

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1119 Withholding or Withdrawal of Life-prolonging Procedures
SPONSOR(S): Health & Human Services Committee, Children, Families & Seniors Subcommittee, Berfield
TIED BILLS: **IDEN./SIM. BILLS:** SB 1098

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	17 Y, 0 N, As CS	Osborne	Brazzell
2) Health & Human Services Committee	18 Y, 0 N, As CS	Osborne	Calamas

SUMMARY ANALYSIS

When an individual is unable to make legal decisions regarding his or her person or property, a court may appoint a guardian to act on his or her behalf; a person served by a guardian is referred to as a ward, and a guardian may oversee a ward's person or property or both. When a guardian is given full (plenary) guardianship, the guardian has authority to make all decisions for a ward, including where the ward lives, whether to sell the ward's property, and consenting to health care treatment. In Florida, circuit court judges appoint guardians and oversee guardianships, as governed by ch. 744, F.S.

Competent adults may formulate, in advance, preferences regarding a course of health care treatment in the event that injury or illness causes severe impairment or loss of decision-making capacity, known as an advance directive. Advance directives may include the designation of a health care surrogate, a person chosen by the principal of the advance directive to make health care decisions should the principal become unable to do so. One form of advance directive is a "do-not-resuscitate order," (DNRO) which indicates that if a person experiences cardiac or pulmonary arrest, then medical professionals are not to provide resuscitative treatments. These orders are most often used by those experiencing a terminal or end-stage condition, or in a persistent vegetative state. Since 2020, Florida law has required guardians obtain court approval prior to signing a DNRO for a ward in all instances.

CS/CS/HB 1119 creates s. 744.4431, F.S., relating to guardianship power regarding life-prolonging procedures. This section requires a professional guardian to petition the court for the authority to withhold or withdraw life-prolonging procedures prior to making such decisions, with certain exceptions. The bill outlines the information required in the petition, the circumstances in which a court hearing is required, and the timeframe a hearing must be held and a ruling reached. The bill specifies circumstances in which a professional guardian may withdraw or withhold life-prolonging procedures or execute a DNRO for a ward without additional court approval.

The bill requires that a guardian file a ward's advanced directive with the court upon discovery, regardless of when the advanced directive is discovered. At such time, the court must determine whether the advance directive is an alternative to guardianship and the appropriate delegation of decision-making authority between the guardian and health care surrogate. Such information on advance directives and existing DNROs, and the date such directives and orders were signed, must be included in the initial and annual guardianship plans.

The bill allows health care surrogates and agents under a durable power of attorney, who retain authority to make health care decisions for a ward, to exercise such authority, including the withholding or withdrawal of life-prolonging procedures, without additional approval by the court. Additionally, the bill allows professional guardians to make decisions consistent with an advance directive or power of attorney without additional court approval when such decision-making authority has been expressly delegated to the guardian by the court.

The bill has an indeterminate, insignificant negative fiscal impact on the state courts. The bill has no fiscal impact on local governments.

The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME: h1119c.HHS

DATE: 4/20/2023

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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 has been appointed by the court to act on behalf of a person who has been adjudicated incapacitated, thereafter referred to as a ward. A guardian may oversee a ward's person or property, or both.¹

A ward's civil and/or legal rights are transferred to the guardian so that the guardian may make decisions on the ward's behalf.² The rights which are transferred to the guardian are determined by the court, and are highly dependent on the individual situation with the intention of preserving an individual's rights whenever possible. Guardianship is considered the most restrictive form of protection and supervision of an individual as it inherently entails the removal of certain rights.³ In recognition of the highly restrictive nature of guardianship, the Legislature has specified its intent that the courts utilize the least restrictive form of guardianship appropriate for the incapacitated persons, and that alternatives to guardianship and less restrictive means of assistance be explored before appointing a guardian.⁴

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.⁵ The alleged incapacitated person is then appointed an attorney and partakes in an examination conducted by a committee of three medical experts.⁶ The committee members each provide a report to the court including a determination of whether the individual lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination of incapacity, as well as an evaluation of the person's ability to retain specific rights.⁷ The final determination of incapacity is made by the court.

Once a person has been adjudicated incapacitated, the court appoints a guardian⁸, and the letters of guardianship defining the terms of the guardianship are issued.⁹ The order appointing a guardian must be consistent with the ward's welfare and safety, must be the least restrictive option that is appropriate, and must reserve to the ward the right to make decisions in all matters commensurate with his or her ability to do so.¹⁰

Relationship Between Guardian and Ward

¹ S. 744.102(9), F.S.

² Guardianship Improvement Task Force. *Final Report: January 2022*. Available at <https://www.guardianshipimprovementtaskforce.com/report/> (last visited April 19, 2023).

³ *Id.*

⁴ S. 744.1012(2), F.S.

⁵ S. 744.3201, F.S.

⁶ S. 744.331, F.S. The committee is appointed by the court. One member of the committee must be a psychiatrist or other physician. The remaining committee members must be either a psychologist, gerontologist, psychiatrist, physician, advanced practice registered nurse, registered nurse, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or any other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.

⁷ S. 744.331(3)(g), F.S.

⁸ S. 744.2005, F.S.

⁹ S. 744.345, F.S.

¹⁰ S. 744.2005(3), F.S.

The relationship between a guardian and his or her ward is a fiduciary one.¹¹ 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.¹² The guardian, as fiduciary, must:¹³

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

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.¹⁴ 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 obligated to intervene to protect the ward and the ward's interests.¹⁵

A guardian's decision-making authority is either "limited" or "plenary" in nature.¹⁶ A limited guardian is appointed to exercise the specific legal rights and powers designated by the court after the ward has been found to lack 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.¹⁷ A person for whom a limited guardian has been appointed retains all legal rights except those that have been specifically granted to the guardian by the court.¹⁸ 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.¹⁹

Appointment of a Guardian

In Florida, a guardian is appointed to a ward by the circuit court. Any of the following persons or entities may be appointed as guardian to a ward:²⁰

- 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

Professional guardians are any 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

¹¹ *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.

¹² *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

¹³ S. 744.361, F.S.

¹⁴ S. 744.446, F.S.

¹⁵ S. 744.446(5), F.S.

¹⁶ S. 744.102(9)(a), F.S.

¹⁷ *Id.*

¹⁸ S. 744.2005(7), F.S.

¹⁹ S. 744.102(9)(b), F.S.

²⁰ S. 744.309, F.S.

considered a professional guardian.²¹ Public guardians are a category of professional guardians who may be appointed to serve individuals of limited financial means if there is no family member, friend, or other entity willing and qualified to serve as guardian.²² Professional guardians, including public guardians, are overseen by the Office of Public and Professional Guardians (OPPG) within the Department of Elderly Affairs (DOEA).²³ OPPG is responsible for regulating professional guardians.²⁴

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.²⁵ The court must consider, and the findings must reference, the following factors:²⁶

- 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, current law prohibits the court from giving 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.²⁷ 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.²⁸ 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.²⁹

A professional guardian must be registered with OPPG in order to be appointed as a guardian by the court.³⁰ The following are disqualified from being appointed as a guardian:³¹

- A person convicted of a felony;
- A person who is incapable of discharging the duties of a guardian due to incapacity or illness, or who 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, if such guardian retains that previous professional or business relationship (with exceptions);

²¹ S. 744.102(17), F.S.

²² S. 744.2007, F.S.

²³ S. 744.2001, F.S.

²⁴ *Id.*

²⁵ S. 744.312(4)(a), F.S.

²⁶ See s. 744.312(2)-(3), F.S.

²⁷ S. 744.312(5), F.S. See also, s. 744.3031, F.S., an emergency temporary guardian may be appointed if prior to the formal appointment of a guardian, there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

²⁸ S. 744.312(4)(b), F.S.

²⁹ *Id.*

³⁰ S. 744.2003(9), F.S.

³¹ S. 744.309(3), 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; or
- Any other person for whom serving as guardian would constitute a conflict of interest.

Powers and Duties of the Guardian

Florida law outlines the rights which a ward retains after the appointment of a guardian,³² and those rights which may be removed from the ward and delegated to the guardian by the court.³³ Rights that may be removed from a ward and delegated to the guardian include the right to travel, contract, determine his or her residence, and to consent to medical and mental health treatment.³⁴ A guardian may only exercise the rights which have been removed the ward and delegated to the guardian.³⁵

The guardian has a significant amount of decision-making authority in regards to the management of a ward's estate. Additional court approval is required before certain powers may be exercised by a guardian.

Examples of Powers That May Be Exercised By a Guardian ³⁶	
With Court Approval	Without Court Approval
<ul style="list-style-type: none"> • Enter into contracts that are appropriate for, and in the best interest of, the ward. • Perform, compromise, or refuse performance of a ward's existing contracts. • Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein. • Borrow money to be repaid from the property of the ward or the ward's estate. • Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward. • Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate. • Make gifts of the ward's property to members of the ward's family in estate and income tax planning. • Pay reasonable funeral, interment, and grave marker expenses for the ward. 	<ul style="list-style-type: none"> • Retain assets owned by the ward. • Receive assets from fiduciaries or other sources. • Insure the assets of the estate against damage, loss, and liability. • Pay taxes and assessments on the ward's property. • Pay reasonable living expenses for the ward, taking into consideration the ward's current finances. • Pay incidental expenses in the administration of the estate. • Prudently invest liquid assets belonging to the ward. • Consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise of the ward. • 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.

State law imposes specific responsibilities on guardians consistent with the basic duties of a fiduciary. For example, guardians must file initial and annual guardianship reports,³⁷ and an annual accounting of the ward's property with the court.³⁸ These statutory obligations ensure a base level of oversight and engagement with the courts to protect and preserve the property of the ward, as well as the ward's

³² See 744.3215(1), F.S. Such rights retained by a ward include the right to counsel, the right to receive visitors and communicate with others, and the right to privacy, among others.

³³ S. 744.3215, F.S.

³⁴ *Id.*

³⁵ S. 744.361(1), F.S.

³⁶ S. 744.441, F.S.

³⁷ S. 744.367, F.S.

³⁸ S. 744.3678, F.S.

overall physical and social health.³⁹

Initial and Annual Guardianship Plans

Within 60 days of appointment, a guardian must file an initial guardianship report with the court.⁴⁰ The required contents of the initial guardianship report depend upon the specific powers that have been delegated to the guardian. A guardian of the property must include a verified inventory, while a guardian of the person must include an initial guardianship plan.⁴¹ Initial guardianship plans must contain certain information specified in statute including information regarding the provision of medical, mental health, or personal care services for the welfare of the ward; the kind of residential setting best suited for the needs of the ward; the provision of social and personal services for the welfare of the ward; and a list of any preexisting orders not to resuscitate or advance directives.⁴²

Guardians must also file an annual guardianship report with the court. The annual guardianship report must be filed within 90 days following the last day of the anniversary month of appointment.⁴³ The annual plan must cover the coming fiscal year, ending on the last day in the anniversary month.⁴⁴ Similar to the initial guardianship report, the annual guardianship report for a guardian of the person must include an annual guardianship plan⁴⁵ updating information regarding the medical and mental health conditions, treatment, and rehabilitation needs of the ward; the residence of the ward; the social condition of the ward; and a list of any preexisting orders not to resuscitate or advance directives.⁴⁶

End of Life Decision-making

Competent adults may formulate, in advance, preferences regarding a course of treatment in the event that injury or illness causes severe impairment or loss of decision-making capacity, known as an advance directive. An advance directive is a witnessed, oral statement or written instruction that expresses 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.⁴⁷ The 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.⁴⁸

Living Wills

A living will is an advanced directive that indicates a person's preferences for the provision, withholding, or withdrawal of life-prolonging procedures in the event that such person has a terminal condition, end-stage condition, or is in a persistent vegetative state.⁴⁹ Life-prolonging procedures are defined as any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.⁵⁰ The terms of a living will are entered into by a competent adult and indicate their personal treatment preferences and goals should they be unable to make medical decisions for themselves.

Health Care Surrogates and Proxies

A health care surrogate is a competent adult who has been expressly designated by a principal via an

³⁹ S. 744.362, F.S.

⁴⁰ S. 744.362, F.S.

⁴¹ *Id.*

⁴² S. 744.363, F.S.

⁴³ S. 744.367(1), F.S.

⁴⁴ *Id.*

⁴⁵ S. 744.367(1) and (3)(a), F.S.

⁴⁶ S. 744.3675, F.S.

⁴⁷ S. 765.101, F.S.

⁴⁸ *Id.*

⁴⁹ S. 765.302(1), F.S.

⁵⁰ S. 765.101(12), F.S.

advance directive to make health care decisions on the behalf of the principal upon the principal's incapacity or at another point in time as determined by the principal.⁵¹ A health care surrogate's authority to make health care decisions includes all of the following:

- Provide informed consent;
- Refuse or withdraw consent for any health care, including life prolonging procedures and mental health treatment unless otherwise stated in the advance directives;
- Apply for private, public, government, or veterans' benefits to defray the cost of health care;
- Access to all records of the principal reasonably necessary to make health care decisions and apply for benefits; and
- Make an anatomical gift pursuant to part V of Ch. 765, F.S.

If a person fails to designate a surrogate or a designated surrogate is unwilling or unable to perform his or her duties, a health care facility may seek the appointment of a proxy to make health care decisions on behalf of such person should they become incapacitated.⁵² Florida law directs health care facilities to appoint proxies according to a prioritized list based on the proposed-proxy's relationship to the patient. The following persons may serve as proxy to an incapacitated patient, in order of priority: the patient's court-appointed guardian with health care decision-making authority, the patient's spouse, adult child, parent, adult sibling, an adult relative who has shown special care and concern for the patient, a close friend, or a clinical social worker under specific circumstances.⁵³

A surrogate appointed by the principal or by proxy, may, subject to any limitations and instructions provided by the principal, take the following actions:⁵⁴

- Make all health care decisions for the principal during the principal's incapacity;
- Consult expeditiously with appropriate health care providers to provide informed consent, including written consent where required, provided that such consent reflects the principal's wishes or the principal's best interests;
- Have access to the appropriate medical records of the principal;
- Apply for public benefits for the principal and have access to information regarding the principal's income, assets, and financial records to the extent required to make such application;
- Authorize the release of information and medical records to appropriate persons to ensure continuity of the principal's health care; and
- Authorize the admission, discharge, or transfer of the principal to or from a health care facility.

Physicians should recognize the patient's proxy or surrogate as an extension of the patient, entitled to the same respect as the competent patient.⁵⁵

Power of Attorney

A power of attorney is a document granting authority to an agent to act in the place of the principal.⁵⁶ A "durable" power of attorney is a kind of power of attorney that cannot be terminated by the principal's incapacity.⁵⁷ Among many other things, a durable power of attorney may be used to allow another person to make health care decisions on behalf of an incapacitated principal.⁵⁸

⁵¹ S. 765.202, F.S.

⁵² S. 765.401(1), F.S.

⁵³ S. 765.401(1), F.S.

⁵⁴ S. 765.205, F.S.

⁵⁵ American Medical Association. *Code of Ethics. Opinion 2.1.2: Decisions for Adult Patients Who Lack Capacity*. Available at <https://code-medical-ethics.ama-assn.org/ethics-opinions/decisions-adult-patients-who-lack-capacity> (last visited March 10, 2023).

⁵⁶ S. 709.2102(9), F.S.

⁵⁷ S. 709.2102(4), F.S.

⁵⁸ The Florida Bar. *Consumer Pamphlet: Florida Power of Attorney, About the Power of Attorney*. Available at <https://www.floridabar.org/public/consumer/pamphlet13/#about> (last visited March 10, 2023).

Do-Not-Resuscitate Orders

One type of advance directive, a “do-not-resuscitate order” (DNRO), results in cardiopulmonary resuscitation (CPR) and all other resuscitative treatment being withheld in the event of cardiac or pulmonary arrest. A DNRO is a physician’s order to withhold resuscitation if a patient experiences cardiac or pulmonary arrest; while a living will may result in the withholding of life-prolonging care under pre-considered circumstances, a DNRO is a direction for health care providers not to administer resuscitation in the immediate circumstance.⁵⁹

DNROs are typically used by individuals experiencing a terminal or end-stage condition, or in a persistent vegetative state, but in some circumstances may also be used by healthy individuals. The DNRO indicates that resuscitative measures are not to be initiated; however, comfort care measures, such as oxygen administration, hemorrhage control and pain management, may still be used.⁶⁰ DNROs are honored in most health care settings including hospices,⁶¹ adult family care homes,⁶² assisted living facilities,⁶³ emergency departments,⁶⁴ nursing homes,⁶⁵ home health agencies,⁶⁶ and hospitals.⁶⁷ DNROs are also honored by emergency medical responders outside of a health care setting provided that the form is prominently displayed or the patient identification device, a miniature version of the form, accompanies the patient.⁶⁸

In order for the DNRO to be valid, it must be on the form adopted by the Department of Health, printed on yellow paper, and signed by the patient’s physician or physician assistant and the patient.⁶⁹ If the patient is incapacitated, then the form must be signed by the patient’s health care surrogate or proxy, court-appointed guardian, or attorney in fact under a durable power of attorney.⁷⁰ A DNRO does not expire;⁷¹ however, it may be revoked by the patient, or the patient’s representative who signed the original form, at any time, either in writing, by physical destruction of the form, or by orally expressing contrary intent.⁷²

End of Life Decision-making by Guardians

Existing Advance Directives

Under current law, a ward’s preexisting advance directives must be considered by the court in the process of delegating authorities to a guardian.⁷³ A list of preexisting DNROs and advance directives must be included in the initial and annual guardianship plans,⁷⁴ and where appropriate, an advance directive may be considered an alternative to guardianship.⁷⁵ If an advance directive exists, the court must determine what health care decision-making authority will be delegated to the guardian or remain

⁵⁹ Florida Department of Health. *Do Not Resuscitate Frequently Asked Questions*. Available at <https://www.floridahealth.gov/about/patient-rights-and-safety/do-not-resuscitate/faq-page.html#difference> (last visited March 9, 2023).

⁶⁰ *Id.*

⁶¹ S. 400.6095, F.S.

⁶² S. 429.73, F.S.

⁶³ S. 429.255, F.S.

⁶⁴ S. 395.1041, F.S.

⁶⁵ S. 400.142, F.S.

⁶⁶ S. 400.487, F.S.

⁶⁷ S. 395.1041, F.S.

⁶⁸ Rule 64J-2.018, F.A.C.

⁶⁹ S. 401.45(3), F.S.

⁷⁰ *Id.*

⁷¹ *Supra*, note 68.

⁷² *Id.*

⁷³ S. 744.345, F.S.

⁷⁴ Ss. 744.363 and 744.3675, F.S.

⁷⁵ S. 744.334, F.S.

with the health care surrogate.⁷⁶ The court has the authority to modify or revoke the advance directive upon specific findings of fact. If the court provides that the guardian is responsible for making health care decisions in accordance with a ward's existing advance directive, then the guardian assumes the responsibilities of health care surrogate.⁷⁷

Do-Not-Resuscitate Orders

Since 2020, Florida law has required guardians obtain court approval prior to signing a DNRO for a ward.⁷⁸ Under current law, a guardian must petition the court and obtain court approval prior to 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.⁷⁹

The impetus for this change in law was a high-profile case in which Steven Stryker, a ward appointed to professional guardian Rebecca Fierle, died in a Tampa hospital after choking on food. Hospital staff could not perform potentially lifesaving measures on him due to a DNRO executed by Fierle, in spite of Stryker and his daughter requesting the order be removed.⁸⁰ The event led to a series of changes to the state's guardianship statute⁸¹ relating to the appointment of guardians, conflicts of interest, and the powers and duties of guardians.⁸²

Guardianship Improvement Task Force

The Guardianship Improvement Task Force (Task Force) was convened in 2021 with the mission of studying the current status of Guardianships in Florida, with the goal of making recommendations to improve the protection of wards throughout the state.⁸³ The Task Force was composed of members identified and selected through stakeholder agencies and organizations that have direct involvement with Florida's guardianship system. Task Force members represented diverse perspectives and expertise in guardianship-related issues ranging from wards and ward advocates, to public guardians, and probate judges.⁸⁴

The Task Force engaged in information gathering meetings, received presentations by experts, and took public comment over the course of three months.⁸⁵ The Task Force Final Report was published in January 2022 and detailed 10 focus areas that should be addressed to improve Florida's guardianship system. The Report also included possible methods for implementing recommended policies, suggestions for future consideration, and an extensive review of public comments received by the Task Force. Included in the subjects reviewed by the Task Force were the use of DNROs for wards, and the treatment of advance directives by the courts.

The Florida Public Guardian Coalition submitted concerns to the Task Force regarding the unintended consequences of the current process requiring court approval before a guardian may sign a DNRO for a ward. These consequences include physicians' refusal to provide comfort care to wards and resuscitations that led to injuries and undue suffering of wards. Public guardians reported barriers to obtaining necessary DNROs such as delays in filing petitions associated with gathering materials for the petitions and physician's refusal to sign forms or appear before the court for hearings. Additionally,

⁷⁶ S. 744.3115, F.S.

⁷⁷ *Id.* See also, 765.205, F.S.

⁷⁸ S. 744.441(2), F.S.

⁷⁹ S. 744.441(2), F.S.

⁸⁰ Adrianna Iwasinski, *Orange commissioners approve new position to help monitor guardianship cases*, Click Orlando (Oct. 22, 2019). Available at <https://www.clickorlando.com/news/2019/10/23/orange-commissioners-approve-new-position-to-help-monitor-guardianship-cases/> (last visited April 16, 2023).

⁸¹ See Ch. 744, F.S.

⁸² Greg Angel, Spectrum News 13, *DeSantis Signs Florida Guardianship Bill Into Law, Expanding Oversight of Program* (June 19, 2020). Available at <https://www.mynews13.com/fl/orlando/news/2020/06/19/desantis-signs-florida-guardianship-bill-into-law> (last visited March 11, 2023).

⁸³ *Supra*, note 2, p. 5.

⁸⁴ *Id.*

⁸⁵ *Supra*, note 2, at p. 10.

some circuit courts did not adjust their operations to accommodate the law's timelines for making decisions in these cases, resulting in delays harmful to the wards.⁸⁶

Among the recommendations made by the Task Force were several suggestions relating to the treatment of ward's advanced directives by the courts. The Task Force reported numerous public comments asserting that advanced directives are routinely being ignored or unlawfully removed by judges.⁸⁷ The Task Force suggested that judges be required to produce specific written findings of fact in any instance in which an advance directive is not honored.⁸⁸ The Task Force also acknowledged that legal documents such as advanced directives are often stored somewhere safe, secure, and private, which may result in the document not being available or able to be disclosed when needed.⁸⁹ To address this, the Task Force suggested the state consider implementing a statewide health care surrogate/proxy database to ensure that this information is available when it is needed.⁹⁰

Effect of Proposed Changes

End of Life Decision-making by Guardians

Existing Advanced Directives

CS/CS/HB 1119 outlines the responsibilities of a guardian if a ward's advance directive is discovered after the guardian has been appointed. The bill requires that a guardian file the advance directive with the courts no later than the due date of the initial guardianship report, annual guardianship plan, or the filing of a petition for the authority to withhold or withdraw life-prolonging procedures. This provision obligates a guardian to file the advance directive at the time of their next interaction with the court on the ward's case. At the time of filing, the court must determine whether the advance directive is an alternative to guardianship, and what authority the guardian will continue to exercise over health care decisions for the ward.

Health Care Surrogates

Under the bill, the court may modify or revoke the authority of a health care surrogate under an advanced directive, but a hearing must be held on the motion before the court may do so. The court is required to make specific written findings of fact after such hearing regarding the authority retained by a health care surrogate and those delegated to a guardian. The bill further specifies that a health care surrogate or agent under a durable power of attorney who retains health care decision-making authority may exercise such authority, including the withdrawal or withholding of life-prolonging procedures, without obtaining additional court approval. The court may grant a professional guardian the authority to carry out the instructions in or take actions consistent with the ward's advance directive if the court finds that the health care surrogate is unwilling or unable to act. These provisions give the court and professional guardians additional guidance for managing advance directives, and ensures that a surrogate or agent chosen by the ward prior to being adjudicated incapacitated may exercise the authority delegated to them by the ward without additional contact with the court.

Withdrawal or Withholding of Life-prolonging Procedures

CS/CS/HB 1119 revises the list of rights that may be removed from a person by the courts in an order determining incapacity and delegated to a guardian. Current law refers to a right "to consent to medical and mental health treatment;" the bill revises this right which may be delegated to a guardian as the right to "make health care decisions as defined in s. 765.101 [F.S.]." This change aligns with Ch. 765, F.S., the chapter of Florida law governing advance directives, and more accurately reflects the authority

⁸⁶ Guardianship Improvement Task Force, *Appendix M: Public Guardian DNR Legislation Unintended Consequences Examples* (January 2022). Available at <https://guardianshiptf.wpengine.com/wp-content/uploads/2022/01/GITFReportAppendix-Jan2022-Reduced.pdf> (last visited April 16, 2023).

⁸⁷ *Supra*, note 2, at p. 83

⁸⁸ *Supra*, note 2, at p. 61

⁸⁹ *Supra*, note 2, at p. 139

⁹⁰ *Id.*

being delegated to a guardian as applied. The definition specifies that court approval is required before a guardian may withdraw or withhold life-prolonging procedures from a ward, even if they have been delegated this right.

The bill creates s. 744.4431, F.S., which details the parameters of a guardian's power regarding life-prolonging procedures. The bill requires that a professional guardian petition the court for approval prior to withdrawing or withholding life-prolonging procedures or executing a DNRO for a ward, except under specified circumstances. The bill also deletes existing law requiring a guardian obtain court approval prior to signing a DNRO⁹¹ which would be redundant upon the implementation of s. 744.4431, F.S.

The bill outlines the required contents of the petition, including a description of the proposed action and documentation of the guardian's existing authority to make health care decisions for the ward, any known objections to the proposed action, a description of the ward's known wishes or why the relief sought is in the best interest of the ward, any exigent circumstances which necessitate immediate relief, and a description of the circumstances and evidence supporting the proposed action. The guardian is required to serve notice of the petition, and of any hearing, upon the ward's known next of kin and interested persons. The bill requires the guardian show clear and convincing evidence that the proposed action or decision being requested would have been the decision of the ward if they had the capacity to do so, or if there is no indication of what the ward would have chosen, that the proposed action is in the best interest of the ward.

The bill does not require that a hearing be held on the petition unless the court has been notified of an objection or conflict, a hearing is requested by the guardian, ward, or ward's attorney, or the court has insufficient information to make a determination. If a hearing is required and a ward is facing exigent circumstances, the court must hold a preliminary hearing within 72 hours of the filing of the petition and either make a ruling immediately following the hearing, or conduct an evidentiary hearing within four days of the preliminary hearing, at which time the court must immediately make a ruling.

Court approval is not required for a professional guardian to make the following decisions:

- To withdraw or withhold life-prolonging procedures by a professional guardian to whom authority has been granted to carry out the instructions in or to take actions consistent with the ward's advance directive, as long as there are no known objections.
- To execute a DNRO by a professional guardian who has been delegated health care decision-making authority if the ward is in the hospital and the following conditions are met:
 - The ward's primary treating physician and at least one consulting physician document in the ward's medical record that:
 - There is no reasonable medical probability for recovery from or a cure of the ward's underlying medical condition;
 - The ward is in an end-stage condition, a terminal condition, or a persistent vegetative state and the ward's death is imminent; and
 - Resuscitation will cause the ward physical harm or additional pain.
 - The guardian has notified the ward's known next of kin, and interested persons as directed by the court, and the decision is not contrary to the ward's expressed wishes and there are no known objections.
 - A guardian must notify the court within two business days of executing a DNRO for a ward under this provision.

Allowing a professional guardian to take actions consistent with a ward's advanced directive without additional court approval ensures that a ward's wishes established prior to incapacitation are honored at the end of their lives. Authorizing a professional guardian to execute a DNRO for a ward under specified circumstances serves to minimize undue suffering when a ward is actively dying and there is no positive outcome associated with continued efforts to resuscitate. The narrow circumstances in which a professional guardian may execute a DNRO under the bill establish safeguards with the

intention of preventing the abuse of a guardian's power, and the requirement that the guardian notify the court ensures that the decisions are not being made without some degree of oversight.

Initial and Annual Guardianship Plans

CS/CS/HB 1119 expands upon the required contents of initial and annual guardianship plans regarding a ward's preexisting DNROs and advance directives. Specifically, in addition to listing any such orders and directives, the plans must also include the date that such orders and directives were signed and whether they were revoked, modified, or suspended by the court.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 744.3115, F.S., relating to advance directives for health care.
- Section 2:** Amends s. 744.3215, F.S., relating to rights of persons determined incapacitated.
- Section 3:** Amends s. 744.363, F.S., relating to initial guardianship plan.
- Section 4:** Amends s. 744.3675, F.S., relating to annual guardianship plan.
- Section 5:** Creates s. 744.4431, F.S., relating to guardianship power regarding life-prolonging procedures.
- Section 6:** Amends s. 744.441, F.S., relating to powers of guardian upon court approval.
- Section 7:** Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate, insignificant negative fiscal impact on the state courts. This is due to an anticipated increase in judicial workload associated with the new judicial processes and hearing requirements established in the bill.⁹²

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:

⁹² Office of the State Courts Administrator, 2023 Judicial Impact Statement: HB 2023, p. 3. On file with the House of Representatives Health and Human Services Committee.

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Florida Probate Rules may need to be reviewed to ensure that they accommodate the new statutory procedures.⁹³ Legislative rule-making authority is not required for the judiciary to amend the Florida Probate Rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 15, 2023, the Children, Families, and Seniors Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment makes structural and conforming changes requiring court approval for all decisions to withdraw or withhold life-prolonging procedures, with exceptions for authorized surrogates or durable power of attorney agents, executing the ward's advance directive, and instances of a near-death ward.

On April 17, 2023, the Health and Human Services Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Directs the court and professional guardians on the management of advance directives;
- Revises the right that may be removed from a ward and delegated to a guardian regarding health care decision-making;
- Revises the process under which a guardian must petition the court for authority to withdraw or withhold life-prolonging procedures; and
- Revises the circumstances under which a guardian may execute a DNRO for a ward without obtaining prior court approval.

The bill analysis is drafted to the bill as amended by the Health and Human Services Committee.

⁹³ *Id.*