

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/SB 1782

SPONSOR: Committee on Judiciary and Senator Saunders

SUBJECT: Guardianship

DATE: April 16, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Roberts	JU	Fav/CS
2.	_____	_____	CP	_____
3.	_____	_____	FT	_____
4.	_____	_____	ACJ	_____
5.	_____	_____	AP	_____
6.	_____	_____	_____	_____

I. Summary:

This bill revises the following provisions of the Florida Guardianship Law as affect 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 a 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.
- 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.
- 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.

This bill substantially amends the following sections of the Florida Statutes: 744.102, 744.1083, 744.1085, 744.3135, 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.

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 SPGO. No more than \$25 may be assessed for registration. Registration requirements are as follows for a professional guardian who is:

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 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.

- 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 professional guardian must also keep and maintain records, 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 is directed to contract with a 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.

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. 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 nonprofessional 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.

Additionally, such guardians will be required to submit a ward's confidential information to a local or state ombudsman council member as relates to an investigation arising under part I of chapter 400, relating to a complaint by a resident or a resident's representative regarding care in a nursing or long-term care facility. The information must be given within 7 days of the initial written request. The confidentiality of such information must be retained.

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. It also removes the ongoing duty of a public guardian to determine whether a family member, friend or other person or entity can serve as a willing and qualified guardian..

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 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:**

None.

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:

It is indeterminate as to what the fiscal impact may be resulting from the broader eligibility requirements for obtaining a public guardian. It is indeterminate what fiscal impact may result for the Department of Elderly Affairs 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.

It is indeterminate what affect there may be 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:

There is a conflict regarding the date from which any professional guardian or public guardian is required to take a state competency examination (effective July 1, 2005) and the date from which a court is prohibited from appointing a professional or public guardian who has not otherwise satisfied statutory requirements for service (effective July 1, 2004). *See* page 7, line 24 and page 8, line 24.

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.
- The bill makes a number of provisions previously applicable solely to professional guardians applicable to public guardians. However, there is inconsistency and conflict within and between sections of current law as amended by the bill. Further clarification is needed to clearly delineate what a professional and public guardian's duties and responsibilities are. For example, provisions under s. 744.1085, F.S., relating to the regulation of professional guardians, has been amended in part to address issues regarding credit and criminal background screening and competency exams as applied to both professional and public guardians but issues within that same section relating to bond and educational requirements remain solely applicable to professional guardians. It is unclear whether the intent is to make public guardians subject to those same requirements.

VIII. Amendments:

None.