

# 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: SB 2688

SPONSOR: Senator Campbell

SUBJECT: Guardianship

DATE: March 23, 2004 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>CF</u>	_____
3.	_____	_____	<u>BI</u>	_____
4.	_____	_____	<u>AAV</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

## I. Summary:

The bill authorizes a guardian of the property of an incapacitated grantor to contest the validity of a trust as an exception to the general rule that an action to contest the validity of a trust may not be commenced until the trust becomes irrevocable.

The bill also permits a court to find that a person is incapacitated without requiring the appointment of a guardian. A court must not appoint a guardian if there is an alternative, such as a trust or durable power of attorney, that will sufficiently address the problems of the incapacitated person. A trust, trust amendment, or durable power of attorney is not an alternative to the appointment of a guardian if an interested person files a verified statement that provides a factual basis for the belief that an instrument is invalid. Nevertheless, the bill provides that a court may appoint a guardian and allow the authority granted by a durable power of attorney to remain exercisable by an attorney in fact.

If a court denies the request of a guardian to contest the validity of a trust created by and for the benefit of a ward, the court must consider whether the guardian is needed to exercise the delegable rights of the ward. If a judicial proceeding determines that the ward's durable power of attorney, trust, or trust amendment is valid, or a petition is filed alleging that an alternative to guardianship exists, a court must consider whether a guardian is needed to exercise the delegable rights of the ward.

This bill substantially amends the following sections of the Florida Statutes: 737.2065, 744.331, and 744.441. The bill also creates section 744.462, Florida Statutes.

## II. Present Situation:

### Trusts

A “trust” is:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. The term[] . . . “beneficiary of a trust” signif[ies] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.<sup>1</sup>

A grantor is one who creates or adds to a trust and includes a settlor or trustor and a testator who creates or adds to a trust.<sup>2</sup>

### *Purposes of a Revocable Trust*

A revocable trust is: “A trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income.”<sup>3</sup> This type of instrument is commonly used as a will substitute. Unlike a will, however, a revocable trust allows a settlor to use the trust property during his or her lifetime.<sup>4</sup>

### *Trust Contests*

Under s. 737.2065, F.S., the validity of a trust may only be contested after the trust has become irrevocable. According to the Florida Bar Real Property, Probate, and Trust Law Section, there have been instances where a settlor and beneficiary of a trust did not have the capacity to revoke a revocable trust procured by fraud, duress, mistake, or undue influence. In some of these cases no person, including a guardian, was able to challenge the validity of the trust to protect the settlor beneficiary from financial harm.

### Guardianship

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.<sup>5</sup> A guardianship is:

a trust relationship of the most sacred character, in which one person, called a “guardian,” acts for another, called the “ward,” which the law regards as incapable of managing his own affairs.<sup>6</sup>

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<sup>1</sup> 55 A Fla. Jur. 2d Trusts s. 1 (database updated January 2004).

<sup>2</sup> Section 731.201(17), F.S.

<sup>3</sup> Black’s Law Dictionary (7th ed. 1999).

<sup>4</sup> Wm. Fletcher Belcher, *Proposed Exception to Existing Prohibition Against Contesting Revocable Trusts*, Fla. Bar Journal, Vol. XXV, No. 2, 11 (Winter 2003).

<sup>5</sup> Section 744.1012, F.S.

***Determination of Incapacity***

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. The petition must provide factual information that demonstrates that a person is incapacitated. The petition will also state the delegable rights that an alleged incapacitated person is incapable of exercising.<sup>7</sup> These delegable rights include the right to marry, vote, personally apply for government benefits, have a driver's license, travel, seek and retain employment, contract, sue and defend lawsuits, manage property, determine his or her residence, and consent to medical treatment.<sup>8</sup> If applicable, a petition for the appointment of a guardian must be filed with the petition to determine incapacity.<sup>9</sup>

After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.<sup>10</sup> If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.<sup>11</sup> If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing, the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.<sup>12</sup> The costs of a proceeding adjudicating a person as incapacitated will be paid by a guardian from the property of the ward.<sup>13</sup> If a petition for determination of incapacity is dismissed, the costs of the proceedings may be assessed against the petitioner.<sup>14</sup>

***Authority of a Guardian***

An order appointing a guardian must specify the specific powers and duties of the guardian and the delegable rights which have been removed from the ward.<sup>15</sup> The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.<sup>16</sup> A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care.<sup>17</sup> Some powers under s. 744.441, F.S., may only be exercised by a guardian with court approval, include the power to:

- (2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

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<sup>6</sup> 28 Fla. Jur. 2d Guardian and Ward s. 1 (database updated January 2004).

<sup>7</sup> Section 744.3201(1) and (2), F.S.

<sup>8</sup> Section 744.3215(2) and (3), F.S.

<sup>9</sup> Section 744.3201(3), F.S.

<sup>10</sup> Section 744.331(4), F.S.

<sup>11</sup> Section 744.331(4), F.S.

<sup>12</sup> See s. 744.311(6)(b) and (f), F.S.

<sup>13</sup> Section 744.311(7)(b), F.S.

<sup>14</sup> Section 744.311(7)(c), F.S.

<sup>15</sup> Section 744.344(1), F.S.

<sup>16</sup> Section 744.344(2), F.S.

<sup>17</sup> See ss. 744.361(4), and 744.444, F.S.

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(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties.

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(19) Create revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning.

The forgoing statutory provisions appear to authorize a guardian to exercise a ward's rights under a revocable trust. This right may include the right to revoke the trust. Accordingly, a guardian was authorized by a court to exercise a ward's authority under a revocable trust to appoint a new trustee.<sup>18</sup> In so holding, the court determined that a guardian with court approval has: "the power not only to execute the powers of the ward, but to exercise or release any powers the ward would have as trustee, personal, representative, custodian, conservator or donee"<sup>19</sup>

In *Ullman v. Garcia*, 645 So. 2d 168 (Fla. 3d DCA 1994), however, the court would not allow a guardian to attack the validity of a revocable trust that was alleged to have been created through undue influence. The case did not involve an attempt by a guardian to revoke the revocable trust. The court stated in holding that the guardian could not attack the validity of the trust:

that the guardian of an incapacitated person cannot seek to rewrite the testamentary plan of a ward by contesting the validity of a revocable trust on the basis of undue influence. A finding to the contrary would defeat the evident purpose of the settlor/ward, and interfere with the settlor/ward's vested right to dispose of her property as she pleases.<sup>20</sup>

### III. Effect of Proposed Changes:

The bill authorizes a guardian of the property of an incapacitated grantor to contest the validity of a trust as an exception to the general rule that an action to contest the validity of a trust may not be commenced until the trust becomes irrevocable.

The bill also permits a court to find that a person is incapacitated without requiring the appointment of a guardian. A court must not appoint a guardian if there is an alternative, such as a trust or durable power of attorney, that will sufficiently address the problems of the incapacitated person. A trust, trust amendment, or durable power of attorney is not an alternative to the appointment of a guardian if an interested person files a verified statement that provides a factual basis for the belief that an instrument is invalid. Nevertheless, the bill provides that a court may appoint a guardian and allow the authority granted by a durable power of attorney to remain exercisable by an attorney in fact.

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<sup>18</sup> *In Re Guardianship of Mueller v. Boyle*, 650 So. 2d 698, 699 (Fla. 4th DCA 1995).

<sup>19</sup> *Id.* at 699.

<sup>20</sup> *Ullman v. Garcia*, 645 So. 2d 168, 170 (Fla. 3d DCA 1994)

If a court denies the request of a guardian to contest the validity of a trust created by and for the benefit of a ward, the court must consider whether the guardian is needed to exercise the delegable rights of the ward. If a judicial proceeding determines that the ward's durable power of attorney, trust, or trust amendment is valid, or a petition is filed alleging that an alternative to guardianship exists, a court must consider whether a guardian is needed to exercise the delegable rights of the ward.

The bill takes effect upon becoming a law.

#### **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 bill authorizes guardians to contest the validity of a ward's revocable trust.

C. Government Sector Impact:

None.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

The bill does not appear to foreclose the possibility that under s. 744.441(2), F.S., a guardian has the authority to revoke a revocable trust rather than attack the validity of the trust.<sup>21</sup> The Legislature may wish to clearly provide that a trust may only be terminated by a guardian upon a judicial determination of invalidity.

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<sup>21</sup> See *In Re Guardianship of Mueller v. Boyle*, 650 So. 2d 698 (Fla. 4th DCA 1995).

**VIII. Amendments:**

#1 by Judiciary:

Corrects a spelling error in the title by changing the word “fir” to “for.”

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

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