

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 403 Guardianship

**SPONSOR(S):** Health Care Appropriations Subcommittee; Children, Families & Seniors Subcommittee, Ahern

**TIED BILLS:**           **IDEN./SIM. BILLS:** CS/SB 232

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Langston	Brazzell
2) Health Care Appropriations Subcommittee	12 Y, 0 N, As CS	Clark	Pridgeon
3) Judiciary Committee			

### SUMMARY ANALYSIS

CS/HB 403 substantially reorganizes ch. 744, F.S. It expands the duties of the Statewide Public Guardianship Office (SPGO) within the Department of Elder Affairs (DOEA) to oversee professional guardians as well as public guardians. The bill renames the SPGO as the Office of Public and Professional Guardian (OPPG).

The bill provides that the executive director of the new OPPG is appointed by the Secretary of DOEA. The bill sets out the new duties and responsibilities of the executive director of the OPPG, including for the oversight of professional guardians. It also requires the annual registration of professional guardians through the OPPG.

Currently, the SPGO only oversees registration of professional guardians, including the denial, suspension, or revocation of the registration. The new OPPG retains its duties relating to registration and becomes responsible for periodic monitoring and the discipline of professional guardians.

OPPG is directed to adopt rules to establish disciplinary oversight, including receiving and investigating complaints, conducting hearings, and taking administrative action pursuant to ch. 120, F.S.

The bill provides an appropriation in the sum of \$698,153 in recurring funds and \$123,157 in nonrecurring funds from the General Revenue Fund. The bill also provides associated salary rate of 242,345 and six full-time equivalent (FTE) positions for the purpose of carrying out this act. There is no fiscal impact on local governments.

The bill provides that it takes effect upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Guardianship

When an individual is unable to make legal decisions regarding his or her person or property, a guardian may be appointed to act on his or her behalf. A guardian is someone who has been appointed by the court to act on behalf of a ward (an individual who has been adjudicated incapacitated) regarding his or her person or property or both.<sup>1</sup>

The process to determine an individual's incapacity and the subsequent appointment of a guardian begins with a verified petition detailing the factual information supporting the reasons the petitioner believes the individual to be incapacitated, including the rights the alleged incapacitated person is incapable of exercising.<sup>2</sup> Once a person has been adjudicated incapacitated, the court may appoint a guardian. The order appointing a guardian must be consistent with the incapacitated person's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person's ability to do so.<sup>3</sup>

##### *Who Can Be Appointed Guardian*

The following may be appointed guardian of a ward:

- Any resident of Florida who is 18 years of age or older and has full legal rights and capacity;
- A nonresident if he or she is related to the ward by blood, marriage, or adoption;
- A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in Florida;
- A nonprofit corporation organized for religious or charitable purposes and existing under the laws of Florida;
- A judge who is related to the ward by blood, marriage, or adoption, or has a close relationship with the ward or the ward's family, and serves without compensation;
- A provider of health care services to the ward, whether direct or indirect, when the court specifically finds that there is no conflict of interest with the ward's best interests; or
- A for-profit corporation that meets certain qualifications, including being wholly owned by the person who is the circuit's public guardian in the circuit where the corporate guardian is appointed.<sup>4</sup>

##### *Relationship Between Guardian and Ward*

The relationship between a guardian and his or her ward is a fiduciary one.<sup>5</sup> A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.<sup>6</sup> The guardian, as fiduciary, must:

- Act within the scope of the authority granted by the court and as provided by law;
- Act in good faith;
- Not act in a manner contrary to the ward's best interests under the circumstances; and

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<sup>1</sup> S. 744.012(9), F.S.

<sup>2</sup> S. 744.3201, F.S.

<sup>3</sup> S. 744.344, F.S.

<sup>4</sup> S. 744.309, F.S.

<sup>5</sup> *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.

<sup>6</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.

Additionally, s. 744.446, F.S., states that there is a fiduciary relationship which exists between the guardian and the ward and that such relationship may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law. Additionally, s. 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary. The two most basic fiduciary duties are the duty of loyalty and the duty of care. As such, the guardian must act in the best interest of the ward and carry out his or her responsibilities in an informed and considered manner. Should a guardian breach his or her fiduciary duty to the ward, the court is authorized to intervene.<sup>7</sup>

### Oversight of Guardians

Guardians are subject to the requirements of ch. 744, F.S. There are three main types of guardians: family or friends of the ward, professional guardians, and public guardians. The two types of guardians overseen by the Department of Elder Affairs (DOEA) are professional guardians and public guardians.

### Professional Guardians

A professional guardian is a guardian who has at any time rendered services to three or more wards as their guardian; however, a person serving as a guardian for two or more relatives is not considered a professional guardian. A public guardian is considered a professional guardian for purposes of regulation, education, and registration.<sup>8</sup> There are currently 482 professional guardians registered with the Statewide Public Guardianship Office (SPGO).<sup>9</sup> The number of wards they serve is unknown.

#### *Registration*

A professional guardian must register with the SPGO established in part IX of ch. 744.<sup>10</sup> As part of the registration the professional guardian must:

- Provide sufficient information to identify the professional guardian;
- Complete a minimum of 40 hours of instruction and training through a course approved or offered by the SPGO;
- Complete a minimum of 16 hours of continuing education every 2 calendar years through a course approved or offered by the SPGO;
- Successfully pass an examination approved by DOEA<sup>11</sup> to demonstrate competency to act as a professional guardian;
- Undergo a criminal background check by the Federal Bureau of Investigation (FBI) and the Florida Department of Law Enforcement (FDLE);
- Submit to a credit history check; and
- Maintain a current blanket bond.<sup>12</sup>

The executive director of the SPGO may deny registration to a professional guardian if the executive director determines that the guardian's proposed registration, including the guardian's credit or criminal investigations, indicates that registering the professional guardian would violate any provision of ch. 744, F.S. If the executive director denies registration to a professional guardian, the SPGO must send written notification of the denial to the chief judge of each judicial circuit in which the guardian was serving on the day of the SPGO's decision to deny the registration.<sup>13</sup> The court is the only entity that can remove a guardian from a case to which he or she has been appointed.

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<sup>7</sup> S. 744.446(4), F.S.,

<sup>8</sup> S. 744.012(7), F.S.

<sup>9</sup> Department of Elder Affairs, *2016 Legislative Bill Analysis HB 403*, November 4, 2015 (on file with Health Care Appropriations Subcommittee staff).

<sup>10</sup> S. 744.1083(1), F.S.

<sup>11</sup> The examination is currently administered by the University of South Florida's College of Education. University of South Florida, *Florida Professional Guardian Examination*, <http://guardianship.usf.edu/index.html> (last visited November 12, 2015).

<sup>12</sup> S. 744.1083(3), F.S.; s. 744.1085, F.S.; s. 744.3135, F.S.

<sup>13</sup> S. 744.1083(5), F.S.

## Compensation

The guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf,<sup>14</sup> is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the assets of the guardianship estate unless the court finds the requested compensation to be substantially unreasonable.<sup>15</sup> Before the fees may be paid, a petition for fees or expenses must be filed with the court and accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.<sup>16</sup> When fees for a guardian or an attorney are submitted to the court for determination, the court shall consider:

- The time and labor required;
- The novelty and difficulty of the questions involved and the skill required to perform the services properly;
- The likelihood that the acceptance of the particular employment will preclude other employment of the person;
- The fee customarily charged in the locality for similar services;
- The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
- The results obtained;
- The time limits imposed by the circumstances;
- The nature and length of the relationship with the incapacitated person; and
- The experience, reputation, diligence, and ability of the person performing the service.<sup>17</sup>

## Powers and Duties of the Guardian

The guardian of an incapacitated person may exercise only those rights that have been removed from the ward and delegated to the guardian.<sup>18</sup> The guardian has a great deal of power when it comes to managing the ward's estate. Some of these powers require court approval before they may be exercised.

<b>Examples of Powers That May Be Exercised By a Guardian</b>	
<b>Upon Court Approval<sup>19</sup></b>	<b>Without Court Approval<sup>20</sup></b>
<ul style="list-style-type: none"> <li>• Enter into contracts that are appropriate for, and in the best interest of, the ward.</li> <li>• Perform, compromise, or refuse performance of a ward's existing contracts.</li> <li>• Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein</li> <li>• Borrow money to be repaid from the property of the ward or the ward's estate.</li> </ul>	<ul style="list-style-type: none"> <li>• Retain assets owned by the ward.</li> <li>• Receive assets from fiduciaries or other sources.</li> <li>• Insure the assets of the estate against damage, loss, and liability.</li> <li>• Pay taxes and assessments on the ward's property.</li> <li>• Pay reasonable living expenses for the ward, taking into consideration the ward's current finances.</li> <li>• Pay incidental expenses in the administration of the estate.</li> </ul>
<b>Powers Upon Court Approval, Continued</b>	<b>Powers Without Court Approval, Continued</b>
<ul style="list-style-type: none"> <li>• Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward.</li> <li>• Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate.</li> </ul>	<ul style="list-style-type: none"> <li>• Prudently invest liquid assets belonging to the ward.</li> <li>• Sell or exercise stock subscription or conversion rights.</li> <li>• Consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other</li> </ul>

<sup>14</sup> Fees for legal services may include customary and reasonable charges for work performed by legal assistants employed by and working under the direction of the attorney. S. 744.108(4), F.S.

<sup>15</sup> S. 744.108(1), (8), F.S.

<sup>16</sup> S. 744.108(5), (7), F.S.

<sup>17</sup> S. 744.108(2), F.S.

<sup>18</sup> S. 744.361(1), F.S.

<sup>19</sup> S. 744.441, F.S.

<sup>20</sup> S. 744.444, F.S.

- Exercise any option contained in any policy of insurance payable to the ward.
- Make gifts of the ward's property members of the ward's family in estate and income tax planning.
- Pay reasonable funeral, interment, and grave marker expenses for the ward.

- business enterprise of the ward.
- Employ, pay, or reimburse persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties.

There are also a number of duties imposed on a guardian. The guardian must:

- File an initial report within 60 days after the letters of guardianship are signed;
- File an annual report consisting of an annual accounting and/or an annual guardianship plan.
- Implement the guardianship plan;
- Consult with other guardians appointed, if any;
- Protect and preserve the property of the ward; invest it prudently, apply income first to the ward before the ward's dependents, and account for it faithfully;
- Observe the standards in dealing with the guardianship property that would be observed by a prudent person dealing with the property of another;
- If authorized by the court, take possession of all of the ward's property and of the rents, income, issues, and profits from it, whether accruing before or after the guardian's appointment, and of the proceeds arising from the sale, lease, or mortgage of the property or of any part; and
- A guardian who is given authority over a ward's person shall, as appropriate under the circumstances:
  - Consider the expressed desires of the ward when making decisions that affect the ward;
  - Allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward;
  - Not restrict the physical liberty of the ward more than reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease;
  - Assist the ward in developing or regaining capacity, if medically possible;
  - Notify the court if the guardian believes that the ward has regained capacity and that one or more of the rights that have been removed should be restored to the ward.;
  - To the extent applicable, make provision for the medical, mental, rehabilitative, or personal care services for the welfare of the ward;
  - To the extent applicable, acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making a health care decision;
  - Evaluate the ward's medical and health care options, financial resources, and desires when making residential decisions that are best suited for the current needs of the ward;
  - Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services; and
  - When not inconsistent with the person's goals, needs, and preferences, acquire an understanding of the available residential options and give priority to home and other community-based services and settings.<sup>21</sup>

Additionally, a professional guardian must ensure that each of the guardian's wards is personally visited by the guardian or one of the guardian's professional staff at least once each calendar quarter.<sup>22</sup>

#### *Abuse or Neglect by Guardian*

A guardian may not abuse, neglect, or exploit a ward.<sup>23</sup> A person who believes that a guardian is abusing, neglecting, or exploiting a ward shall report the incident to the central abuse hotline of the Department of Children and Families.<sup>24</sup> A guardian has committed exploitation when the guardian:

<sup>21</sup> S. 744.361, F.S.

<sup>22</sup> Id.

<sup>23</sup> S. 744.359, F.S.

<sup>24</sup> Id.

- Commits fraud in obtaining appointment as a guardian;
- Abuses his or her powers; or
- Wastes, embezzles, or intentionally mismanages the assets of the ward.<sup>25</sup>

### *Discipline of Guardian*

If a guardian who is currently registered with the SPGO violates a provision of ch. 744, F.S., the executive director of the SPGO may suspend or revoke the guardian's registration. SPGO does not have the authority to take any other disciplinary action against the professional guardian. Currently, the SPGO does not monitor professional guardians, nor does it conduct investigations into complaints received regarding professional guardians; it only undertakes those actions for public guardians.<sup>26</sup>

Once the executive director suspends or revokes a professional guardian's registration, the SPGO must send written notification of the suspension or revocation to the chief judge of each judicial circuit in which the guardian was serving on the day of the decision to suspend or revoke the registration.<sup>27</sup> SPGO has no authority to remove a guardian from cases to which he or she has been appointed; the court that appointed the guardian is the entity with the authority to remove a guardian. The court may remove a guardian for a number of reasons, including:

- Fraud in obtaining her or his appointment;
- Failure to discharge her or his duties;
- Abuse of her or his powers;
- An incapacity or illness, including substance abuse, which renders the guardian incapable of discharging her or his duties;
- Failure to comply with any order of the court;
- The wasting, embezzlement, or other mismanagement of the ward's property;
- Development of a conflict of interest between the ward and the guardian;
- A material failure to comply with the guardianship report;
- A failure to comply with the rules for timely filing the initial and annual guardianship reports; and
- A failure to fulfill the guardianship education requirements.<sup>28</sup>

### *Appointment of Professional Guardians*

Except in the case of a standby or preneed guardian, the court is required to appoint professional guardians according to a rotation system. In each case when a court appoints a professional guardian and does not use a rotation system for such appointment, the court must make specific findings of fact stating why the person was selected as guardian in the particular matter involved.<sup>29</sup> The findings must reference the following factors that must be considered by the court:

- Whether the guardian is related by blood or marriage to the ward;
- Whether the guardian has educational, professional, or business experience relevant to the nature of the services sought to be provided;
- Whether the guardian has the capacity to manage the financial resources involved;
- Whether the guardian has the ability to meet the requirements of the law and the unique needs of the individual case;
- The wishes expressed by an incapacitated person as to who shall be appointed guardian;
- The preference of a minor who is age 14 or over as to who should be appointed guardian;
- Any person designated as guardian in any will in which the ward is a beneficiary; and
- The wishes of the ward's next of kin, when the ward cannot express a preference.<sup>30</sup>

<sup>25</sup> Id.

<sup>26</sup> Email from Department of Elder Affairs, *FW: DOEA Summary of Programs and Services (override)*, March 16, 2015. (on file with Children, Families, and Seniors Subcommittee staff).

<sup>27</sup> S. 744.1083(5), F.S.

<sup>28</sup> S. 744.477, F.S.

<sup>29</sup> S. 744.312(4)(a), F.S.

<sup>30</sup> S. 744.312(2)-(3), F.S.

Additionally, the court may not give preference to the appointment of a person based solely on the fact that such person was appointed by the court to serve as an emergency temporary guardian.<sup>31</sup> When a professional guardian is appointed as an emergency temporary guardian that professional guardian may not be appointed as the permanent guardian of a ward unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian.<sup>32</sup> However, the court may waive this limitation if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience.<sup>33</sup>

### *Responsibilities of the Clerk of the Circuit Court*

In addition to the duty to serve as the custodian of the guardianship files, the clerk shall review each initial and annual guardianship report to ensure that it contains required information about the ward.<sup>34</sup> The clerk is required to:

- Within 30 days after the date of filing of the initial or annual report of the guardian of the person, complete his or her review of the report.
- Within 90 days after the filing of the verified inventory and accountings by a guardian of the property, the clerk shall audit the verified inventory and the accountings and advise the court of the results of the audit.
- Report to the court when a report is not timely filed.

If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship.<sup>35</sup>

### Public Guardianship

The “Public Guardianship Act”<sup>36</sup> was created by the Florida Legislature in 1999 to help provide services to meet the needs of vulnerable persons who lack the capacity to make decisions on their own behalf.<sup>37</sup> SPGO is responsible for appointing and overseeing Florida’s public guardians.<sup>38</sup>

The Public Guardianship Act authorizes the executive director of the SPGO, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups to establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public guardian.<sup>39</sup> Once established, the executive director must create a list of persons best qualified to serve as the public guardian.<sup>40</sup> The public guardian is directed to maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions.<sup>41</sup> As of January 2013, there were 13 offices of public guardian that served 27 of 67 counties; by December of that year, SPGO expanded public guardianship services to cover all 67 counties.<sup>42</sup>

As of September 9, 2015, there were 60 public guardians, serving approximately 3,000 wards, overseen by SPGO. SPGO monitors the public guardians by conducting in-depth investigations into the

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<sup>31</sup> S. 744.312(5), F.S.

<sup>32</sup> S. 744.312(4)(b), F.S.

<sup>33</sup> Id.

<sup>34</sup> S. 744.368, F.S.

<sup>35</sup> Id.

<sup>36</sup> S. 744.701, F.S.

<sup>37</sup> Department of Elder Affairs, *2016 Legislative Bill Analysis HB 403*, November 4, 2015 (on file with Health Care Appropriations Subcommittee staff).

<sup>38</sup> S. 744.7021, F.S.

<sup>39</sup> S. 744.703(1), F.S.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Florida is the only state, except for Delaware, which has three counties, to accomplish statewide coverage of public guardian services in every county. Florida Department of Elder Affairs, *Summary of Programs and Services, February, 2014*, available at [http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2014/2014%20SOPS\\_complete.pdf](http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2014/2014%20SOPS_complete.pdf) (last visited November 12, 2015).

local programs<sup>43</sup> administration and use of financial resources.<sup>44</sup> SPGO's fiscal monitoring includes investigating whether public guardians are spending state resources reasonably and whether they are spending the wards' assets reasonably.<sup>45</sup> SPGO reviews the case files and notes if there are any show cause orders or other issues that need to be addressed; additionally, SPGO conducts random site visits for at least 20% of the wards belonging to each public guardian.<sup>46</sup>

### Problems in the Guardianship System

In 2003, the Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, conducted a review of how effectively guardians were fulfilling their duties and obligations.<sup>47</sup> At that time, Florida was already confronting issues such as how the courts would be able to adequately exercise their legal, ethical, and moral responsibilities to monitor guardianship cases and protect the incapacitated adults entrusted to their care.<sup>48</sup> The committee received input from citizens that there was abuse, neglect, and misuse of ward's funds.<sup>49</sup> As a result, the committee stated that, though the majority of guardians are law-abiding and are diligently fulfilling their complex responsibilities, a small percentage are not properly handling guardianship matters, and as a result, monitoring is necessary.<sup>50</sup>

In 2004, DOEA released the Final Report of its Guardianship Task Force<sup>51</sup> which also advocated for additional oversight of professional guardians. These reports prompted enactment into law a number of the requirements for professional guardian registration that are now in place. Since then, media outlets have continued to report on issues within the guardianship system.<sup>52 53</sup>

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<sup>43</sup> These are entities that have contracted with SPGO to provide public guardian services.

<sup>44</sup> Email from Department of Elder Affairs, *FW: DOEA Summary of Programs and Services (override)*, March 16, 2015. (on file with Children, Families, and Seniors Subcommittee staff).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003, *available at* <http://flcourts.org/core/fileparse.php/260/urlt/guardianshipmonitoring.pdf> (last visited November 12, 2015).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Department of Elder Affairs, Guardianship Task Force – 2004 Final Report, *available at* <http://elderaffairs.state.fl.us/doea/pubguard/GTF2004FinalReport.pdf> (last visited November 12, 2015).

<sup>52</sup> An article from May 2014 provides anecdotal evidence of fraud within the guardianship system, noting that the appointed court monitor for Broward County has uncovered hundreds of thousands of dollars that guardians have misappropriated from their wards, and, over the course of two years, Palm Beach County's guardianship fraud hotline has investigated over 100 cases. Michael E. Miller, *Florida's Guardians Often Exploit the Vulnerable Residents They're Supposed to Protect*, MIAMI NEWTIMES, May 8, 2014, *available at* <http://www.miaminewtimes.com/2014-05-08/news/florida-guardian-elderly-fraud/full/> (last visited November 12, 2015).

<sup>53</sup> A three-part series published in December 2014 details abuses occurring in guardianships based on an evaluation of guardianship court case files and interviews with wards, family and friends caught in the system against their will. Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida*, SARASOTA HERALD-TRIBUNE, December 6, 2014, *available at* <http://guardianship.heraldtribune.com/default.aspx> (last visited November 12, 2015).



## Effect of Proposed Changes

CS/HB 403 substantially reorganizes ch. 744, F.S. The bill includes a legislative finding that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person and such person does not have adequate income or wealth for the compensation of the private guardian. The term "private guardian" is not presently defined in statute, nor is it defined by the bill.

Additionally, the bill provides that a public guardian will only be provided to those persons whose needs cannot be met through a less restrictive means of intervention. However, it also permits a public guardian to serve as a limited guardian or as a guardian advocate for individuals with developmental disabilities under s. 393.12, F.S.

### Office of Public and Professional Guardian (OPPG)

The bill expands the responsibilities of SPGO within DOEA regarding oversight of professional guardians. The bill renames the SPGO as the Office of Public and Professional Guardian (OPPG), which is to facilitate the establishment of offices of public guardians for the purpose of providing guardianship services for incapacitated persons when no private guardian is available.

The bill provides that the executive director of the new OPPG is appointed by the Secretary of DOEA. The bill sets out the new duties and responsibilities of the executive director of the Office of Public and Professional Guardians for the oversight of public and professional guardians. The executive director must review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida. The executive director's oversight responsibilities for professional guardians include but are not limited to:

- Establishing standards of practice for public and professional guardians;
- Reviewing and approving the standards and criteria for the education, registration, and certification of public and professional guardians in Florida;
- Developing a guardianship training program curriculum that may be offered to all guardians;
- Developing and implementing a monitoring tool to use for periodic monitoring activities of professional guardians; however, this monitoring tool may not include a financial audit as required to be performed by the clerk of the circuit court under s. 744.368, F.S.;
- Developing procedures for the review of an allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians; and
- Establishing disciplinary proceedings, conducting hearings, and taking administrative action under ch. 120, F.S.

The executive director is required to establish standards of practice for public and professional guardians, by rule, no later than October 1, 2016, in consultation with professional guardianship associations and other interested stakeholders. Additionally, a draft of these rules must be provided to the Governor, Legislature, and Secretary of DOEA by August 1, 2016.

### Regulation and Appointment of Professional Guardians

The bill provides that a court may not appoint any professional guardian who is not registered by OPPG.

### Discipline of Professional Guardians

The bill directs OPPG to establish standards and procedures in rule by October 1, 2016, and provide a draft of the standards and procedures to the Governor, the Legislature and the Secretary of DOEA for review by August 1, 2016. These rules shall provide for OPPG to:

- Review and investigate complaints against professional guardians;
- Initiate an investigation no later than 10 business days after OPPG receives a complaint;

- Complete and provide initial investigative findings and recommendations, if any, to the professional guardian and person filing the complaint within 60 days;
- Obtain supporting information, including interviewing the ward, family member, or interested party, or documentation to determine the legal sufficiency of a complaint;
- Dismiss any complaint that is not legally sufficient; and
- Coordinate with the clerks of the court to avoid duplication of duties.

OPPG must establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S. Disciplinary actions may include, but are not limited to, requiring professional guardians to participate in additional educational courses, imposing additional monitoring of the guardianships being served by the professional guardian; and suspending and revoking the guardian's registration. If the final determination from a disciplinary proceeding is to suspend or revoke the guardian's registration, the determination must be provided to any court that oversees any guardianship to which the professional guardian is appointed.

OPPG is required to report any suspected abuse, neglect or exploitation of a vulnerable adult as a result of a complaint, or investigation of a complaint, to the Department of Children and Families' central abuse hotline.

The bill directs DOEA to adopt rules to implement the standards and procedures outlined above by October 1, 2016.

Additionally, the bill sets forth the grounds for discipline. Disciplinary action may be taken against a professional guardian for:

- Making a misleading, deceptive, or fraudulent representation in or related to the practice of guardianship;
- Violating any rule governing guardians or guardianship adopted by OPPG;
- Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to a crime which relates to the practice of, or ability to practice as a professional guardian;
- Failing to comply with the educational course requirements for professional guardians;
- Having a registration, license, or authority to practice a regulated profession revoked;
- Knowingly filing a false report or complaint with OPPG against another guardian;
- Attempting to obtain, obtaining, or renewing a registration or license to practice a profession by bribery, fraud, or a known error;
- Failing to report a violation of ch. 744, F.S. or the rules of OPPG to OPPG;
- Failing to perform a legal or statutory obligation.;
- Making or filing a false report that is signed in the person's capacity as professional guardian.
- Using the position of guardian for financial gain;
- Violating or failing to comply with an order from OPPG;
- Improperly interfering with an investigation;
- Using the guardianship relationship to engage or attempt to engage in sexual activity;
- Failing to report to OPPG within 30 days being convicted or found guilty of, or enter a plea of guilty or nolo contendere to a crime;
- Being unable to perform the functions of guardian;
- Failing to post and maintain a blanket fiduciary bond;
- Failing to maintain all records relating to a guardianship for specified time; or
- Violating any provision of ch. 744, F.S., or any rules adopted thereunder.

When OPPG finds that a professional guardian is guilty of any of the grounds for discipline, it may take action against that guardian by entering an order imposing one or more penalties on the professional guardian. When determining what action is appropriate against a professional guardian, prior to consideration of any mitigation or rehabilitation for the professional guardian, OPPG must first consider what sanctions are necessary to safeguard the wards and protect the public. The bill provides legislative intent that the disciplinary guidelines should specify a meaningful range of penalties based on the severity and repetition of offenses and that minor violations should be treated differently than

those which endanger the ward or the public. OPPG may impose any combination of the following sanctions:

- Refuse to register an applicant as a professional guardian;
- Suspend or revoke of a professional guardian's registration;
- Issue of a reprimand;
- Require treatment, completion of continuing education courses, or reexamination;
- Require restitution; or
- Require remedial education.

The bill provides for ch. 120, F.S., rights for professional guardians who are subject to disciplinary procedures. OPPG is directed to adopt rules through DOEA that set forth the disciplinary guidelines applicable to each grounds for discipline, designate mitigating and aggravating circumstances, and otherwise administer this section.

#### Access to Records by OPPG

The bill provides OPPG access to financial audits prepared by the clerk of the court pursuant to s. 744.368, F.S., and held by the court that are necessary as part of an investigation of a guardian as a result of a complaint filed with OPPG.

#### Joining Forces Public Guardianship Grant Program

The bill amends the legislative intent for the existing Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties in establishing and funding community-supported public guardianship programs.

#### Background Checks

The bill requires OPPG to adopt rules by October 1, 2016, that detail the acceptable methods for completing an electronic fingerprint criminal history record check and for completing a credit investigation for professional guardians and each employee of a professional guardian who has a fiduciary responsibility to the ward.

The bill takes effect upon becoming law.

#### B. SECTION DIRECTORY:

- Section 1:** Provides directives to the Division of Law Revision and Information.
- Section 2:** Provides directives to the Division of Law Revision and Information.
- Section 3:** Provides directives to the Division of Law Revision and Information.
- Section 4:** Amends s. 744.1012, F.S., relating to legislative intent.
- Section 5:** Renumbers s. 744.201, F.S., as s. 744.1096, F.S., relating to domicile of ward.
- Section 6:** Amends s. 744.202, F.S., renumbered as 744.1097, F.S., relating to venue.
- Section 7:** Renumbers s. 744.2025, F.S., as s. 744.1098, F.S., relating to change of ward's residence.
- Section 8:** Amends s. 744.7021, F.S., renumbering it as s. 744.2001, F.S., relating to the Office of Public and Professional Guardians.
- Section 9:** Amends s. 744.1083, F.S., renumbering it as s. 744.2002, F.S., relating to professional guardian registration.
- Section 10:** Amends s. 744.1085, F.S., renumbering it as s. 744.2003, F.S., relating to regulation of professional guardians; application; bond required; educational requirements.
- Section 11:** Creates s. 744.2004, F.S., relating to complaints; disciplinary proceedings; penalties; enforcement.
- Section 12:** Creates s. 744.20041, F.S., relating to grounds for discipline; penalties; enforcement.
- Section 13:** Amends s. 744.344, F.S., renumbering it as s. 744.2005, F.S., relating to order of appointment.

- Section 14:** Amend s. 744.703, F.S., renumbering it as s. 744.2006, F.S., relating to the Office of Public and Professional Guardians; appointment, notification.
- Section 15:** Renumbers s. 744.704, F.S., as s. 744.2007, F.S., relating to powers and duties.
- Section 16:** Renumbers s. 744.705, F.S., as s. 744.2008, F.S., relating to costs of the public guardian.
- Section 17:** Amends s. 744.706, F.S., renumbering it as s. 744.2009, F.S., relating to preparation of budget.
- Section 18:** Amends s. 744.707, F.S., renumbering it as s. 744.2101, F.S., relating to procedures and rules.
- Section 19:** Renumbers s. 744.709, F.S., as s. 744.2102, F.S., relating to surety bond.
- Section 20:** Amends s. 744.708, F.S., renumbering it as s. 744.2103, F.S., relating to reports and standards.
- Section 21:** Amends s. 744.7081, F.S., renumbering it as s. 744.2104, F.S., relating to access to records by the Office of Public and Professional Guardians; confidentiality.
- Section 22:** Amends s. 744.7082, F.S., renumbering it as s. 744.2105, F.S., relating to direct-support organization; definition; use of property; board of directors; audit; dissolution.
- Section 23:** Amends s. 744.712, F.S., renumbering it as s. 744.2106, F.S., relating to Joining Forces for Public Guardianship grant program; purpose.
- Section 24:** Amends. 744.713, F.S., renumbering it as s. 744.2107, F.S., relating to program administration; duties of the Office of Public and Professional Guardians.
- Section 25:** Amends s. 744.714, F.S., renumbering it as s. 744.2108, F.S., relating to eligibility.
- Section 26:** Amends s. 744.715, F.S., renumbering it as s. 744.2109, F.S., relating to grant application requirements; review criteria; award process.
- Section 27:** Amends s. 744.3135, F.S., relating to credit and criminal investigation.
- Section 28:** Repeals s. 744.701, F.S., relating to short title
- Section 29:** Repeals s. 744.702, F.S., relating to legislative intent.
- Section 30:** Repeals s. 744.7101, F.S., relating to short title.
- Section 31:** Repeals s. 744.711, F.S., relating to legislative findings and intent.
- Section 32:** Amends s. 400.148, F.S., relating to Medicaid "Up-or-Out" Quality of Care Contract Management Program.
- Section 33:** Amends s. 744.331, F.S., relating to procedures to determine incapacity.
- Section 34:** Amends s. 20.415, F.S., relating to Department of Elderly Affairs; trust funds.
- Section 35:** Amends s. 415.1102, F.S., relating to adult protection teams.
- Section 36:** Amends s. 744.309, F.S., relating to who may appoint guardian of a resident ward.
- Section 37:** Amends s. 744.524, F.S., relating to termination of guardianship on change of domicile of a resident ward.
- Section 38:** Provides an appropriation.
- Section 39:** Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill will have a significant negative fiscal impact on DOEA. DOEA will see increased costs associated with regulating professional guardians. DOEA would need funding and FTEs to perform the duties required by the bill. There would also be increased costs to DOEA's general counsel's office as the professional guardians will be able to challenge decisions by the new OPPG under ch. 120, F.S. The number of wards represented by the 482 guardians is unknown at this time.

DOEA estimated the total fiscal impact on the department to be \$821,670. This includes \$698,153 in recurring costs for six full-time equivalent positions (FTEs) and their associated travel expenses

for the oversight of the 482 professional guardians. DOEA estimates this number of FTEs is needed on the assumption that the current workload would at least double. The total also includes funding for contracted services for forensic auditors to investigate potential issues with professional guardians; DOEA estimates there will be 3-5 forensic cases per year. The recurring costs are:

- Five complaint investigators: \$298,471
- One senior attorney: \$88,453
- Travel costs: \$21,750
- Forensic auditors: \$289,479

Additionally, DOEA estimates a non-recurring cost of \$100,000 for a computer system to capture data related to the professional guardians activities, such as information related to complaints and investigations.

The Office of State Courts Administrator cannot accurately determine the fiscal impact of the bill because it cannot determine the revenues from increased filing fees nor the additional costs of appellate review of administrative actions.

The bill provides an appropriation in the sum of \$698,153 in recurring funds and \$123,157 in nonrecurring funds from the General Revenue Fund. The bill also provides associated salary rate of 242,345 and six full-time equivalent (FTE) positions.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill requires DOEA to promulgate rules relating to OPPG's handling of complaints, disciplinary proceedings, penalties, and enforcement.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On November 18, 2015, the Children, Families, and Seniors Subcommittee adopted two amendments. The first amendment specifies that a public guardian may also serve as a limited guardian or a guardian advocate under s. 393.12, F.S., for individuals with developmental disabilities. The second amendment creates s. 744.20041, F.S., which:

- Establishes grounds for disciplining a professional guardian.
- Establishes the range of penalties available for professional guardians who have violated this section.
- Establishes the procedures for determining whether a professional guardian is guilty of a violation and what sanction is appropriate.
- Sets forth legislative intent for the establishment of the disciplinary guidelines.
- Directs DOEA to adopt rules to implement this section.

The bill was reported favorably as a committee substitute. The analysis is drafted to the committee substitute.

On January 28, 2016, the Health Care Appropriations Subcommittee adopted one amendment. The amendment provides six full-time equivalent (FTE) positions, with associated salary rate of 242,345, and the sums of \$698,153 in recurring funds and \$123,517 in nonrecurring funds from the General Revenue Fund to the Department of Elder Affairs for the purpose of carrying out this act.

The bill was reported favorably as a committee substitute to the committee substitute. The analysis is drafted to the committee substitute as passed by the Health Care Appropriations Subcommittee.