

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Judiciary Committee

BILL: CS/SB 2040

INTRODUCER: Judiciary Committee and Senator Storms

SUBJECT: Guardians/Criminal History Check

DATE: April 12, 2007                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Luczynski	Maclure	JU	<b>Fav/CS</b>
2.			CJ	
3.			HA	
4.				
5.				
6.				

**I. Summary:**

The bill makes the following changes relating to criminal history record checks, background checks, and credit history investigations for guardians:

- Provides requirements for a state and national criminal history record check for nonprofessional guardians when ordered by a court;
- Provides that the existing law concerning the requirements and methods for the completion of a criminal history record check applies only to professional guardians;
- Requires the Statewide Public Guardianship Office to adopt a rule detailing the acceptable methods for completing an electronic fingerprint criminal history record check for professional guardians;
- Deletes a provision that permitted the agency operating the electronic fingerprinting equipment to charge the professional guardian an additional fee up to \$10;
- Clarifies that the requirements related to the completion of level 1 and level 2 background screenings apply to professional guardians and certain employees and are tied to the date of “registration” as a guardian not “appointment”;
- Clarifies that the requirements related to the completion of a credit history investigation for professional guardians and certain employees are tied to the date of “registration” as a guardian not “appointment”;
- Clarifies that certain references to “person” or “guardian” in several provisions are references to “professional guardian.”

This bill substantially amends section 744.3135, Florida Statutes.

## II. Present Situation:

### Guardianship

The 2003 report on guardianship monitoring in Florida by the Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, provides an overview of guardianship:

A guardian is a surrogate decision-maker appointed by the court to make either personal and/or financial decisions for a minor or for an adult with mental or physical disabilities. After adjudication, the subject of the guardianship is termed a “ward.”

....

Florida law allows both voluntary and involuntary guardianships. A voluntary guardianship may be established for an adult who, though mentally competent, is incapable of managing his or her own estate and who voluntarily petitions for the appointment.

Legislative intent establishes that the least restrictive form of guardianship is desirable. Accordingly, Florida law provides for limited as well as plenary adult guardianship. A limited guardianship is appropriate if the court finds the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property; and if the individual does not have pre-planned, written instructions for all aspects of his or her life. A plenary guardian is a person appointed by the court to exercise all delegable legal rights and powers of the adult ward after the court makes a finding of incapacity. Wards in plenary guardianships are, by definition, unable to care for themselves.

Whether one is dealing with a minor whose assets must be managed by another or an adult with a disability who is not capable of making decisions for him/herself, when the court removes an individual's rights to order his or her own affairs there is an accompanying duty to protect the individual. One of the court's duties is to appoint a guardian. All adult and minor guardianships are subject to court oversight.

The legal authority for guardianship in Florida is found in Chapter 744, Florida Statutes. The court rules that control the relationships among the court, the ward, the guardian, and the attorney are found in Part III, Probate Rules, Florida Rules of Court. Together, these statutes and rules describe the duties and obligations of guardians and attorneys, as well as

the court, to ensure that they act in the best interests of the ward, minor, or person who is alleged incapacitated.<sup>1</sup>

Under Florida guardianship law:

[t]he court may require a nonprofessional guardian and shall require a professional or public guardian,<sup>2</sup> and all employees of a professional guardian who have a fiduciary responsibility to a ward, to submit, at their own expense, to an investigation of the guardian's credit history and to undergo level 2 background screening<sup>3</sup> ....<sup>4</sup>

The court must consider the results of any investigation before appointing a guardian. The law also provides methods of satisfying the criminal history record check including by an electronic fingerprint criminal history record check or a criminal history record check using a fingerprint card.<sup>5</sup> The law provides how often background screenings must be completed and the requirements for the screenings.<sup>6</sup>

Section 744.3135(4), F.S., provides that a professional guardian, and each employee who has a fiduciary responsibility to a ward, must have a credit investigation before and at least once every 2 years after the date of the guardian's appointment.

### III. Effect of Proposed Changes:

#### Nonprofessional Guardians

Section 744.3135(1), F.S., provides that the court may require a nonprofessional guardian to submit an investigation of the guardian's credit history and to undergo a *level 2 background screening*. However, the bill provides the requirements for a nonprofessional guardian to complete a state and national *criminal history record check*. It is not clear whether the statute and the bill intend the terms *level 2 background screening* and *criminal history record check* to be synonymous. If the terms are intended to have the same meaning, then the bill provides the requirements for a nonprofessional guardian to complete a criminal history record check when required by a court. If these terms are not intended to have the same meaning, then arguably the bill language could be interpreted as creating a requirement for all nonprofessional guardian to complete a criminal history record check. Representatives of the Department of Elderly Affairs indicated that the intent is not to require nonprofessional guardians to complete criminal history record checks, but only to provide the method for such record checks if required by a court. The current law does not distinguish between nonprofessional guardians and other types of guardians for the purpose of criminal history record checks. The bill provides that a nonprofessional

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<sup>1</sup> COMMITTEE ON GUARDIANSHIP MONITORING, FLORIDA SUPREME COURT, GUARDIANSHIP MONITORING IN FLORIDA: FULFILLING THE COURT'S DUTY TO PROTECT WARDS 5 (2003), [http://www.floridasupremecourt.org/pub\\_info/documents/guardianshipmonitoring.pdf](http://www.floridasupremecourt.org/pub_info/documents/guardianshipmonitoring.pdf).

<sup>2</sup> Section 744.102(17), F.S., provides that "[a] public guardian shall be considered a professional guardian for purposes of regulation, education, and registration."

<sup>3</sup> See s. 435.04, F.S., for the requirements of a level 2 security background investigation.

<sup>4</sup> Section 744.3135(1), F.S.

<sup>5</sup> Section 744.3135(2), F.S.

<sup>6</sup> Section 744.3135(3), F.S.

guardian satisfies the criminal history check requirement by undergoing a state and national criminal history record check using a fingerprint card. The results of the record check shall be maintained by the clerk of the court and made available to the court.

### **Professional Guardians**

The bill provides that the existing law<sup>7</sup> concerning the methods for the completion of a criminal history record check applies only to professional guardians. For professional guardians, the law permits a criminal history record check using either an electronic fingerprint check or a fingerprint card. The bill requires the Statewide Public Guardianship Office to adopt a rule detailing the acceptable methods for completing an electronic fingerprint criminal history record check. The provision that permitted the agency operating the electronic fingerprinting equipment to charge the professional guardian an additional fee up to \$10 is deleted.

The bill clarifies that the requirements related to the completion of level 1 and level 2 background screenings only apply to professional guardians and their employees who have fiduciary responsibilities to a ward. Furthermore, the timing of the background screenings is tied to the date of “registration” as a guardian not “appointment.” The bill also clarifies that the requirements related to the completion of a credit history investigation for professional guardians and their employees who have fiduciary responsibilities to a ward are tied to the date of “registration” as a guardian not “appointment.”

The bill clarifies that certain references to “person” or “guardian” in several provisions of s. 744.3135, F.S., are references to “professional guardian.” Finally, the bill deletes certain obsolete language.

The bill provides that it takes effect on July 1, 2007.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

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<sup>7</sup> Section 744.3135(2), F.S.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Currently the clerk of the courts have greater handling and processing responsibilities for criminal history record checks for nonprofessional guardians when they are done using a fingerprint card than when they are done using an electronic fingerprint check. Assuming that at least some criminal history record checks for nonprofessional guardians are done currently using an electronic fingerprint check, the bill may have an impact on the clerks of the court. The clerks of the court may incur costs because the bill requires all criminal history record checks for nonprofessional guardians to be done using a fingerprint card. The bill requires the clerks of the court to obtain fingerprint cards from the Federal Bureau of Investigation and make them available to nonprofessional guardians. The clerks must also maintain the results of the criminal history records check in the nonprofessional guardian's file. The bill does not authorize the clerk of the court to charge a nonprofessional guardian a fee for handling and processing nonprofessional guardian files, although current law does authorize the imposition of a fee up to \$7.50 for handling and processing professional guardian files. The additional costs associated with handling and processing nonprofessional guardian files, if any, are indeterminate.

**VI. Technical Deficiencies:**

The term *nonprofessional guardian* is used in the bill and in existing law; however, the term is not defined. The Legislature may wish to define *nonprofessional guardian* to avoid ambiguity in the application of existing law and the provisions of the bill that use the term.

**VII. Related Issues:**

In several provisions of s. 744.3135, F.S., the expression *criminal history record check* and *level 2 background screening* appear to be used synonymously. Furthermore, a representative of the Florida Department of Law Enforcement indicated that the reports that are produced as the product of a *criminal history record check* or *level 2 background screening* are indistinguishable. Nevertheless, existing s. 744.3135(2) and (3), F.S., treat them as separate requirements for guardians. The Legislature may wish to clarify the meaning and use of these terms throughout s. 744.3135, F.S.



## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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