

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1351 Pub. Rec./Guardianship Data Transparency

**SPONSOR(S):** Children, Families & Seniors Subcommittee, Chaney

**TIED BILLS:** HB 1349 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Morris	Brazzell
2) Civil Justice & Property Rights Subcommittee			
3) Government Operations Subcommittee			
4) Health & Human Services Committee			

### SUMMARY ANALYSIS

When an individual is unable to make legal decisions regarding his or her person or property, a guardian may be appointed by the court to act on his or her behalf. A person served by a guardian is termed a ward, and a guardian may oversee a ward's person or property or both.

When a person becomes a ward, that person loses those civil and legal rights transferred to the guardian. When a guardian is given full (plenary) guardianship, the guardian has authority to make all decisions for a ward, such as deciding where the ward lives and to sell the ward's property.

Ch. 744, F.S., outlines Florida's system of guardianship. Florida's guardianship system involves a variety of parties, including alleged incompetent persons and wards; guardians; circuit judges who appoint guardians and oversee their service to individual wards; the clerks of court, who receive filings by guardians and audit them; attorneys, who represent guardians and alleged incompetent persons; family members of wards; and the Department of Elder Affairs, which regulates professional guardians.

Various task forces, and situations where guardians made adverse and unethical decisions regarding wards, have highlighted the lack of data regarding Florida's guardianship system. A recent task force found that basic information, such as the number of wards in the state, is unavailable.

CS/HB 1351 creates a public record exemption for personal identifying information of a ward or petitioner held by the Florida Association of Court Clerks and Comptrollers and the clerks of court in the guardianship database created under CS/HB 1349. Such information may be released to another governmental entity for use in the performance of its official duties and responsibilities.

The bill provides a public necessity statement as required by the Florida Constitution, specifying that the exemption is necessary because the public disclosure of sensitive information could lead to abuse or exploitation of vulnerable citizens and avoiding exploitation or abuse is a reason why guardianships are sought for such individuals.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2027, unless saved from repeal by reenactment by the Legislature.

The bill has no fiscal impact on state or local governments.

The bill will become effective on the same date that CS/HB 1349 or similar legislation takes effect if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

**Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.<sup>1</sup> The public also has a right to notice of and access to meetings of any collegial public body of the executive branch of state government or of any local government.<sup>2</sup> The Legislature's meetings must also be open and noticed to the public, unless there is an exception.<sup>3</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>4</sup> guarantees every person's right to inspect and copy any state or local government public record.<sup>5</sup> The Sunshine Law<sup>6</sup> requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.<sup>7</sup>

The Legislature may create an exemption to public records or open meetings requirements.<sup>8</sup> An exemption must specifically state the public necessity justifying the exemption<sup>9</sup> and must be tailored to accomplish the stated purpose of the law.<sup>10</sup> There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be confidential and exempt.<sup>11</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(b).

<sup>3</sup> FLA. CONST., art. I, s. 24(b).

<sup>4</sup> Ch. 119, F.S.

<sup>5</sup> "Public record" means "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." S. 119.011(12), F.S. "Agency" means "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." S. 119.011(2), F.S. The Public Records Act does not apply to legislative or judicial records, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), however, the Legislature's records are public pursuant to s. 11.0431, F.S.

<sup>6</sup> S. 286.011, F.S.

<sup>7</sup> S. 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

<sup>8</sup> FLA. CONST., art. I, s. 24(c).

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

## Exempt Records

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.<sup>12</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>13</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>14</sup>

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:<sup>15</sup>

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>16</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

### 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>17</sup> Adjudicating a person totally incapacitated and in need of a guardian deprives a person of his or her civil and legal rights.<sup>18</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>19</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

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<sup>12</sup> See *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S. [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." *Id.* at 686.

<sup>13</sup> S. 119.15, F.S. S. 119.15(4)(b), F.S. provides that an exemption is considered to be substantially amended if it expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

<sup>14</sup> S. 119.15(3), F.S.

<sup>15</sup> S. 119.15(6)(b), F.S.

<sup>16</sup> Art. I, s. 24(c), FLA. CONST.

<sup>17</sup> s. 744.102(9), F.S.

<sup>18</sup> s. 744.1012(1), F.S.

<sup>19</sup> s. 744.1012(2), F.S.

believes the individual to be incapacitated, including the rights the alleged incapacitated person is incapable of exercising.<sup>20</sup> Once a person has been adjudicated incapacitated (termed a “ward”), the court appoints a guardian, and the letters of guardianship are issued.<sup>21</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>22</sup>

### Relationship Between Guardian and Ward

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:

- 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.<sup>25</sup>

Additionally, s. 744.446, F.S., states the fiduciary relationship 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. As such, the guardian must act in the best interest of the ward and carry out his or her responsibilities in an informed and considered manner. Should a guardian breach his or her fiduciary duty to the ward, the court is authorized to intervene.<sup>26</sup>

A guardian can either be a 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>

### Appointment of a Guardian

In Florida, the circuit court appoints a guardian to a ward.

The following may be appointed guardian of a ward:

- Any resident of Florida who is 18 years of age or older and has full legal rights and capacity;
- A nonresident if he or she is related to the ward by blood, marriage, or adoption;
- A trust company, a state banking corporation, or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in Florida;
- A nonprofit corporation organized for religious or charitable purposes and existing under the laws of Florida;
- A judge who is related to the ward by blood, marriage, or adoption, or has a close relationship with the ward or the ward’s family, and serves without compensation;

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<sup>20</sup> s. 744.3201(2)(f), F.S.

<sup>21</sup> ss. 744.3371-744.345, F.S.(?)

<sup>22</sup> s. 744.2005, F.S.

<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.*

- A provider of health care services to the ward, whether direct or indirect, when the court specifically finds that there is no conflict of interest with the ward's best interests; or
- A for-profit corporation that meets certain qualifications, including being wholly owned by the person who is the circuit's public guardian in the circuit where the corporate guardian is appointed.<sup>30</sup>

### 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>31</sup>

In each case when a court appoints a professional guardian and does not use a rotation system for such appointment, the court must make specific findings of fact stating why the person was selected as guardian in the particular matter involved.<sup>32</sup> The findings must reference the following factors that must be considered by the court:

- Whether the guardian is related by blood or marriage to the ward;
- Whether the guardian has educational, professional, or business experience relevant to the nature of the services sought to be provided;
- Whether the guardian has the capacity to manage the financial resources involved;
- Whether the guardian has the ability to meet the requirements of the law and the unique needs of the individual case;
- The wishes expressed by an incapacitated person as to who shall be appointed guardian;
- The preference of a minor who is age 14 or over as to who should be appointed guardian;
- Any person designated as guardian in any will in which the ward is a beneficiary; and
- The wishes of the ward's next of kin, when the ward cannot express a preference.<sup>33</sup>

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>34</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>35</sup> However, the court may waive this limitation if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience.<sup>36</sup>

The court may not appoint a professional guardian who is not registered by the Office of Public and Professional Guardians.<sup>37</sup> The following are disqualified from being appointed as a guardian:

- 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

<sup>30</sup> s. 744.309, F.S.

<sup>31</sup> s. 744.102(17), F.S.

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

<sup>33</sup> s. 744.312(2)-(3), F.S.

<sup>34</sup> s. 744.312(5), F.S.

<sup>35</sup> s. 744.312(4)(b), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> s. 744.2003(9), F.S.

- 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.<sup>38</sup>

A court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.<sup>39</sup>

### Powers and Duties of the Guardian

The guardian of an incapacitated person may exercise only those rights removed from the ward and delegated to the guardian.<sup>40</sup> The guardian has a great deal of power when it comes to managing the ward's estate. Some of these powers require court approval before they may be exercised.

Examples of Powers That May Be Exercised By a Guardian	
With Court Approval <sup>41</sup>	Without Court Approval <sup>42</sup>
<ul style="list-style-type: none"> <li>• <b>Enter into contracts that are appropriate for, and in the best interest of, the ward.</b></li> <li>• <b>Perform, compromise, or refuse performance of a ward's existing contracts.</b></li> <li>• <b>Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein.</b></li> <li>• <b>Borrow money to be repaid from the property of the ward or the ward's estate.</b></li> <li>• <b>Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward.</b></li> <li>• <b>Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate.</b></li> <li>• <b>Exercise any option contained in any policy of insurance payable to the ward.</b></li> <li>• <b>Make gifts of the ward's property to members of the ward's family in estate and income tax planning.</b></li> <li>• <b>Pay reasonable funeral, interment, and grave marker expenses for the ward.</b></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>

There are also a number of duties imposed 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;<sup>43</sup>
- 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

<sup>38</sup> s. 744.309(3), F.S.

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

<sup>40</sup> s. 744.361(1), F.S.

<sup>41</sup> s. 744.441, F.S.

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

<sup>43</sup> s. 744.362(1), F.S.

- 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.<sup>44</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:

- Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity 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;
- 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>45</sup>

A guardian found to have such conflict of interest is subject to removal from the guardianship.<sup>46</sup>

### Office of Public and Professional Guardians

While the court appoints guardians to wards, the Department of Elder Affairs (DOEA) regulates professional guardians to ensure that they receive required training and comply with standards of practice.

In 1999, the Legislature created the "Public Guardianship Act" and established the Statewide Public Guardianship Office (SPGO) within DOEA.<sup>47</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 appoints 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.

There are 17 public guardian offices that serve all 67 counties.<sup>48</sup> In fiscal year 2018-2019, the public guardian offices served 3,816 wards.<sup>49</sup> Currently, there are more than 550 professional guardians registered with the Office of Public and Professional Guardians within the Department of Elder Affairs.<sup>50</sup>

The executive director of the OPPG is responsible for the oversight of all public and professional guardians.<sup>51</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;

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<sup>44</sup> s. 344.361, F.S.

<sup>45</sup> s. 744.446, F.S.

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

<sup>47</sup> s. 744.701, F.S. (1999).

<sup>48</sup> Florida Department of Elder Affairs, 2020 Summary of Programs and Services, *available at* [https://elderaffairs.org/wp-content/uploads/2020\\_SOPS\\_C.pdf](https://elderaffairs.org/wp-content/uploads/2020_SOPS_C.pdf) (last visited Jan. 21, 2022).

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

<sup>50</sup> Office of Public and Professional Guardians, Department of Elder Affairs, <https://elderaffairs.org/programs-services/office-of-public-professional-guardians-oppg/> (last visited Jan. 21, 2022).

<sup>51</sup> s. 744.2001(2)(a), F.S.

- 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.

OPPG has no role in the appointment of a guardian to an individual ward, or in removing a guardian from service to any ward—these are decisions of the court. Neither does OPPG maintain any data on the wards served by guardians.

### Guardian Compensation

The guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf,<sup>52</sup> is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the assets of the guardianship estate unless the court finds the requested compensation to be substantially unreasonable.<sup>53</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>54</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>55</sup>

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<sup>52</sup> Fees for legal services may include customary and reasonable charges for work performed by legal assistants employed by and working under the direction of the attorney. S. 744.108(4), F.S.

<sup>53</sup> s. 744.108(1), (8), F.S.

<sup>54</sup> s. 744.108(5), (7), F.S.

<sup>55</sup> s. 744.108(2), F.S.



## Guardian Investigations

In July 2019, Steven Stryker, a ward appointed to professional guardian Rebecca Fierle,<sup>56</sup> died in a Tampa hospital after choking on food.<sup>57</sup> Hospital staff could not perform lifesaving procedures on him due to a Do Not Resuscitate Order (DNRO) executed by Fierle.<sup>58</sup>

It was also reported that Fierle had billed AdventHealth, an Orlando area hospital, approximately \$4 million for services rendered to wards<sup>59</sup> and developed conflicts of interest with members of appointed examining committees used to determine incapacity of a person.<sup>60</sup>

The Clerk of the Circuit Court and Comptroller of Okaloosa County (Clerk)<sup>61</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>62</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>63</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>64</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. In a letter to the OPPG, Fierle resigned from all appointed guardianship cases (approximately 450 in 13 counties) in July, 2019.<sup>65</sup> A judge was reported, during a hearing on Fierle, to have stated that she had been unaware of the total number of wards being served by Fierle.<sup>66</sup>

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<sup>56</sup> The Orlando Sentinel, *Florida's Troubled Guardian Program*, <https://www.orlandosentinel.com/news/florida/guardians/> (last visited Jan. 21, 2022).

<sup>57</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. 21, 2022).

<sup>58</sup> *Id.*

<sup>59</sup> *New audit shows AdventHealth paid embattled guardian Rebecca Fierle nearly \$4 million*, ABC Action News WFTS, <https://www.abcactionnews.com/news/local-news/i-team-investigates/new-audit-shows-adventhealth-paid-embattled-guardian-rebecca-fierle-nearly-4-million> (last visited Jan. 21, 2022).

<sup>60</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-osbekpwlnfezneolyxtvzmrhy-story.html> (last visited Jan. 21, 2022).

<sup>61</sup> J.D. Peacock II, Clerk of the Circuit Court and Comptroller Okaloosa County, Florida, *OPPG Investigation Case Number 19-064* (July 9, 2019).

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

<sup>63</sup> Orange County Comptroller, *Report No. 479 – Investigation of Payments Made to Professional Guardian – Rebecca Fierle by AdventHealth*.

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

<sup>65</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. 21, 2022).

<sup>66</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. 23, 2022).

## Data regarding Guardianship in Florida

Several task forces have highlighted the challenge of serving wards without available data, regionally and statewide.

For instance, the 2014 Restoration of Capacity Study and Work Group Report stated:

“There is little uniform data collected on guardianships in Florida. The Office of the State Courts Administrator reports at the state level only the number of guardianships filed in a given year and the dispositions of those cases. The state does not keep a record of the total number of persons under guardianship, whether the guardianship is plenary or partial, the nature of the disability of the person under guardianship, or a host of other data crucial to making informed decisions about systems change. Additionally, there is neither central reporting of the number of Suggestions of Capacity filed nor restoration outcomes in general.”<sup>67</sup>

A 2022 report by a task force convened by the Florida Court Clerks and Comptrollers Association including stakeholders representing a variety of perspectives, including wards, guardians, attorneys, legislators, courts, and clerks of courts, recommended the creation of a statewide data collection system for all guardianship cases. The task force had found that Florida has little state-wide formalized guardianship case data collection or sharing processes in place, and that much of the needed information exists in the 67 separate Florida county clerks of courts' case maintenance systems.

According to the task force report, the purpose for creating a statewide data collection system for all guardianship cases is to provide meaningful and objective data for improvements to guardianship system, while increasing the public trust with the transparency of non-confidential information. The task force report also recommended that judicial circuits collect and report a variety of data, such as regarding the existence of advance directives, powers of attorney, health care surrogate designations, and other similar legal documents; and guardianship case information and changes.<sup>68</sup>

CS/HB 1349 requires the DOEA to collect specified information regarding wards, guardians, cases, and related details. That bill requires DOEA to maintain a real-time dashboard which provides the following information:

- The number of open, active, and ongoing guardianship cases in the state.
- The number of guardianship cases closed in the preceding fiscal year.
- The number of guardianship cases opened in the preceding fiscal year.
- The percentage of cases with a nonprofessional guardian or a family member acting as the guardian.
- The average age of an adult ward.
- The percentage of cases in which there is a guardian of the person but not a guardian of the property.
- The percentage of cases that involve a plenary guardian.
- The percentage of adult wards who have had their rights restored.
- The percentage of cases that have been closed due to the death of the ward.
- The percentage of cases in which the petitioner who filed the petition alleging incapacity was a family member of the ward.
- The percentage of cases in which there were allegations of exploitation by a family member before the appointment of a guardian.
- The number of legally sufficient complaints about the conduct of professional guardians which are investigated by the Statewide Investigation Alliance.

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<sup>67</sup> Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, Feb. 28, 2014, <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>

<sup>68</sup> Florida Clerks of Court and Comptrollers, *Guardianship Improvement Task Force Final Report*, Jan. 2022

<https://guardianshippf.wpengine.com/wp-content/uploads/2022/01/GITFRreport-Jan2022.pdf>.

- The percentage of substantiated complaints and the number of unsubstantiated complaints submitted to the Statewide Investigation Alliance.
- The primary deficiencies of professional guardians alleged in the complaints submitted to the Statewide Investigation Alliance, broken down by subject matter.
- The number and type of disciplinary actions taken against a professional guardian.

The Guardianship Data Commission created under the bill may require additional information be reported on the dashboard.

### **Effect of the Bill**

The bill creates a public record exemption for personal identifying information of a ward or petitioner held by the Florida Association of Court Clerks and Comptrollers and the clerks of court in the guardianship database created under CS/HB 1349. Such information may be released to another governmental entity for use in the performance of its official duties and responsibilities.

The bill provides a public necessity statement as required by the Florida Constitution, specifying that the exemption is necessary because the public disclosure of sensitive information could lead to abuse or exploitation of vulnerable citizens and avoiding exploitation or abuse is a reason why guardianships are sought for such individuals.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2027, unless saved from repeal by reenactment by the Legislature.

This bill provides that the act shall take effect on the same date that CS/HB 1349 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law. CS/HB 1349 has an effective date of July 1, 2022.

#### **B. SECTION DIRECTORY:**

**Section 1:** amends s. 744.2104, relating to access to records by the Office of Public and Professional Guardians; confidentiality.

**Section 2:** provides a statement of public necessity.

**Section 3:** provides an effective date, contingent on HB 1349 or similar legislation taking effect, under certain circumstances.

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

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

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

None.

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

None.

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

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

None.

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

None.

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

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Current law provides sufficient rulemaking authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

CS/HB 1349 no longer requires the Department of Elder Affairs to hold the data protected under CS/HB 1351. Instead, CS/HB 1349 requires the Florida Association of Court Clerks and Comptrollers, Inc., to implement a database to facilitate improving court oversight of guardianship cases. CS/HB 1349 also no longer specifies in detail the data that would be maintained that would be covered by a public records exemption.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 3, 2022, the Children, Families, and Seniors Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Protects data held in a database established by the Florida Association of Court Clerks and Comptrollers, Inc., and the clerks of court;
- Provides a public necessity statement; and
- Requires an Open Government Sunset Review in 2027, and repeals the exemption at that time, unless saved from repeal by the Legislature.

This analysis is drafted to the committee substitute as passed by the Children, Families, and Seniors Subcommittee.