B. Private Sector Impact:

The provisions of this bill may improve the quality of professional and public guardians and provide for more accountability governing their actions. However, it is unclear what accountability there will be for employees or agents of professional or public guardians who are often delegated duties on behalf of the guardian as the bill further removes the requirement that employees of such professional guardians undergo initial level 2 criminal background testing and biennial level 1 criminal background testing. Notably, current law exempts employees of corporate or business financial entities acting as professional guardians from credit and criminal background checks. Under this bill these types of professional guardians and their employees will also be exempt from the competency requirements as well.

Professional guardians, not otherwise exempted, shall incur the cost of credit and criminal background checks, the increased cost of registration, and the state competency exam.

C. Government Sector Impact:

The Department of Elderly Affairs may incur additional expenses due to the changes in this bill in which the department assumes greater administrative responsibility for the Statewide Public Guardianship Office.

Public guardians will assume greater financial responsibility regarding their appointment including but not limited to, the cost associated with registration, the cost of the initial credit and criminal background checks and subsequent biennial background screening, the cost of the state competency exam which may total \$500, and potentially, the costs of administration.

There may be a fiscal impact on local and federal funding for the SPGO if professional guardians are permitted to serve as public guardians as authorized by this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- The bill removes the provision requiring the costs of administration to be paid from the SPGO's budget. It is unclear as to who will assume responsibility for such costs.
- A public guardian may actually be appointed to serve someone of greater financial means in accordance with department determination. It is not clear whether this is consistent with current legislative intent expressed under s. 744.702, F.S., which provides for the appointment of public guardians only to those persons whose needs can not be met through less drastic means of intervention and to incapacitated persons only when no private guardian is available.
- It is not entirely clear how the new educational and training requirements in the bill reflect the existing development of an educational and training curriculum by the SPGO and the curriculum committee.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
