

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 172

INTRODUCER: Judiciary Committee; Children, Families, and Elder Affairs Committee; and Senators Passidomo and Mayfield

SUBJECT: Guardianship

DATE: March 15, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	Fav/CS
2.	Stallard	Cibula	JU	Fav/CS
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 172 revises several aspects of Florida's guardianship statutes relating to the determination of a person's incapacity, a guardian's annual report on the incapacitated person over whom he or she has responsibility, what findings a court must make to allow a guardian to initiate a ward's divorce, and how much a guardian may spend on a ward's funeral and related expenses.

The Florida Statutes prescribe a process for courts to use in determining that an alleged incapacitated person is indeed incapacitated, and for appointing a guardian for the ward. A committee of experts aids the court in making this determination. Under the bill, the committee members' reports are due at least 10 days, instead of 5 days, before the incapacity hearing, unless they are not complete. However, the bill expressly authorizes a motion for continuance if the service deadline is missed. Also, the bill expressly permits the petitioner and the alleged incapacitated person to object to the admission of part or all of each report, and requires the court to assess the admissibility of these reports based on the rules of evidence.

The timeframe for the adjudicatory hearing is moved from not later than 14 days after the filing of the examining committee reports to between 10 and 30 days after the filing of the last-filed report. However, this 10-day minimum timeframe may be waived, permitting the hearing to occur sooner.

Under current law, guardians must file annual guardianship reports, which include 1-year guardianship plans. The filing deadlines differ depending on whether the court has required filing on a calendar-year basis. In a case where the court has not required filing on a calendar-year basis, the filing deadline is moved back 150 days. Moreover, in a case in which the court has *not* required filing on a calendar-year basis, the report for the forthcoming year must be filed by April 1, instead of between September 1 and December 1. The bill expressly states that the report remains in effect until a new report is filed.

And when it comes to authorizing a guardian to initiate a ward's divorce proceeding, current law requires the court to find, among other things, that the ward's spouse consents to the dissolution. The bill removes this requirement.

Under current law, after obtaining approval of the court pursuant to a petition for authorization to act, the guardian of a ward's property may, among a list of other things, pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to \$6,000.¹ The bill removes this \$6,000 limit.

II. Present Situation:

Guardianship in General

Guardianship is a trust relationship in which one person, called the "guardian,"² acts as a fiduciary³ for another, called the "ward."⁴ There are two main forms of guardianship: guardianship over the person and guardianship over the property; the latter may be limited or plenary.⁵

A court may establish a guardianship without the consent of an alleged incapacitated person if the court finds that this person is indeed incapacitated—that is, unable to manage his or her own affairs. Accordingly, the court then appoints a guardian to manage the ward's affairs. And commensurate to the incredible authority over a ward that is vested in a guardian, the law prescribes a rigorous process for determining that a person is incapacitated, and for appointing a trustworthy and competent guardian. Furthermore, the law places limits on the guardians ability to take particular, drastic or life-changing actions on the ward's behalf.

Procedure to Determine Incapacity

In order for a guardianship over an incapacitated person to be established, the court must determine that the alleged incapacitated person is indeed incapacitated. The Florida Statutes specify the process for filing a petition to determine incapacity, as well as the process for providing and reading the petition to the alleged incapacitated person at issue.⁶ Notice of the

¹ Section 744.441, F.S.

² "Guardian" means a person who has been appointed by the court to act on behalf of a ward's person or property, or both. Section 744.102(9), F.S.

³ See, e.g., *In re Guardianship of Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

⁴ "Ward" means a person for whom a guardian has been appointed. Section 744.102(22), F.S.

⁵ See generally, Section 744.102(9), F.S.

⁶ Section 744.331(1), F.S. If there is a petition to appoint a guardian, this must also be filed, and served upon and read to the alleged incapacitated person.

filing of a petition to determine incapacity must be served on certain persons, including the attorney for the alleged incapacitated person.⁷ And this notice must state the time and place of the hearing on the petition to determine incapacity. The notice must also state that an attorney has been appointed and that, if the person is determined incapable of exercising certain rights, then a guardian will be appointed to exercise those rights on his or her behalf.⁸

Within 5 days from the filing of a petition to determine incapacity, the court must appoint a three-member examining committee.⁹ The committee members must meet the professional qualifications set forth in statute, and at least one must have knowledge of the type of incapacity alleged in the petition.¹⁰

Each committee member must examine the alleged incapacitated person, determine the person's ability to exercise certain rights as specified in statute, and submit a report within 15 days after appointment.¹¹ If two of the three examining committee members conclude that the person is incapacitated then a hearing on the petition must be set.¹² A copy of each examining committee member's report must be served on the petitioner and the attorney for the alleged incapacitated person within 3 days after filing and at least 5 days before a hearing is held on the petition.¹³

When the court appoints the examining committee, the court also sets the adjudicatory hearing on the petition for not more than 14 days after the filing of the examining committee reports.¹⁴

Filing of Annual Guardianship Report

Among various other duties, a guardian of an incapacitated person must file an annual report.¹⁵ This report must update information about the condition of the ward, specify the current needs of the ward and explain how those needs are proposed to be met in the coming year.¹⁶

If the court does not require a calendar-year filing, the guardian must file the annual guardianship plan between 60 and 90 days before the last day of the anniversary month that the letters of guardianship were signed. In this case, the plan must cover the coming fiscal year. If instead the court requires a calendar-year guardianship plan to be filed, the plan must be filed after September 1 but no later than December 1 of the current year.¹⁷

⁷ *Id.*

⁸ *Id.*

⁹ Section 744.331(3)(a), F.S.

¹⁰ *Id.* At least one member of the committee must be a physician, and each of the other two members must be a physician, a nurse practitioner, a registered nurse, another type of specified professional, or anyone else who the court determines to be qualified as specified in statute.

¹¹ Section 744.331(3)(e), F.S.

¹² Section 744.331(4), F.S.

¹³ Section 744.331(3)(h), F.S.

¹⁴ Section 744.331(5)(a), F.S. Upon good cause shown, the court may set the hearing for a later date.

¹⁵ Section 744.367(1), F.S.

¹⁶ Section 744.3675, F.S.

¹⁷ *Id.*

Procedure for Acquiring Extraordinary Authority

Though a guardian has extensive authority to act on behalf of a ward, the law expressly prohibits guardians from taking certain drastic or life-changing actions on the ward's behalf. These actions include committing a ward to an institution without the process specified in statute, initiating a ward's divorce proceeding, or consenting on behalf of the ward for his sterilization.¹⁸ However, a guardian may acquire the legal ability to do one or more of these things, referred to as "extraordinary authority."¹⁹

Before the court allows a guardian to exercise this extraordinary authority, the court must:²⁰

- Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at any hearing on the petition for authority to act;
- Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;
- Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court;
- Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future;
- Be persuaded by clear and convincing evidence that the authority being requested is in the best interests of the incapacitated person; and
- *In the case of dissolution of marriage, find that the ward's spouse has consented to the dissolution.*

Powers of the Guardian of Property to Pay Reasonable Death Expenses

Though the discussion above has focused on guardianship of a ward's person, guardianship may also pertain to a ward's property. After obtaining approval of the court pursuant to a petition to act, the types of guardians of a ward's property specified in statute may, among a list of other things, pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, *up to \$6,000.*²¹

III. Effect of Proposed Changes:

Procedure to Determine Incapacity

Reports of the Examining Committee Members

In order for a guardianship over an incapacitated person to be established, the court must determine that the ward is indeed incapacitated. While the court makes this decision ultimately,

¹⁸ See ss. 744.3215(4) and 744.3725, F.S.

¹⁹ Section 744.3725, F.S.

²⁰ *Id.* (Emphasis added).

²¹ Section 744.441, F.S.

its determination is aided by the reports of a three-member examining committee, which is generally comprised of healthcare professionals.²² The bill modifies the requirements for the committee members' filing of their reports and the requirements for the reports' service upon counsel. Also, the bill sets forth a standard and process for a petitioner or alleged incapacitated person to follow in seeking to bar the reports' introduction into evidence at the adjudicatory hearing.

The bill specifies that the reports must be filed *with the clerk of the court* within 15 days after appointment to the committee. In contrast, current law does not specify where these reports must be filed.

The bill, unlike current law, expressly provides that the reports must be *served by the clerk of the court*, on the petitioner and the attorney for the alleged incapacitated person. Also, the bill moves the date by which this service must occur, from at least 5 days before adjudicatory hearing to at least 10 days before the hearing. However, service need not occur in this timeframe if the reports are not complete. And if service is late on account of the reports not being complete, both sides may waive the 10-day service deadline or move for a continuance.²³ Lastly, the bill, in contrast to current law, specifies the manner of the clerk's service—it must be by electronic mail or U.S. mail.

The bill, unlike current statutory law, expressly states that the petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examining committee members' report.²⁴ Specifically, these persons may make this objection by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing.²⁵ The court must apply the rules of evidence in determining the admission of these reports.²⁶

Timeframe for Holding the Adjudicatory Hearing

The adjudicatory hearing is the court proceeding at which the court hears argument and admits evidence so that it may rule on whether the alleged incapacitated person is indeed incapacitated. The bill revises the timeframe in which this hearing must occur, from within 14 days after the admission of the reports of the examining committee members to between 10 and 30 days after the last filed report. However, this 10-day minimum timeframe may be waived, permitting the hearing to occur sooner.

Annual Guardianship Report

Each year, a guardian is required to file an annual guardianship report, updating information about the condition of the ward and specifying the current needs of the ward and how those needs are proposed to be met in the coming year.

²² Section 744.331(3)(a), F.S. At least one member of the committee must be a physician, and each of the other two members must be a physician, a nurse practitioner, a registered nurse, another type of specified professional, or anyone else who the court determines to be qualified as specified in statute.

²³ The bill does not state that this motion would be granted, even upon proof of late service.

²⁴ The bill expressly states that these are the only people who may make this objection.

²⁵ The court may extend the time to file an objection.

²⁶ It is unclear as to whether the court may also apply other theories of law to exclude the reports.

Under current law, in a case where the court has not required filing on a calendar-year basis, guardian must file the report between 60 and 90 days before the last day of the anniversary month that the letters of guardianship were signed. The bill extends this deadline, to “within 90 days after the last day of the anniversary month that the letters of guardianship were signed”

Under current law, in a case in which the court has not required filing on a calendar-year basis, the report for the forthcoming year must be filed between September 1 and December 1 of the current year. The bill changes this deadline to April 1. Moreover, the bill gives effect to a filed and approved annual guardianship report until the court approves a subsequent plan.

Procedure for Acquiring Extraordinary Authority

Though a guardian has extensive authority to act on behalf of a ward, the law expressly prohibits guardians from taking certain drastic or life-changing actions on behalf of the ward. One of these actions is the initiation of a ward’s divorce proceeding.²⁷ However, the court may grant a guardian the “extraordinary authority” to do one or more of these things.²⁸ But to do so, the court must take a number of actions and make a number of findings. And when it comes to authorizing a guardian to initiate a ward’s divorce proceeding, current law requires the court to find that the ward’s spouse consents to the dissolution. The bill removes this requirement.

Powers of the Guardian of Property to Pay Reasonable Death Expenses

Under current law, after obtaining approval of the court pursuant to a petition for authorization to act, guardian of a ward’s property may, among a list of other things, pay reasonable funeral, interment, and grave marker expenses for the ward from the ward’s estate, up to \$6,000.²⁹ The bill removes this \$6,000 limit.

Effective Date

The effective date of the bill is July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

²⁷ See ss. 744.3215(4) and 744.3725, F.S.

²⁸ Section 744.3725, F.S.

²⁹ Section 744.441, F.S.

C. Trust Funds Restrictions:

None.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill allows guardians, with court approval, to spend more than \$6,000 on a ward's funeral, interment, and grave marker expenses.

C. Government Sector Impact:

None.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 744.331, 744.3725, 744.441, 744.3215, and 744.367.

IX. **Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on March 14, 2017:

The bill required the clerk of the court to serve the examining committee's reports on the petitioner's attorney and the attorney for the alleged incapacitated person at least 10 days before the adjudicatory hearing. Under the committee substitute, the service must be on the petitioner, not his or her attorney. Also, if the reports are not complete by 10 days before the hearing, they no longer need to be served by that deadline. Nonetheless, each side is expressly authorized to move for a continuance if this service deadline is missed.

Regarding the admission of these reports into evidence at the hearing, the committee substitute no longer expressly restricts the authority to object to only the alleged incapacitated person and the petitioner. Lastly, though the adjudicatory hearing still may

not occur until 10 days after the last committee report is filed, the committee substitute allows for waiver of this restriction.

CS by Children, Families, and Elder Affairs on February 6, 2017:

The amendment provides clarification that the annual guardianship plan is to be filed with the court within 90 days after the last day of the anniversary month that the letters of guardianship were signed unless the court requires calendar-year filing. If the court requires a calendar-year filing the guardianship plan is to be filed before April 1 of each year. The last annual guardianship plan approved by the court will remain in effect until the court approves the subsequent plan.

B. Amendments:

None.