

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 709 Guardianship  
**SPONSOR(S):** Health & Human Services Committee, Burton and others  
**TIED BILLS:**           **IDEN./SIM. BILLS:** CS/CS/SB 994

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**FINAL HOUSE FLOOR ACTION:** 117 Y's      0 N's            **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 709 passed the House on March 11, 2020, as CS/CS/SB 994.

Guardianship is a concept whereby a "guardian" acts on behalf of a "ward" whom the law regards as incapable of managing his or her own person or property, or both, due to age or incapacity. A court may appoint a public or private guardian if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian of that ward. Before a guardian may be appointed to act for the ward, a court must determine that the ward is incapable of handling his or her affairs.

The bill amends sections of law relating to guardianship, addressing the appointment of a guardian, orders not to resuscitate, information required to be disclosed in petitions for appointment of a guardian, mandated guardianship reports, and conflicts of interest.

The bill requires the court to inquire into and consider potential disqualifications and potential conflicts of interest prior to the appointment of a guardian. It prohibits professional guardians from petitioning for their own appointments, though it allows public guardians to petition for their own appointments to certain persons. The bill requires the petition for appointment of a guardian to contain certain information related to the guardian, alternatives to guardianship, and reasons why alternatives to guardianship are insufficient to meet the needs of the alleged incapacitated person.

The bill prohibits a guardian from receiving kickbacks for services provided to a ward and having specified interests with certain individuals, unless court approval is obtained or such relationships existed prior to appointment and are disclosed to the court in the petition for appointment of a guardian.

The bill requires a guardian to first obtain specific approval from the court before consenting to or signing on behalf of the ward an order not to resuscitate. If a ward is experiencing exigent circumstances, a judge must hold a preliminary hearing on the guardian's petition for such approval within 72 hours.

The bill requires certain information about preexisting advance directives and do-not-resuscitate orders to be included in the initial and annual guardianship plans. It also requires guardians to declare all remuneration they received in the annual guardianship report.

The bill has an indeterminate fiscal impact on state and local governments.

The bill was approved by the Governor on June 18, 2020, ch. 2020-35, L.O.F., and will become effective on July 1, 2020.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF 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 is 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> Adjudicating a person totally incapacitated and in need of a guardian deprives a person of his or her civil and legal rights.<sup>2</sup> The Legislature has recognized that the least restrictive form of guardianship should be used to ensure the most appropriate level of care and the protection of that person's rights.<sup>3</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>4</sup> Once a person has been adjudicated incapacitated (termed a "ward"), the court appoints a guardian, and the letters of guardianship are issued.<sup>5</sup> The order appointing a guardian must be consistent with the ward's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the ward the right to make decisions in all matters commensurate with his or her ability to do so.<sup>6</sup>

Generally, three types of guardians are appointed to wards in Florida: professional guardians, public guardians, and family guardians. Professional guardians are appointed to provide services to three or more wards who are not family members of the guardian. Public guardians are considered to be professional guardians, but are generally appointed to serve indigent wards. Family guardians are appointed to serve their own family members and are not considered to be professional guardians, regardless of how many family members they serve.

Professional guardians and family guardians are paid for their services using funds from the estate of the ward.<sup>7</sup> Public guardian offices are funded through the General Appropriations Act and the Foundation for Indigent Guardianship.<sup>8</sup> In Fiscal Year 2018-2019, the OPPG was appropriated \$7,003,388 by the Legislature for the 17 Offices of Public Guardianship throughout the state.<sup>9</sup> All costs of operating a Public Guardianship Office must be paid from the budget of such office, not the assets of the ward.<sup>10</sup>

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<sup>1</sup> s. 744.102(9), F.S.

<sup>2</sup> s. 744.101(1), F.S.

<sup>3</sup> s. 744.101(2), F.S.

<sup>4</sup> s. 744.3201, F.S.

<sup>5</sup> ss. 744.3371-744.345, F.S.(?)

<sup>6</sup> s. 744.2005, F.S.

<sup>7</sup> s. 744.108, F.S. See also s. 744.641, F.S.

<sup>8</sup> Department of Elder Affairs, *Office of Public and Professional Guardians 2018 Annual Report*, [http://elderaffairs.state.fl.us/doea/SPGO/pubs/OPPG\\_AR\\_2018.pdf](http://elderaffairs.state.fl.us/doea/SPGO/pubs/OPPG_AR_2018.pdf) (last visited Mar. 26, 2020). The Foundation for Indigent Guardianship is a Direct Support Organization created by the Legislature in 2006.

<sup>9</sup> Department of Elder Affairs, *2019 Summary of Programs and Services*, [http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2019/2019\\_SOPS\\_web.pdf](http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2019/2019_SOPS_web.pdf) (last visited Mar. 26, 2020).

<sup>10</sup> s. 744.2008(1), F.S.

## Appointment of a Guardian

The following may be appointed guardian of a ward:<sup>11</sup>

- 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.

## Appointment of a Professional Guardian

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>12</sup>

When a court appoints a professional guardian without using a rotation system to select the guardian, the court must make specific findings of fact stating why the person was selected as guardian in the particular matter involved.<sup>13</sup> The findings must reference the following factors that must be considered by the court:<sup>14</sup>

- 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.

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>15</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>16</sup> However, the court may waive this limitation if the special requirements of the guardianship

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<sup>11</sup> s. 744.309, F.S.

<sup>12</sup> s. 744.102(17), F.S.

<sup>13</sup> s. 744.312(4)(a), F.S.

<sup>14</sup> s. 744.312(2)-(3), F.S.

<sup>15</sup> s. 744.312(5), F.S.

<sup>16</sup> s. 744.312(4)(b), F.S.

demand that the court appoint a guardian because he or she has special talent or specific prior experience.<sup>17</sup>

The court may not appoint a professional guardian who is not registered by the Office of Public and Professional Guardians.<sup>18</sup> The following are disqualified from being appointed as a guardian:<sup>19</sup>

- A person convicted of a felony;
- A person who is incapable of discharging the duties of a guardian due to incapacity or illness, or is otherwise unsuitable to perform the duties of a guardian;
- A person who has been judicially determined to have committed abuse, abandonment, or neglect against a child;
- A person who has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under s. 435.04, F.S.;
- A person who provides substantial services to the proposed ward in a professional or business capacity, or a creditor of the proposed ward, may not be appointed guardian and retain that previous professional or business relationship, with exceptions; or
- A person who is in the employ of any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity, unless that person is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest.

A court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.<sup>20</sup>

### Conflict of Interest

Unless the court gives prior approval, or such relationship existed prior to the appointment of the guardian and is disclosed to the court in the petition for appointment of a guardian, a guardian may not:<sup>21</sup>

- Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;
- Acquire an ownership, possessory, security, or other monetary interest adverse to the ward;
- Be designated as a beneficiary on any life insurance policy, pension, or benefit plan of the ward unless such designation was made by the ward prior to adjudication of incapacity; and
- Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity that the guardian, or the guardian's spouse or family, is an officer, partner, director, shareholder, or proprietor, or has any financial interest.

A guardian found to have such conflict of interest is subject to removal from the guardianship.<sup>22</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> s. 744.2003(9), F.S.

<sup>19</sup> s. 744.309(3), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> 744.446, F.S.

<sup>22</sup> *Id.*

## Duties and Powers of the Guardian

The relationship between a guardian and his or her ward is a fiduciary one.<sup>23</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>24</sup> The guardian, as fiduciary, must:<sup>25</sup>

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

Section 744.446, F.S., expressly establishes this fiduciary relationship between the guardian and the ward, and provides 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. 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 the fiduciary duty to the ward, the court is authorized to intervene.<sup>26</sup>

Current law imposes various specific duties on a guardian after the appointment to a ward in order to provide appropriate services to that ward. The guardian must:

- File an initial report within 60 days after the letters of guardianship are signed;
- File an annual report with the court 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; and
- 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.

A guardian's powers can either be limited or plenary.<sup>27</sup> A limited guardian is appointed by the court to exercise the legal rights and powers specifically designated by the court after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of a limited guardian.<sup>28</sup> A plenary guardian is appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property.<sup>29</sup>

The guardian of an incapacitated person may exercise only those rights removed from the ward and delegated to the guardian.<sup>30</sup> However, some of these powers require court approval before they may be exercised. Guardians are required to consider the expressed desires of the ward when making decisions that affect the ward outside of any decisions that require specific authority from the court.<sup>31</sup>

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<sup>23</sup> *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.

<sup>24</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>25</sup> s. 744.361(1), F.S.

<sup>26</sup> s. 744.446(4), F.S.

<sup>27</sup> s. 744.102(9), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> s. 744.361(1), F.S.

<sup>31</sup> s. 744.361, F.S.

## Examples of Powers That May Be Exercised By a Guardian

| With Court Approval <sup>32</sup>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Without Court Approval <sup>33</sup>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <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><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><li>• Exercise any option contained in any policy of insurance payable to the ward.</li><li>• Make gifts of the ward's property to members of the ward's family in estate and income tax planning.</li><li>• Pay reasonable funeral, interment, and grave marker expenses for the ward.</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><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 business enterprise of the ward.</li><li>• 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.</li></ul> |

### Procedure for Extraordinary Authority

Some decisions made by a guardian on behalf of a ward are complex, dealing directly with the ward's interpersonal relationships, medical procedures, and life or death scenarios. Current law establishes special court procedures for certain actions. Guardians must obtain court authority through the procedure for extraordinary authority<sup>34</sup> before consenting to the following actions:<sup>35</sup>

- Having the ward committed to an institution;
- Consenting on behalf of the ward to any experimental biomedical or behavioral procedures;
- Initiating divorce proceedings for the ward;
- Consenting on behalf of the ward to termination of the ward's parental rights; and
- Consenting on behalf of the ward to a sterilization or abortion procedure on the ward.

Under the procedure for extraordinary authority, the court must appoint an independent attorney to act on behalf of the incapacitated person. The attorney must have an opportunity to meet with the incapacitated person and present evidence and cross-examine witnesses at any hearing on a petition for the authority to act. The court must receive an independent medical, psychological, and social evaluation of the incapacitated person or appoint its own experts to assist in the evaluation. The court must meet personally with the incapacitated person to obtain its own impression of their capacity and give them the opportunity to express their views and wishes relating to the issue before the court. The court must find by clear and convincing evidence that the incapacitated person lacks the capacity to make decisions, that capacity is not likely to change in the near future, and that the authority requested by the guardian is in the best interest of the incapacitated person.<sup>36</sup>

Under Florida law, court approval is not currently required in order for a guardian to execute a do not resuscitate order (DNRO) on behalf of a ward, and no special or extraordinary procedures apply.

<sup>32</sup> s. 744.441, F.S.

<sup>33</sup> s. 744.444, F.S.

<sup>34</sup> s. 744.3725, F.S.

<sup>35</sup> s. 744.3215(4), F.S.

<sup>36</sup> *Supra*, note 34.

## Office of Public and Professional Guardians

In 1999, the Legislature created the “Public Guardianship Act” and established the Statewide Public Guardianship Office (SPGO) within the Department of Elder Affairs (DOEA).<sup>37</sup> By December 2013, the SPGO had expanded public guardianship services to cover all 67 counties.<sup>38</sup> In 2016, the Legislature renamed the Statewide Public Guardianship Office within the DOEA as the Office of Public and Professional Guardians (OPPG) and required OPPG to regulate professional guardians. The OPPG establishes local public guardian offices to provide guardianship services to people who have neither adequate income nor assets to afford a private guardian, nor any willing family or friend to serve.<sup>39</sup>

There are 17 public guardian offices that serve all 67 counties.<sup>40</sup> In fiscal year 2017-2018, the public guardian offices served 3,846 wards.<sup>41</sup> Currently, there are 515 professional guardians registered with the OPPG.<sup>42</sup> The total number of wards served by registered professional guardians in this state is unknown to DOEA.<sup>43</sup>

The executive director of the OPPG oversees all professional guardians.<sup>44</sup> 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;
- 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.

Similarly, current law also requires the executive director of the OPPG to oversee the functions of public guardians.<sup>45</sup>

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<sup>37</sup> s. 744.701, F.S. (1999).

<sup>38</sup> 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 Dec. Jan. 24, 2020).

<sup>39</sup> Department of Elder Affairs, *Office of Public and Professional Guardians*, *available at* <http://elderaffairs.state.fl.us/doea/spgo.php> (last visited Jan. 24, 2020).

<sup>40</sup> *Supra*, note 8.

<sup>41</sup> *Id.*

<sup>42</sup> Email from Derek Miller, Legislative Analyst, Department of Elder Affairs, RE: HB 709 Analysis, (Jan. 24, 2020).

<sup>43</sup> *Id.*

<sup>44</sup> s. 744.2001(2)(a), F.S.

<sup>45</sup> s. 744.2001(4), F.S.

## Guardian Compensation

The guardian 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>46</sup> Before the fees may be paid, the guardian must file a petition for fees or expenses with the court and accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.<sup>47</sup> In determining whether to grant a petition for fees or expenses, the court must consider:<sup>48</sup>

- The time and labor required;
- The novelty and difficulty of the questions involved and the skill required to perform the services properly;
- Whether performance of the work precludes other possible compensable work;
- 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.

## Types of Guardianship

Florida law recognizes several types of guardianships, including:<sup>49</sup>

- **Natural guardians:** Parent(s) of natural or adopted minor children, unless their parental rights have been terminated.
- **Guardians of minors:** A person, appointed by the court, who has the powers and responsibilities of a parent for a minor, but is not the natural parent or adoptive parent of the minor.
- **Preneed guardian for a minor:** A person nominated in a written declaration by the minor's parents to serve as guardian if the last surviving parent becomes incapacitated or dies. The declaration must be filed with the clerk of court and produced when a petition for incapacity of the last surviving parent or the appointment of a guardian upon the death of the last surviving parent is filed.
- **Standby guardianship:** A person, appointed by the court upon petition by the natural guardian or guardian of a minor, who assumes the duties of guardianship for a minor upon the death or adjudication of incapacity of the last surviving natural guardian or appointed guardian.
- **Emergency temporary guardianship:** Granted where an emergency exists prior to the appointment of a guardian, but after a petition for determination of incapacity is filed, and someone is needed to give approval for an alleged incapacitated person to receive immediate services. An emergency temporary guardian is appointed by the court to serve during the emergency only and the alleged incapacitated person must be found to be in imminent danger.
- **Preneed guardians:** A person named in a written declaration by a competent adult to serve as guardian in the event of the incapacity of that adult. The declaration may be filed with the clerk of court and produced when a petition for incapacity is filed. The preneed guardian assumes the duties of a guardian immediately upon adjudication of incapacity.
- **Foreign guardians:** A guardian appointed to a ward in another state or country before the ward moved to this state. The original appointment must have occurred when both the guardian and the ward lived in the same state or country outside of Florida.

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<sup>46</sup> s. 744.108(1), (8), F.S.

<sup>47</sup> s. 744.108(5), (7), F.S.

<sup>48</sup> s. 744.108(2), F.S.

<sup>49</sup> ch. 744, part III, F.S.



Before a plenary guardian is appointed, current law requires the least restrictive form of guardianship to be made available to assist people who are only partially incapable of caring for their needs, and alternatives to guardianship and less restrictive means of assistance, including, but not limited to guardian advocates, should also be explored.<sup>50</sup>

### Alternatives to Guardianship

In 2016, Florida Supreme Court Chief Justice Jorge Labarga established a Guardianship Workgroup to better protect vulnerable people subject to guardianship and guardian advocacy.<sup>51</sup> The workgroup was charged with examining “judicial procedures and best practices pertaining to guardianship,” focusing on topics including, but not limited to, the use of least restrictive alternatives that address specific functional limitations.

The workgroup recommended requiring guardianship petitioners to explain why alternatives to guardianship are insufficient and expand the types of alternatives that must be addressed. The report specified alternatives to guardianship include supported decision making,<sup>52</sup> durable powers of attorney,<sup>53</sup> trusts, banking services, advance directives,<sup>54</sup> medical proxies,<sup>55</sup> and representative payees.<sup>56</sup>

Additionally, the workgroup recommended the petitioner specify whether he or she is aware of the existence of a designation of preneed guardian and to identify his or her efforts in determining whether a designation exists in the petition for appointment of a guardian.

### Do-Not-Resuscitate Orders

An advance directive is any witnessed, oral statement or written instruction that expresses a person’s desires about any aspect of his or her future health care, including designation of a health care surrogate, a living will, or an anatomical gift.<sup>57</sup> Designation of a health care surrogate, a living will, or an anatomical gift each serve different purposes and have their own unique requirements and specifications under the law.

One type of advance directive, a “do not resuscitate order” (DNRO) results in the withholding of cardiopulmonary resuscitation and any other resuscitative treatment from an individual if a DNRO is presented to the health care professional treating the patient. For the DNRO to be valid, it must be on the form adopted by the Department of Health, signed by the patient’s physician and by the patient; or, if the patient is incapacitated, the patient’s health care surrogate or proxy, court-appointed guardian, or attorney in fact under a durable power of attorney.<sup>58</sup> A DNRO may be revoked by the patient at any time, if signed by the patient or the patient’s health care surrogate, proxy, court-appointed guardian or a person acting under a durable power of attorney.<sup>59</sup>

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<sup>50</sup> s. 744.1012(1), F.S.

<sup>51</sup> Judicial Management Council, *Guardianship Workgroup Final Report* (June 2018) (on file with Health and Human Services Committee staff).

<sup>52</sup> Supported decision making involves trusted supports used to enhance an individual’s capacity in the decision making process, enabling them to retain autonomy in life decisions. National Center for Biotechnology Information, *Supported Decision Making in Serious Mental Illness*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6093283/> (last visited Mar. 24, 2020).

<sup>53</sup> s. 709.2102, F.S. A power of attorney (POA) is a writing that grants authority to an agent to act in the place of the principal, and a durable power of attorney is a POA which is not terminated by the principal’s incapacity.

<sup>54</sup> See s. 765.101(1), F.S.

<sup>55</sup> See ss. 765.101(19) and 765.401, F.S.

<sup>56</sup> 42 U.S. Code § 1007. A representative payee is person deemed qualified by the Social Security Administration who manages the social security benefits of another person who is incapable of managing his or her own benefits.

<sup>57</sup> s. 765.101, F.S.

<sup>58</sup> s. 401.45(3), F.S.

<sup>59</sup> *Id.*

Currently, Florida law does not require a guardian to obtain any approval from the court in order to execute DNRO on behalf of a ward. Execution of a DNRO only requires the signatures of the guardian and a physician.

### Guardian Investigations

In July 2019, Steven Stryker, a ward appointed to professional guardian Rebecca Fierle,<sup>60</sup> died in a Tampa hospital after choking on food.<sup>61</sup> Hospital staff could not perform lifesaving procedures on him due to a DNRO executed by Fierle.<sup>62</sup>

The Clerk of the Circuit Court and Comptroller of Okaloosa County (Clerk)<sup>63</sup> investigated complaints filed against Fierle with the OPPG. The Clerk found Fierle had executed a DNRO against Stryker's wishes, violating the standards of practice established by the OPPG.<sup>64</sup> The Clerk reported that Fierle kept a DNRO in place after a psychiatrist who examined Stryker while he was admitted to St. Joseph's Hospital determined Stryker had the ability to decide that he wanted to live and stated that Stryker wanted to be resuscitated.

The Orange County Comptroller also investigated Fierle's guardianships.<sup>65</sup> The Comptroller found Fierle had submitted over 6,000 invoices and charges of at least \$3.9M to AdventHealth for payments between January 2009 and June 2019.<sup>66</sup> The payments were made on behalf of 682 patients. The Comptroller also found that in some cases Fierle had billed both AdventHealth and the wards for identical fees and services. Additionally, the Comptroller identified conflicts of interest, including several situations in which Fierle had previous relationships with wards to whom she was appointed guardian and did not disclose these relationships in the petitions for appointment of a guardian.

An Orange County judge removed Fierle from nearly 100 cases to which she had been appointed.<sup>67</sup> Fierle has appealed the judge's decision.<sup>68</sup> In a letter to the OPPG, Fierle resigned from all appointed guardianship cases (approximately 450 in 13 counties) in July, 2019.<sup>69</sup> As of February, 2020, Fierle was charged with abuse and neglect of an elderly person and was arrested in Marion County.<sup>70</sup> She was released on bond.<sup>71</sup> FDLE's investigation remains active.<sup>72</sup>

### Effect of the Bill

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<sup>60</sup> The Orlando Sentinel, *Florida's Troubled Guardian Program*, <https://www.orlandosentinel.com/news/florida/guardians/> (last visited Dec. 6, 2019).

<sup>61</sup> Adrianna Iwasinski, *Orange commissioners approve new position to help monitor guardianship cases*, Click Orlando (Oct. 22, 2019), <https://www.clickorlando.com/news/2019/10/23/orange-commissioners-approve-new-position-to-help-monitor-guardianship-cases/> (last visited Dec. 9, 2019).

<sup>62</sup> *Id.*

<sup>63</sup> J.D. Peacock II, Clerk of the Circuit Court and Comptroller Okaloosa County, Florida, *OPPG Investigation Case Number 19-064* (July 9, 2019), <https://www.scribd.com/document/417992870/Fierle-State-Report> (last visited Dec. 6, 2019).

<sup>64</sup> *Id.*

<sup>65</sup> Orange County Comptroller, *Report No. 479 – Investigation of Payments Made to Professional Guardian – Rebecca Fierle by AdventHealth*, <https://occompt.com/wpfb-file/rpt479-pdf/> (last visited Dec. 6, 2019).

<sup>66</sup> *Id.*

<sup>67</sup> *Supra* note 60.

<sup>68</sup> *Id.*

<sup>69</sup> Greg Angel, *Embattled Guardian Resigns From Cases Statewide; Criminal Investigation Continues*, Spectrum News 13 (July 29, 2019), <https://www.mynews13.com/fl/orlando/crime/2019/07/29/embattled-guardian-resigns-from-cases-statewide> (last visited Jan. 24, 2020).

<sup>70</sup> WFTS Digital Staff, *Rebecca Fierle, guardian accused of causing death, arrested in Marion County* ABC Action News, WFTS Tampa Bay (Feb. 10, 2020), <https://www.abcactionnews.com/news/state/rebecca-fierle-guardian-accused-of-causing-death-arrested-in-marion-county> (last visited Mar. 18, 2020).

<sup>71</sup> WESH 2 News, *Embattled former Central Florida guardian arrested in relation to DNR order death*, <https://www.wesh.com/article/embattled-former-central-florida-guardian-arrested-in-relation-to-dnr-order-death/30863705> (last visited Mar. 18, 2020).

<sup>72</sup> *Id.*

The bill proposes changes to ch. 744, F.S., relating to the appointment of a guardian, orders not to resuscitate, information required to be disclosed in petitions for appointment of a guardian, mandated guardianship reports, and conflicts of interest.

### Appointment of a Guardian

The bill requires petitions for appointment of a guardian or professional guardian to include:

- Information on any other type of guardianship under part III of ch. 744, F.S., or alternatives to guardianship the alleged incapacitated person has designated, is currently in or has been in previously;
- The reasons why a guardian advocate or other alternatives to guardianship are insufficient; and
- Whether the proposed guardian is a professional guardian.

Under the bill, alternatives to guardianship include an advance directive under s. 765.101, F.S., a durable power of attorney as provided in ch. 709, F.S., a representative payee under 42 U.C.S. s. 1007, or a trust instrument under s. 736.0103, F.S.

The bill requires the court to inquire into and consider potential disqualifications which would prohibit a person from being appointed as a guardian and potential conflicts of interest when appointing a guardian to a ward. The bill also prohibits professional guardians from petitioning for their own appointment to wards, unless they are relatives of those prospective wards. Public guardians are permitted to petition for their own appointment to a person of limited financial means when their compensation for caring for such a person would be paid from the OPPG.

### Conflict of Interest

The bill prohibits a guardian from offering, paying, soliciting, or receiving certain benefits or engaging in split-fee arrangements in return for referring, soliciting, or engaging in a transaction for goods or services on behalf of an alleged incapacitated person, minor, or ward for past or future goods or services.

Additionally, unless prior approval is obtained by the court or such a relationship existed before appointment of the guardian and is disclosed in the petition, the bill prohibits a guardian from having any specified interest with:

- The ward;
- The judge presiding over the case;
- Any member of the appointed examining committee;
- Any court employee involved in the guardianship process; or
- The attorney for the ward.

### Powers and Duties of the Guardian

The bill requires the initial guardianship plan and the annual guardianship plan to include:

- Any preexisting do-not-resuscitate orders and advance directives;
- The date an order or directive was signed;
- Whether the order or directive has been suspended by the court; and
- A description of the steps taken to identify and locate such information.

Additionally, a declaration of all remuneration received by the guardian from any source for services rendered to or on behalf of the ward must be included in the annual guardianship report. Remuneration

is defined as “any payment or other benefit made directly or indirectly, overtly or covertly, or in cash or in kind to the guardian”.

### Do-Not-Resuscitate Orders

The bill requires a guardian to obtain court approval before signing a DNRO. If a ward is facing exigent circumstances, the court must hold a preliminary hearing within 72 hours after the filing of the petition and either make a ruling immediately after the preliminary hearing or conduct an evidentiary hearing within four days after the preliminary hearing and make a ruling immediately after the evidentiary hearing.

Under the bill, the court is not required to use the procedure for extraordinary authority under s. 744.3725, F.S., before granting approval to a guardian to sign a DNRO under this bill. This means that the court is not required to personally meet with the ward, appoint an independent attorney to act on behalf of the ward, receive medical, psychological, and social evaluations of the ward, and make a finding that the ward lacks capacity to make a decision on his or her own behalf and that the authority requested is in the best interest of the ward.

The bill provides an effective date of July 1, 2020.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

The bill would have an indeterminate impact on state courts workload. The State Courts Administrator estimates it is likely that there will be an increase in judicial workload due to inquiries the court would be required to make under the bill. The impact is indeterminate due to the unavailability of data needed to quantifiably establish the increase in judicial time and workload as a result of the proposed changes in the bill.<sup>73</sup>

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

#### **1. Revenues:**

None.

#### **2. Expenditures:**

The bill would have an indeterminate impact on the county Clerks. The Florida Court Clerks and Comptrollers Association (Clerks) estimates it is likely that there will be an increase in the number of items the Clerk’s staff will have to review and will need to modify their internal procedures to accommodate the proposed changes in the bill, but the impact is indeterminate. The Clerks also estimate there will be an increase in auditing if additional complaints are received relating to “do not resuscitate orders,” assuming the number of court hearings do not increase. If the number of court hearings increases, the Clerks will have an impact due to court docketing and related duties. The

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<sup>73</sup> Office of the State Courts Administrator, *2020 Judicial Impact Statement – HB 709*, December 5, 2019.

impact is indeterminate due to the unavailability of data needed to establish an increase in workload relating to guardianship cases.<sup>74</sup>

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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<sup>74</sup> Florida Court Clerks & Comptrollers Association, *FCCC Bill Analysis – HB 709*, December 10, 2019.