

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: SB 994

INTRODUCER: Senator Passidomo

SUBJECT: Guardianship

DATE: January 14, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Delia	Hendon	CF	<b>Favorable</b>
2.			JU	
3.			RC	

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## I. Summary:

SB 994 makes a number of changes to chapter 744 of the Florida Statutes to improve guardianship laws in the state. The bill adds additional factors for a court to consider when appointing a guardian and provides that a guardian may only consent to or authorize a do-not-resuscitate order with court approval. The bill provides additional requirements for a petition for the appointment of a guardian and also defines the term "alternatives to guardianship." The bill creates an additional requirement for an initial guardianship plan and provides additional requirements for annual guardianship reports, as well as additional requirements for an annual guardianship plan. Finally the bill revises provisions relating to conflicts of interest for professional guardians.

The bill could have an indeterminate fiscal impact on the state court system and has an effective date of July 1, 2020.

## II. Present Situation:

### 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. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship.

There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.<sup>1</sup> 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

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

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.<sup>2</sup>

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.<sup>3</sup> A fiduciary relationship exists between two persons when one of them is under a duty to act or to give advice for the benefit of another upon matters within the scope of that relationship.<sup>4</sup> The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.<sup>5</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out his or her responsibilities in an informed and considered manner.

Section 744.361, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward and his or her overall physical and social health. A guardian must file with the court an initial guardianship report,<sup>6</sup> an annual guardianship report,<sup>7</sup> and an annual accounting of the ward's property.<sup>8</sup> The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.<sup>9</sup>

At the heart of a court's interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446, F.S., states that the "fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law." In the event of a breach by the guardian of the guardian's fiduciary duty, the court must take the necessary actions to protect the ward and the ward's assets.<sup>10</sup>

### **Professional Guardians**

In Florida, a "professional guardian" means any guardian who has, at any time, rendered services to three or more wards as their guardian.<sup>11</sup> A professional guardian must register annually with the Statewide Public Guardianship Office.<sup>12</sup> Professional guardians must receive a minimum of 40 hours of instruction and training and a minimum of 16 hours of continuing education every 2 years after the initial educational requirement is met. The instruction and education must be completed through a course approved or offered by the Statewide Public Guardianship Office.<sup>13</sup>

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<sup>2</sup> See generally, s. 744.102(12), F.S.

<sup>3</sup> *In re Guardianship of Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

<sup>4</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>5</sup> *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

<sup>6</sup> Section 744.362, F.S.

<sup>7</sup> Section 744.367, F.S.

<sup>8</sup> Section 744.3678, F.S.

<sup>9</sup> Section 744.368, F.S.

<sup>10</sup> Section 744.446(4), F.S.

<sup>11</sup> Section 744.102(17), F.S.

<sup>12</sup> Section 744.2002(1)F.S.

<sup>13</sup> Section 744.2003(3), F.S.

A professional guardian is subject to a level 2 background check,<sup>14</sup> an investigation of the guardian's credit history,<sup>15</sup> and is required to demonstrate competency to act as a professional guardian by taking an examination approved by the DOEA.<sup>16</sup> These requirements do not apply to a professional guardian or the employees of that professional guardian when that guardian is a:

- Trust company;
- State banking corporation;
- State savings association authorized and qualified to exercise fiduciary powers in this state; or
- National banking association or federal savings and loan association authorized and qualified to exercise fiduciary duties in this state.<sup>17</sup>

### **Determining Incapacity**

The process to determine incapacity and the appointment of a guardian begins with a petition filed in the appropriate circuit court. A petition may be executed by an adult and must be served on and read to the alleged incapacitated person. The notice and copies of the petition must be provided to the attorney for the alleged incapacitated person and served on all next of kin identified in the petition.<sup>18</sup>

In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.<sup>19</sup> The court must enter a written order determining incapacity after finding that a person is incapacitated with respect to the exercise of a particular right or all rights. A person is determined to be incapacitated only with respect to those rights specified in the court's order.<sup>20</sup> When an order determines that a person is incapable of exercising delegable rights, the court must consider whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. If an alternative to guardianship will not sufficiently address the problems of the incapacitated person, a guardian will be appointed.<sup>21</sup>

### **Court Proceedings**

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.<sup>22</sup> At any time, any interested person, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan or is exceeding his or her authority under the guardianship plan and is not acting in the best interest of the ward. If the petition for review is found to be without merit the court may assess costs and attorney fees against the petitioner.<sup>23</sup>

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<sup>14</sup> Section 744.2003(5), F.S.

<sup>15</sup> Section 744.2003(4), F.S.

<sup>16</sup> Section 744.2003(6), F.S.

<sup>17</sup> Section 744.2003(10), F.S.

<sup>18</sup> Section 744.331(1), F.S.

<sup>19</sup> Section 744.331(5)(c), F.S.

<sup>20</sup> Section 744.331(6), F.S.

<sup>21</sup> Section 744.331(6)(b), F.S.

<sup>22</sup> Section 744.372, F.S.

<sup>23</sup> Section 744.3715, F.S.

A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee.<sup>24</sup> Fees and costs incurred are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>25</sup>

A ward has the right to be restored to capacity at the earliest possible time.<sup>26</sup> The ward, or any interested person filing a suggestion of capacity, has the burden of proving the ward is capable of exercising some or all of the rights which were removed. Immediately upon the filing of the suggestion of capacity, the court must appoint a physician to examine the ward. The physician must examine the ward and file a report with the court within 20 days.<sup>27</sup> All objections to the suggestion of capacity must be filed within 20 days after formal notice is served on the ward, guardian, attorney for the ward, if any, and any other interested persons designated by the court.<sup>28</sup> If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the court must set the matter for hearing.<sup>29</sup>

### **Guardian Compensation**

The guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, 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>30</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>31</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>32</sup>

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<sup>24</sup> Section 744.108(1), F.S.

<sup>25</sup> Section 744.108(8), F.S.

<sup>26</sup> Section 744.3215(1)(c), F.S.

<sup>27</sup> Section 744.464(2)(b), F.S.

<sup>28</sup> Section 744.464(2)(d), F.S.

<sup>29</sup> Section 744.464(2)(e), F.S.

<sup>30</sup> s. 744.108(1), (8), F.S.

<sup>31</sup> s. 744.108(5), (7), F.S.

<sup>32</sup> s. 744.108(2), F.S.

### **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:

- 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.<sup>33</sup>

A guardian with such a conflict of interest may be removed from the guardianship by the court.<sup>34</sup>

### **End of Life Decision-Making**

Florida law defines an advance directive as any witnessed, oral statements or written instructions that express a person's desires about any aspect of his or her future health care, including the designation of a health care surrogate, a living will, or an anatomical gift.<sup>35</sup> Designation of each of these can 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 (CPR) 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>36</sup> Florida's DNRO form is printed on yellow paper.<sup>37</sup> It is the responsibility of the Emergency Medical Services provider to ensure that the DNRO form or the patient identification device, which is a miniature version of the form, accompanies the patient.<sup>38</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>39</sup>

### **Media Reports**

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<sup>33</sup> s. 744.446, F.S.

<sup>34</sup> *Id.*

<sup>35</sup> s. 765.101, F.S.

<sup>36</sup> s. 401.45(3), F.S.

<sup>37</sup> Rule 64J-2.018, F.A.C.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

In July 2019, Steven Stryker, a ward appointed to professional guardian Rebecca Fierle,<sup>40</sup> died in a Tampa hospital after choking on food.<sup>41</sup> Hospital staff could not perform lifesaving procedures on him due to a DNRO executed by Fierle.<sup>42</sup>

It was also reported that Fierle had billed AdventHealth, an Orlando area hospital, approximately \$4 million for services rendered to wards<sup>43</sup> (all of whom were also AdentHealth patients) and developed conflicts of interest with members of appointed examining committees used to determine incapacity of a person.<sup>44</sup>

The Clerk of the Circuit Court and Comptroller of Okaloosa County (Clerk)<sup>45</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>46</sup> The Clerk reported that Fierle kept a DNRO in place after a psychiatrist examined Stryker while he was admitted to St. Joseph's hospital and 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>47</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>48</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>49</sup> Fierle has appealed the judge's decision.<sup>50</sup> In a letter to the OPPG, Fierle resigned from all appointed guardianship cases (approximately 450 in 13 counties) in July, 2019.<sup>51</sup> As of

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<sup>40</sup> The Orlando Sentinel, *Florida's Troubled Guardian Program*, <https://www.orlandosentinel.com/news/florida/guardians/> (last visited Jan. 7, 2020).

<sup>41</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 Jan. 7, 2020).

<sup>42</sup> *Id.*

<sup>43</sup> *Supra* note 56.

<sup>44</sup> Monivette Cordeiro, *Florida's troubled guardianship system riddled with conflicts of interest, critics claim | Special Report*, Orlando Sentinel (Aug. 14, 2019), <https://www.orlandosentinel.com/news/florida/guardians/os-ne-guardianship-examining-committee-conflicts-20190814-osbepwlnfezneolyxtvzmrhy-story.html> (last visited Jan. 7, 2020).

<sup>45</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 Jan. 7, 2020).

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

<sup>47</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 Jan. 7, 2020).

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

<sup>49</sup> *Supra* note 56.

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

<sup>51</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. 7, 2020).

November 2019, Fierle is under criminal investigation by the Florida Department of Law Enforcement.<sup>52</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 744.312, F.S., to specifically require the court to consider a guardian's potential disqualification under s. 744.309, F.S., or potential conflicts of interest under s. 744.446, F.S., before appointing them as a guardian.

**Section 2** amends 744.3215, F.S., to specifically address do-not-resuscitate (DNR) orders by requiring that a guardian may not consent to or authorize a do-not-resuscitate order without court approval.

**Section 3** amends s. 744.334, F.S., requiring that a petition for the appointment of a guardian state the reasons why an individual should be appointed guardian and whether he or she is a professional guardian. The bill also adds the word "alleged" before "incapacitated person or minor," and provides that the petition must explain any other type of guardianship under part III of Chapter 744 or "alternatives to guardianship," which it defines as an advance directive, a durable power of attorney, a representative payee, or a trust instrument. The bill requires the petition to state why a guardian advocate or other alternatives to guardianship are insufficient to meet the needs of the alleged incapacitated person or minor. The bill further provides that if the petitioner is a professional guardian, he or she may not petition for his or her own appointment unless the petitioner is a relative of the alleged incapacitated person or minor.

**Section 4** amends s. 744.363, F.S., to require specific information relating to preexisting do-not-resuscitate orders or preexisting advance directives to be included in an initial guardianship plan in addition to the contents that are presently required.

**Section 5** amends s. 744.367, F.S., to require that guardians make disclosures to the court of all remuneration received by the guardian from any source for services rendered to or on behalf of the ward as part of their annual guardianship report. This applies to both guardians of the person and guardians of the property. The bill also defines remuneration as any payment or other benefit made directly or indirectly, overtly or covertly, or in cash or in kind to the guardian.

**Section 6** amends s. 744.3675, F.S., to require specific information relating to preexisting do-not-resuscitate orders or preexisting advance directives to be included in the annual guardianship plan in addition to the contents that are presently and statutorily required to be included.

**Section 7** amends s. 744.446, F.S., relating to conflicts of interest. The bill renumbers subsections (2), (3), and (4), and adds a new subsection (2), to more specifically prohibit guardians from offering, paying, soliciting, or receiving a commission, benefit, bonus, rebate, or kickback, directly or indirectly, overtly or covertly, or in cash or in kind, or engage in a split-fee arrangements in return for referring, soliciting, or engaging in a transaction for goods or services

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<sup>52</sup> Greg Angel, *Watchdog: Judge Dismisses Embattled Guardian's Appeal to Reverse Court Order*, Spectrum News 13 (Nov. 19, 2019) <https://www.mynews13.com/fl/orlando/news/2019/11/19/watchdog-fierle-appeal-to-reverse-court-order-dismissed> (last visited Jan. 7, 2020).

on behalf of an alleged incapacitated person or minor, or a ward, for past or future goods or services. Additionally, the bill specifies who the guardian may not have any conflict of interest with as it relates to the guardianship, such as 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.

**Section 8** provides an effective date of July 1, 2020.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The State Courts Administrator predicts an increase in workload and judicial time as a result of modifying screening and monitoring requirements of guardians and guardianship plans. The impact is unquantifiable at this time but any judicial workload increases resulting from the bill will be reflected in the Supreme Court of Florida's annual opinion, In re: Certification of Need for Additional Judges.



The Florida Court Clerks and Comptrollers (Clerks) estimates that there will be an increase in the number of items the Clerk's staff will need to review, but the impact is indeterminate. The Clerks also estimate there will be an increase in auditing if additional complaints are received relating to DNROs, assuming the number of court hearings do not increase. If the number of court hearings do increase, there will be an impact due to court docketing and related duties.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 744.312, 744.3215, 744.334, 744.363, 744.367, 744.3675, and 744.446 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.