

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1187 **Guardianship**

SPONSOR(S): Spano

TIED BILLS: **IDEN./SIM. BILLS:** SB 1002

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N	Langston	Brazzell
2) Civil Justice & Claims Subcommittee	14 Y, 0 N	MacNamara	Bond
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. The Office of Public and Professional Guardians (OPPG) oversees, investigates, and disciplines all public and professional guardians. Complaints against a guardian must be filed with OPPG.

A guardian must file with the court an initial guardianship report, an annual guardianship report, and an annual accounting of the ward’s property. In addition to the duty to serve as the custodian of the guardianship files, the clerk reviews each initial and annual guardianship report to ensure that it contains required information about the ward. If the clerk believes further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets. A guardian or OPPG may disclose confidential information about a ward in limited circumstances.

HB 1187 identifies specific actions that the circuit court clerks may take when reviewing guardianship reports. Specifically, the bill permits the clerk to conduct audits and may cause the initial and annual guardianship reports to be audited, when the clerk has reason to believe further review is appropriate. If the clerk identifies an act of wrongdoing on the part of the guardian based on the audit, the bill prohibits the guardian from being paid or reimbursed using the ward’s assets for any fees incurred in responding to the audit.

The bill requires the clerk to advise the court of the results of such audits. The bill states that the clerk’s communication to the court regarding the clerk’s duties to review and audit guardianship reports and accountings may not be considered an ex parte communication.

The bill provides that the clerk may disclose confidential information to the Department of Children and Families or law enforcement agencies “for other purposes,” as provided by a court order. The bill authorizes a guardian to provide the confidential information to the court clerk or an investigator with OPPG for investigations that arise under a review of records and documents involving assets, the beginning inventory balance, and fees charged to the guardianship.

The bill allows a complaint against a guardian to be filed with either OPPG or its designee.

The bill does not have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Guardianship

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity.¹ There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.² A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.³ For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, when an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence, which is determined by a court appointed examination committee.⁴

Fiduciary Relationship

The relationship between a guardian and his or her ward is a fiduciary one.⁵ 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.⁶ Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary. 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. Additionally, a guardian may not use the relationship with the ward for his or her private gain other than the remuneration for fees and expenses provided by law.⁷

Initial and Annual Guardianship Reports

Every guardian must file an initial report within 60 days after the letters of guardianship, which appoint the guardian, are signed and file an annual report with the court consisting of an annual accounting and/or an annual guardianship plan.⁸

Initial Guardianship Report

The initial guardianship plan continues in effect until amended or replaced by the approval of an annual guardianship plan; the restoration of capacity or death of the ward; or the ward, if a minor, reaches the age of 18 years.⁹ The initial guardianship plan includes:¹⁰

- The provision of medical, mental, or personal care services for the welfare of the ward;
- The provision of social and personal services for the welfare of the ward;
- The place and kind of residential setting best suited for the needs of the ward;

¹ S. 744.102(9), F.S.

² S. 744.2005, F.S.

³ S. 744.102(17), F.S.

⁴ S. 744.102(12), F.S.

⁵ S. 744.361(1), F.S. Additionally, Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship. *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.

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

⁷ S. 744.446, F.S.

⁸ S. 744.3678(1), F.S.

⁹ S. 744.363(5), F.S.

¹⁰ S. 744.363(1), F.S.

- The application of health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward; and
- Any physical and mental examinations necessary to determine the ward's medical and mental health treatment needs.

Additionally, an initial guardianship plan for an incapacitated person must be based on the recommendations of the examining committee's examination, as incorporated into the order determining incapacity.¹¹

Annual Guardianship Report and Accounting

The annual guardianship report of a guardian of the property must consist of an annual accounting, and the annual report of a guardian of the person must consist of an annual guardianship plan.¹² Unless the court requires filing on a calendar-year basis, each guardian of the person must file an annual guardianship plan with the court within 90 days after the last day of the anniversary month that the letters of guardianship were signed; the plan must cover the coming fiscal year, ending on the last day in such anniversary month.¹³

The annual accounting must include:¹⁴

- A full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period; and
- A copy of the annual or year-end statement of all of the ward's cash accounts from each of the institutions where the cash is deposited.

Additionally, the guardian must obtain and preserve a receipt, cancelled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward, along with any substantiating papers, for three years after his or her discharge as a guardian.¹⁵ The guardian is not required to file these documents with the court but must make them available for inspection and review as the court may order.¹⁶

Responsibilities of the Clerk of the Circuit Court

In addition to the duty to serve as the custodian of the guardianship files, the clerk reviews each initial and annual guardianship report to ensure that it contains required information about the ward.¹⁷ The clerk must:

- 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.

¹¹ S. 744.363(2), F.S.

¹² S. 744.367(3), F.S.

¹³ S. 744.367(1), F.S. If the court requires calendar-year filing, the guardian must file the guardianship plan on or before April 1 of each year.

¹⁴ S. 744.3678(2), F.S.

¹⁵ S. 744.3678(3), F.S.

¹⁶ Id.

¹⁷ S. 744.368, F.S. This includes information about the ward that addresses mental and physical health care, physical and mental health examinations, personal and social services, residential setting, the application of insurance, private and government benefits, and the initial verified inventory or the annual accounting.

¹⁸ S. 744.368(2)-(4), F.S.

If the clerk believes further review is appropriate, he or she 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.¹⁹ If a guardian does not produce records and documents to the clerk upon request, the clerk may request the court to enter an order compelling the guardian to produce the requested records and documents.²⁰

The guardian must pay a fee to the clerk of the circuit court for its audit.²¹ This fee is paid from the ward's estate, and is scaled based on the value of his or her estate. The maximum fees the clerk may charge are:²²

- \$20 for estates with a value of \$25,000 or less;
- \$85 for estates with a value of more than \$25,000 up to and including \$100,000;
- \$170 for estates with a value of more than \$100,000 up to and including \$500,000; and
- \$250 for estates with a value in excess of \$500,000.

Office of the Public and Professional Guardians

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.²³ In 2016, the Legislature renamed the Statewide Public Guardianship Office within the Department of Elder Affairs (DOEA) as the Office of Public and Professional Guardians (OPPG) and expanded the OPPG's responsibilities.²⁴ The expansion of the Office's oversight of professional guardians followed reports of abuse and inappropriate behavior by professional guardians.²⁵ The OPPG now regulates professional guardians with certain disciplinary and enforcement powers.²⁶ Specifically, s. 744.2004, F.S., requires OPPG to review and, if determined legally sufficient, investigate any complaint that a professional guardian has violated the standards of practice established by OPPG.

OPPG has entered into a Memorandum of Understanding (MOU) with the Clerks' Statewide Investigations Alliance²⁷ to conduct independent and objective investigations when OPPG refers complaints to them.²⁸ There are seven county clerk offices with units accredited to perform investigations of legally sufficient complaints regarding the conduct of professional guardians.²⁹ Since

¹⁹ Id.

²⁰ S. 744.368(6), F.S.

²¹ S. 744.3678(4), F.S.

²² Id.

²³ Chapter 99-277 L.O.F.

²⁴ See CS/CS/CS/SB 232 (2016) and ch. 2016-40, L.O.F.

²⁵ See, e.g., 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 March 9, 2017) (reviewed how effectively guardians were fulfilling their duties and obligations. The committee received input from citizens that there was abuse, neglect, and misuse of ward's funds. 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.); Department of Elder Affairs, Guardianship Task Force – 2004 Final Report, available at

<http://elderaffairs.state.fl.us/doea/pubguard/GTF2004FinalReport.pdf> (last visited January 19, 2018) (advocated for additional oversight of professional guardians); Michael E. Miller, *Florida's Guardians Often Exploit the Vulnerable Residents They're Supposed to Protect*, MIAMI NEW TIMES, May 8, 2014, available at <http://www.miaminewtimes.com/2014-05-08/news/florida-guardian-elderly-fraud/full/> (last visited January 19, 2018) (provided 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; and 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 January 19, 2018) (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.).

²⁶ Section 744.2004, F.S.

²⁷ Department of Elder Affairs, Agency Analysis 2018 House Bill 1187, p. 3 (Jan. 9, 2018) (on file with Children, Families, and Seniors Subcommittee). These clerks have specialized investigatory training related to guardianship.

²⁸ Id.

²⁹ Id. The Palm Beach County Clerk serves as the administrative coordinator and chief investigator. The remaining clerk offices are Pinellas County, Polk County, Okaloosa County, Lake County, Lee County, and Sarasota County

OPPG began receiving complaints on October 1, 2017, it has referred 83 legally sufficient complaints to the Clerks' Statewide Investigative Alliance for further investigation.³⁰

Confidentiality of Guardianship Records

Typically, guardianship records are confidential; this includes initial, annual, and final guardianship reports, as well as any amendments thereto.³¹ These reports and any court record relating to the settlement of a claim³² on behalf of the ward are only subject to inspection by:³³

- The court:
- The clerk or the clerk's representative:
- The guardian and the guardian's attorney:
- The guardian ad litem with regard to the settlement of the claim; and
- The ward, in certain circumstances, and the ward's attorney.

If anyone other than the statutorily identified individuals above wishes to inspect guardianship records, he or she must petition the court for access and show good cause as to why access should be granted.³⁴ Additionally, the court may direct disclosure of guardianship records in connection with a real property transaction or for such other purpose as the court allows.³⁵

Disclosure of Confidential Information without Court Approval to Ombudsman Council Members

Without obtaining court approval, a guardian acting within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may provide confidential information about a ward, such as medical or financial information, that is related to an investigation arising under part I of ch. 400, F.S., to a local or state ombudsman³⁶ council member conducting such an investigation.³⁷

Confidentiality of Records Held by OPPG Related to Investigations

Any medical, financial, or mental health records or financial audits of guardianship records that are held by certain agencies must be provided to OPPG upon its request, if necessary to investigate a guardian as a result of a complaint filed with OPPG or for OPPG to fulfil its statutory duties.³⁸ All records held by OPPG relating to the medical, financial, or mental health of vulnerable adults,³⁹ persons with a

³⁰ Florida Senate Bill Analysis and Fiscal Impact Statement of 2017 Senate Bill 1002, (Jan. 9, 2018) In 30 of those cases, letters of concern were issued or discipline was imposed or the cases were determined to be unfounded. The remaining 53 cases are still open and ongoing.

³¹ S. 744.3701(1), F.S.

³² A court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may not be disclosed except as specifically authorized. S. 744.3701(3), F.S.

³³ S. 744.3701(1), F.S.

³⁴ Id.

³⁵ S. 744.3701(2), F.S.

³⁶ This is a volunteer-based system of local units that act as advocates for residents of long-term care facilities. Council members work with staff to identify, investigate, and resolve complaints made by, or on behalf of, residents of nursing homes, assisted living facilities, adult family-care homes, and continuing care retirement communities. See Department of Elder Affairs, *State Long-Term Ombudsman Council*, http://elderaffairs.state.fl.us/doea/lcop_council.php (last visited January 20, 2018).

³⁷ S. 744.444(17), F.S.

³⁸ S. 744.2104(1), F.S. OPPG's statutory duties include evaluating the public guardianship system, assessing the need for additional public guardianship, and developing required reports.

³⁹ S. 415.102(28), F.S., defines a "vulnerable adult" as a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

developmental disability,⁴⁰ or persons with a mental illness,⁴¹ are confidential and exempt from s. 119.07(1), F.S., and Article I, section 24(a) of the State Constitution.⁴² Additionally, s. 744.2111, F.S., provides that the following are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, when held by DOEA in connection with a complaint filed and any subsequent investigation conducted by OPPG, unless the disclosure is required by court order:

- Personal identifying information of a complainant or ward;
- All personal health and financial records of a ward; and
- All photographs and video recordings.

Any confidential or exempt information provided to OPPG must continue to be held confidential or exempt as otherwise provided by law.⁴³ However, the confidentiality requirements in s. 744.2111, F.S. do not prevent DOEA or OPPG from disclosing the protected records to any law enforcement agency, any other regulatory agency in the performance of its official duties and responsibilities, or the clerk of circuit court when reviewing an initial or annual guardianship report.

Ex Parte Communications

An ex parte communication occurs when one party to a case communicates directly with the judge about something related to the factual or legal issues of the case without the other parties' knowledge.⁴⁴ Similarly, an ex parte proceeding is one that does not require one of the parties in the case to be present or respond to the motion; these proceedings are limited urgent matters where requiring notice would subject one party to irreparable harm, such as a request for a temporary restraining order. Ex parte communications are prohibited except in limited circumstances, because they remove the appearance of the court's impartiality in a proceeding and may prejudice a pending matter against the party not represented.⁴⁵

Effect of Proposed Changes

Review of Guardianship Reports by the Clerk

HB 1187 identifies specific actions that the circuit court clerks may take when reviewing guardianship reports. Specifically, the bill permits the clerk to conduct audits and may cause the initial and annual guardianship reports to be audited, when the clerk has reason to believe further review is appropriate under s. 744.368(5), F.S. If the clerk finds an act of wrongdoing on the part of the guardian when he or she responds to the review or audit, any fees the guardian incurred in responding to the audit may not be paid or reimbursed using the ward's assets.

The bill requires the clerk to advise the court of the results of such audits. The bill states that the clerk's communication to the court regarding such audits may not be considered an ex parte communication.

⁴⁰ S. 393.063(12), F.S., defines "developmental disability" as a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

⁴¹ S. 394.455(28), F.S., defines "mental illness" as an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with the person's ability to meet the ordinary demands of living. The term does not include a developmental disability as defined in chapter 393, intoxication, or conditions manifested only by antisocial behavior or substance abuse.

⁴² S. 744.2104(2), F.S.

⁴³ Id.

⁴⁴ Hawai'i State Judiciary, *Self-Help: Ex Parte*, http://www.courts.state.hi.us/self-help/exparte/ex_parte_contact (last visited January 19, 2018). "Ex parte" is a Latin phrase meaning "on one side only; by or for one party."

⁴⁵ *Supra*, note 27.

Disclosure of Confidential Information

The bill allows the clerk to disclose confidential information to the Department of Children and Families (DCF) or law enforcement agencies “for other purposes,” as provided by a court order. Currently, if DCF or law enforcement agencies want access to confidential guardianship records, they must petition the court and show good cause. “Other purposes” is not defined in the bill; it is unclear what these purposes would be. Additionally it is unclear if the clerk would have to show good cause to obtain a court order for such disclosure.

The bill also expands to whom a guardian may disclose confidential information about a ward without court approval beyond the state or local ombudsman council members currently authorized in law. The bill authorizes guardians to disclose confidential information to:

- The court clerk for investigations that arise from a review of guardianship reports, guardianship records and documents, and related audits conducted pursuant to s. 744.368, F.S.; and
- The OPPG for investigations related to the regulation and oversight of professional guardians pursuant to Part II of ch. 744, F.S.

The bill requires the clerk or the OPPG’s investigator to maintain the confidentiality of such disclosed information.

Complaints Against Guardians

The bill allows a complaint against a guardian to be filed with a designee of OPPG. The Clerks’ Statewide Investigations Alliance currently performs investigative services for the OPPG.⁴⁶ This change would allow complaints to be filed with the Clerks’ Statewide Investigations Alliance, who is the current OPPG designee pursuant to an MOU, or any other designee of the OPPG in addition to with the OPPG.

The bill provides an effective date of July 1, 2018.

B. SECTION DIRECTORY:

Section 1: Amends s. 744.2104(1), F.S., relating to access to records by the Office of Public and Professional Guardians; confidentiality.

Section 2: Amends s. 744.368, F.S., relating to responsibilities of the clerk of the circuit court.

Section 3: Amends s. 744.3701, F.S., relating to confidentiality.

Section 4: Amends s. 744.444, F.S., relating to power of a guardian to act without court approval.

Section 5: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

⁴⁶ Id. at 4.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None. Any additional audits conducted by county clerks are optional.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Guardians will be liable for any costs incurred responding to a clerk's review of guardianship records and documents or audits conducted pursuant to s. 744.368, F.S., if the court finds wrongdoing on the part of the guardian. The guardian will not be able to pay or reimburse any such fees from the ward's assets.

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES