

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.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/SB 318

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Criminal and Civil Justice); Judiciary Committee; and Senators Diaz de la Portilla and Detert

SUBJECT: Guardianship Proceedings

DATE: April 23, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Harkness/Davis</u>	<u>Sadberry</u>	<u>ACJ</u>	<u>Recommend: Fav/CS</u>
3.	<u>Harkness/Cibula</u>	<u>Kynoch</u>	<u>AP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 318 amends the power of attorney and guardianship statutes to:

- Provide that a power of attorney remains in effect for a close relative when incapacity is alleged unless a petitioner makes a showing of wrongdoing or neglect by the principal;
- Permit a court to appoint the office of criminal conflict and civil regional counsel to serve as a court monitor or emergency court monitor if a ward is indigent;
- Clarify that attorneys for a ward are entitled to compensation from the guardianship estate;
- Require that an alleged incapacitated person and his or her attorney given at least 24-hours advance notice of a hearing alleging incapacity unless the petitioner demonstrates that substantial harm will occur if notice is given;
- Provide that a court may not authorize final payment for an emergency temporary guardian's fee or fees of his or her attorney until a final report is filed;
- Require a court, when modifying the authority of a health care surrogate in an advance directive, to specify in its orders to what extent a guardian's authority will supersede a health care surrogate and base that decision on findings of fact;
- Revise considerations that a court must consider when appointing a guardian;
- Authorize the use of corporate structures for public guardians who provide services to indigent and non-indigent wards, and requires that they maintain a bond or liability insurance in the amount of \$250,000;

- Clarify that expert testimony is not necessary to establish compensation for a guardian or guardian's attorney;
- Provide that when an alleged incapacitated person is determined not to be incapacitated, the examining committee will be paid from court funds for expert witnesses, not the individual's funds;
- Directs a court to remove only the rights that an alleged incapacitated person does not have the ability to exercise when delegating rights to a guardian;
- Provide a code of conduct or ethical standards for a guardian and requires the reporting of abuse of a ward to the Department of Children and Families;
- Authorize family members of wards to challenge a decision by a guardian which denies visitation to family members;
- Provide that the results of a court-ordered medical exam after a suggestion of capacity is filed is evidence that a court can use for determining capacity or restoring rights; and
- Require a court to give priority to scheduling restoration of capacity proceedings

This bill does not have a discernable fiscal impact.

This bill provides an effective date of July 1, 2015.

II. Present Situation:

Power of Attorney

A power of attorney is an instrument that grants someone authority to act as an agent for the grantor.¹ The "principal" is the individual who grants authority to the agent who then acts in place of the principal, whether the term "agent" is actually used in the writing or not.² A power of attorney that continues after the principal's incapacity is a durable power of attorney.³ Powers of attorney are often used by elderly persons to designate someone to handle their financial matters in anticipation of becoming incapacitated.⁴ A power of attorney is a low cost alternative to guardianship.

Under existing law, an alleged incapacitated person's power of attorney is automatically suspended upon the filing of a petition to determine incapacity of the principal. The result is that the agent then loses the ability to act on behalf of the principal.

Qualifications of Agents

Chapter 709, F.S., governs the creation and use of powers of attorney. Who the chapter has authorized to serve as an agent has changed over time. Before 1995, chapter 709, F.S., did not expressly limit who could serve as an agent. After the chapter was amended in 1990, agents were limited to natural persons who were at least 18 years of age and certain financial institutions

¹ BLACK'S LAW DICTIONARY 1191 (7th ed. 1999).

² Sections 709.2102 (1), (9), and (11), F.S.

³ Section 709.2014, F.S.

⁴ Donna Fuscaldo, *Why You Need a Financial Power of Attorney*, Fox Bus. News, (Jul. 16, 2013)

<http://www.foxbusiness.com/personal-finance/2013/07/16/why-need-financial-power-attorney/>.

having trust powers.⁵ In 1997, the chapter was amended to authorize a narrow category of not-for-profit corporations to serve as agents. The specific 1997 authorization stated:

A not-for-profit corporation, organized for charitable or religious purposes in this state, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt organization under 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact. Notwithstanding any contrary clause in the written power of attorney, no assets of the principal may be used for the benefit of the corporate attorney in fact,⁶ or its officers or directors.⁷

In 2011, Florida's power of attorney law was rewritten and largely conformed to the Uniform Power of Attorney Act by the National Conference of Commissioners on Uniform State Laws.⁸ As adopted in Florida, the new power of attorney law did not carry forward the provision that authorized not-for-profit corporations to serve as agents. The 2011 law, which to date remains substantially unchanged, limited those who may serve as an agent to natural persons and financial institutions. This limitation was a deviation from the uniform act, which places no limits on who may serve as an agent. However, the 2011 law allowed preexisting powers of attorney to continue in effect.⁹ As such, not-for-profit corporations may continue to serve as agents under powers of attorney executed before the October 1, 2011, effective date of the 2011 law.

Power of Attorney v. Guardianship

Under current law, not-for-profit corporations that wish to manage a person's finances must be appointed as a guardian to handle a person's financial matters. A guardianship provides for supervision of the actions of a guardian by a court. But the additional oversight comes with additional costs. The additional costs may result from attorney fees for making court filings, fees to prepare annual accountings and annual guardianship plans, and the guardian's fees.¹⁰

The major similarities and differences between a power of attorney and a guardianship are shown in the table below.

⁵ Section 708.08(2), F.S. (1995).

⁶ Under current law, attorneys in fact are known as agents.

⁷ Chapter 97-240, s. 2, Laws of Fla.

⁸ Comm. on Judiciary, The Florida Senate, *Bill Analysis and Fiscal Impact Statement for CS/SB 670* (Mar. 6, 2011), available at <http://www.flsenate.gov/Session/Bill/2011/0670/Analyses/2011s0670.ju.PDF>.

⁹ Section 709.2106(2), F.S.

¹⁰ See s. 744.108, F.S.

Power of Attorney	Guardianship
The principal selects an agent. ¹¹	A court appoints a guardian. ¹²
No similar requirement.	A guardian must pass a background check. ¹³
No similar requirement.	A guardian must have several hours of training. ¹⁴
An agent has fiduciary obligations to the principal. ¹⁵	A guardian has fiduciary responsibilities to a ward. ¹⁶
Unless otherwise provided in a power of attorney, an agent who is a “qualified agent” is entitled to reasonable compensation and reimbursement for reasonable expenses. ¹⁷	Fees for a guardian or attorney must be approved by a court. ¹⁸
An agent must: <ul style="list-style-type: none"> • Keep a record of all receipts, disbursements, and transactions; and • Maintain an inventory of the principal’s safe-deposit box.¹⁹ 	A guardian must prepare: <ul style="list-style-type: none"> • An inventory of a ward’s property;²⁰ • Annual guardianship plans;²¹ and • Annual accountings of a ward’s property.²²
The actions of an agent will not be reviewed by a court unless a person petitions a court for review of the agent’s actions. ²³	The actions of a guardian will be reviewed by a court or clerk at least on an annual basis. ²⁴
An agent is liable for the misuse of a principal’s property, ²⁵ but agents are not required to maintain a bond.	A guardian generally must maintain a bond to ensure the faithful performance of his or her duties. ²⁶

Guardianship

Background

A guardianship is a relationship based upon trust in which one person, a guardian, has the legal duty and authority to care for the person or property of another person, who is referred to as a ward. A guardianship is established because a court has determined that the ward is not capable

¹¹ Section 709.2102(11), F.S.

¹² Sections 744.3031 and 744.334, F.S.

¹³ Section 744.3135, F.S.

¹⁴ Sections 744.1085 and 744.3145, F.S.

¹⁵ Section 709.2114(1), F.S.

¹⁶ Section 744.446, F.S.

¹⁷ Section 709.2112, F.S. A qualified agent is an agent who is the principal’s spouse, or heir, a financial institution, a certified public accountant, or a natural person who has never served as an agent for more than three principals at the same time.

¹⁸ Section 744.108, F.S.

¹⁹ Section 709.2114(1)(c) and (d), F.S.

²⁰ Section 744.362(1), F.S.

²¹ Section 744.367, F.S.

²² Section 744.367, F.S.

²³ Section 709.2116, F.S.

²⁴ Sections 744.3125(1), 744.367, and 744.3678, F.S.

²⁵ Section 709.2117, F.S.

²⁶ Sections 744.1085 and 744.351, F.S.

of managing his or her affairs, generally due to infancy, incapacity, or disability.²⁷ A guardian may be appointed over the person, over the property, or both.

When a court determines that someone is incapacitated,²⁸ it must consider whether there is an alternative to guardianship which will sufficiently meet the person's needs. If no alternative can be found, then a guardian²⁹ must be appointed.³⁰ The Legislature has stated, however, that the form of assistance be chosen in each situation that least interferes with the legal capacity of someone to act on his or her behalf.³¹

Guardianship Proceedings

A guardianship proceeding is initiated in circuit court when an adult files a petition to determine incapacity and alleges specifically the factual information on which the petitioner believes the incapacity is based.³² Within 5 days after the petition is filed, the court must appoint a three member examining committee³³ to examine the allegedly incapacitated person to determine his or her incapacity. The members have 15 days³⁴ after their appointment to submit a written report to the court which sets an adjudicatory hearing to be held within 14 days³⁵ after the examining members' reports are filed. If the court finds on the basis of clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the incapacity, but only with respect to those rights specified in the order.³⁶

Powers and Duties of a Guardian

A guardian has a fiduciary relationship with a ward and is bound to act in good faith and trust on the ward's behalf. The guardian may not use that relationship for private gain except for the reimbursement of fees and expenses provided by law.³⁷ The guardian of an incapacitated person may only exercise the rights that have been removed from the ward and delegated to the guardian. In addition to performing all duties required of him or her by law, a guardian is required to file an initial guardianship report and an annual guardianship report, implement the guardianship plan, and at the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to the property.³⁸ If the guardian breaches the fiduciary duty owed to

²⁷ BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

²⁸ An "incapacitated person" is a person who has been judicially determined to lack the capacity to manage at least some of his or her property or to meet at least some of his or her essential health and safety requirements. Section 744.102(12), F.S.

²⁹ Various provisions in ch. 744, F.S., provide for a guardian ad litem, limited guardian, plenary guardian, standby guardian, foreign guardian, corporate guardian, nonprofit corporate guardian, preneed guardian, professional guardian, surrogate, and public guardian.

³⁰ Section 744.331(6)(b), F.S.

³¹ Section 744.1012, F.S.

³² Section 744.3201, F.S.

³³ One member must be a psychiatrist or other physician and the remaining members must be a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology, or other person who has special skill, training, or education to advise the court in the form of an expert opinion.

³⁴ Section 744.331(3), F.S.

³⁵ Section 744.331(5), F.S.

³⁶ Section 744.331(6), F.S.

³⁷ Section 744.446, F.S.

³⁸ Section 744.361, F.S.

the ward, the court is obligated to take the steps necessary to protect the ward and the ward's assets.³⁹

Responsibilities of the Clerk of Court and Judicial Review

The clerk of the circuit court, as custodian of the guardianship files, must review each initial and annual guardianship report, which is later reviewed by the circuit court. The court retains jurisdiction over all guardianships and must review the appropriateness and extent of a guardianship annually.⁴⁰

Termination of a Guardianship

The relationship between a guardian and ward is terminated when a ward is restored to capacity, the guardian has been unable to find the ward after a diligent search, or for a guardian of the property, when the property subject to the guardianship has been exhausted.⁴¹ The relationship is also terminated upon the death of the guardian or ward, by resignation⁴² or removal of the guardian,⁴³ or by a change or domicile to a foreign jurisdiction.⁴⁴

Resolution of Disputes Involving Guardianships

Disputes often arise in guardianship matters and involve issues such as visitation, care plans, the ward's range of choices, medical care, whether less restrictive options are available to the ward, property issues, and financial decisions. These issues are litigated, often at great expense to the ward, and burden court calendars.

Court Monitors and Emergency Court Monitors

A court is authorized under the guardianship chapter to appoint a court monitor over a matter under its jurisdiction, when an interested person inquires or upon its own motion. The order of appointment is served upon the guardian, the ward, and other interested persons as the court decides. The monitor serves to investigate, seek information, examine documents, or interview the ward and report his or her findings to the court in a report. The report is also served on the guardian, the ward, and any other person as the court decides. If the monitor's report indicates that the court needs to take action to protect the ward's interest, the court, after a hearing with notice, enters any necessary order to protect the ward or his or her estate. A court monitor may not be a family member or someone with a personal interest in the proceedings but may be allowed a reasonable fee for his or her services from the ward's property.⁴⁵

Similarly, a court may appoint a court monitor on an emergency basis without notice. To do so, the court must find that there appears to be imminent danger that the physical or mental health or

³⁹ Section 744.446, F.S.

⁴⁰ Sections 744.368 and 744.372, F.S.

⁴¹ Section 744.521, F.S.

⁴² Section 744.467, F.S.

⁴³ Section 744.474, F.S.

⁴⁴ Section 744.524, F.S.

⁴⁵ Section 744.107, F.S.

safety of the ward will be impaired, or the ward's property is in danger of being wasted or lost unless immediate action is taken. The emergency court monitor's authority expires 60 days after appointment or upon a finding of no probable cause, whichever occurs first, but may be extended for an additional 30 days upon a showing that the emergency condition still exists. The monitor has 15 days to file a report of findings and recommendation to the court after his or her appointment. As with a court monitor, the emergency monitor may be allowed a reasonable fee that is paid from the ward's property.⁴⁶

Guardian and Attorney Fees and Expenses in Guardianship Proceedings

Section 744.108, F.S., establishes that a guardian or attorney who has rendered services to the ward or the guardian on the ward's behalf is entitled to reasonable fees for those services and reimbursement for those costs. The court is given a list of factors to consider in awarding those fees. It is not clear whether s. 744.108(8), F.S., covers all requests for attorney fees or is limited to only fees for the guardian's attorney. It is also unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney.

Claims of Minors

Section 744.3025(1)(a), F.S., provides that a court may appoint a guardian ad litem before approving a settlement of a claim for a minor when the gross settlement exceeds \$15,000. The statute does not specify criteria for the court to rely upon in determining whether there is a need for the appointment of a guardian ad litem.

Emergency Temporary Guardianship

The process of appointing a guardian may take up to 34 days or longer, upon a showing of good cause. The statutes, however, provide a more timely remedy through an additional type of guardianship in an emergency situation. A court may appoint an emergency temporary guardian⁴⁷ for an allegedly incapacitated person upon a finding that there appears to be an imminent danger that:

- The physical or mental health or safety of the person will be seriously impaired; or
- The person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

Under those circumstances, a court may appoint an emergency temporary guardian after the filing of a petition for determination of incapacity and before the appointment of a guardian. The court must appoint counsel to represent the alleged incapacitated person during the proceedings. Further, the court may appoint an emergency temporary guardian on its own motion if no petition for appointment of guardian has been filed when the order determining incapacity is entered.⁴⁸

⁴⁶ Section 744.1075, F.S.

⁴⁷ Section 744.3031(1), F.S.

⁴⁸ Section 744.3031(2), F.S.

The emergency temporary guardian's authority expires 90 days after the appointment or when a guardian is appointed, whichever occurs first. The authority may be extended for 90 additional days upon a showing that the emergency conditions continue to exist.⁴⁹ The emergency temporary guardian's authority and responsibility begin when the letters of emergency temporary guardian are issued. He or she must file a final report no later than 30 days after the emergency temporary guardianship expires⁵⁰ and the final report must be served on the successor guardian and the ward.⁵¹

Advance Directives

An "advance directive" is a written document or oral statement that is witnessed in which a person states his or her desires regarding health care and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.⁵² An advance directive permits a competent adult to express his or her wishes regarding decisions relating to his or her own health, particularly the right to choose or refuse medical treatment.

Considerations When Appointing a Guardian

The statutes provide a list of factors that a court must consider when appointing a guardian.⁵³ The court must give preference to a person who:

- Is related by blood or marriage;
- Has educational, professional, or business experience that is relevant to the services needed for the ward;
- Has the capacity to manage the ward's financial resources; or
- Has the ability to meet the law's requirements and unique needs of the case at hand.

The court must also consider:

- The wishes expressed by the incapacitated person as to who the guardian should be;
- The preferences of a minor who is over the age of 14 years as to who the guardian should be;
- Any person designated as a guardian in a will under which the ward is a beneficiary.

The court shall appoint the standby guardian or preneed guardian, unless that is contrary to the best interests of the ward.⁵⁴

Guardianship Plans and Reports

For a court to monitor and supervise a guardian's compliance, the guardian must file reports and plans for review. A guardian of the person must file an annual plan which updates information about the ward's condition, specifying the ward's needs and how those needs should be met in

⁴⁹ Section 744.3031(3), F.S.

⁵⁰ Section 744.3031(7) and (8)(a), F.S.

⁵¹ Section 744.3031(8)(d), F.S.

⁵² Section 765.101, F.S.

⁵³ Section 744.312, F.S.

⁵⁴ Section 744.312(4), F.S.

the upcoming year.⁵⁵ If the court requires calendar year planning, the plan must be filed by April 1 of that plan year. If not, the plan must be filed within 90 days after the anniversary month that the letters of guardianship were filed.⁵⁶ The approved report authorizes the guardian the necessary power to act within the terms of the plan and limits the powers of the guardian to those terms.⁵⁷

Restoration to Capacity

An incapacitated person retains the right to be restored to capacity at the earliest possible time.⁵⁸ The procedure for restoration is described in s. 744.464, F.S. Any interested person or the ward may file a suggestion of capacity stating that the ward is currently capable of exercising some or all or the rights which were removed. The statute is silent on what the evidentiary standard is that is used to determine restoration of capacity. Clear guidance is needed in the statute to remove this uncertainty.

III. Effect of Proposed Changes:

Not-For-Profit Corporations as an Agent under a Power of Attorney (Section 1)

The bill essentially reinstates the authority that certain not-for-profit corporations had to serve as agents under a power of attorney before the power of attorney laws were rewritten in 2011.

Under the bill, certain not-for-profit corporations may serve as an agent for a principal under a power of attorney. A not-for-profit corporation may serve as an agent if, most significantly, the corporation was qualified as a court appointed guardian before 1996 and if the corporation:

- Maintains a fiduciary bond in the amount of \$250,000 which covers the acts or omissions of each agent or employee of the corporation who has direct contact with the principal or access to the principal's assets;
- Maintains a liability insurance policy in the amount of \$250,000 which covers any losses sustained by the principal caused by errors, omissions, or intentional misconduct committed by the corporation's officers or directors; or
- Discloses that the principal will have limited recourse against the corporation for losses caused by errors, omissions, or intentional misconduct of an employee or agent of the corporation.

The disclosure of the limited recourse available is accomplished by the principal signing a statement mandated by the bill which must be written in 14-point uppercase type. In detail, the disclosure statement advises that:

- The officers of the not-for-profit corporation are not liable for the acts of the corporation.
- The corporation does not maintain insurance or a bond to cover any losses incurred by the principle.

⁵⁵ Section 744.3675, F.S.

⁵⁶ Section 744.367(1), F.S.

⁵⁷ Section 744.369(8), F.S.

⁵⁸ Section 744.3215(1)(c), F.S.

- The assets of the corporation may not be sufficient to cover any of the principal's losses resulting from an error, omission, or intentional misconduct by an employee or agent of the corporation.

The bill further provides that if a not-for-profit corporation acting as an agent fails to maintain insurance or a bond or fails to make the required disclosure, the officers of the corporation are jointly and severally liable with the corporation for acts and omissions under a power of attorney. However, the bill does not provide liability protection to an individual who is directly responsible for an error, omission, or intentional misconduct.

By operation of existing s. 709.2112, F.S., a not-for-profit corporation that qualifies as an agent under this bill is not entitled to compensation for serving as an agent.⁵⁹

Suspension of a Power of Attorney (Sections 2, and 11)

This bill creates s. 744.3203, F.S., to address the suspension of a power of attorney when the incapacity of the principal is alleged and the authority is granted to a parent, spouse, child, or grandchild. However, the power of attorney will remain in effect pursuant to s. 709.210, F.S., for these groups unless the petitioner files a verified motion that includes specific statements of fact showing wrongdoing or neglect by the principal. When someone files a petition to determine incapacity but before the order is entered, the alleged incapacitated person's power of attorney is suspended when the petitioner files a motion stating that a power of attorney should be suspended or modified for any of the following reasons:

- The agent's decision are not consistent with the alleged incapacitated person's known desires;
- The power of attorney is invalid;
- The agent has not discharged his or her duties or incapacity or illness renders him or her incapable of discharging those duties;
- The agent has abused powers; or
- There is a danger that the property of the alleged incapacitated person may be wasted, misappropriated, or lost unless the authority is suspended.

It is not grounds to suspend a power of attorney if a dispute exists between the agent and the petitioner and the matter is appropriately resolved in a different forum or a legal proceeding other than a guardianship proceeding.

The petitioner's motion must identify one of the five grounds listed above and allege specific statements of fact demonstrating that there are grounds to justify the suspension of the power of attorney. The petitioner must sign the petition and declare that he or she has read the motion and that the facts stated in it are true to the best of his or her knowledge and belief.

The court must schedule an expedited hearing for the motion when the agent files a response. The court order must set forth what powers the agent is permitted to exercise, if any, pending the outcome of the petition to determine the principal's incapacity. The intent appears to be that, in

⁵⁹ See note 17.

an emergency situation, a specific power can be reinstated without a hearing and without notice to all interested persons.

Sections 709.2109(3) and 709.2119(2), F.S., are amended to conform to the changes created by s. 744.3203, F.S.

Court Monitors and Emergency Court Monitors (Sections 3 and 4)

The bill provides that a court may appoint the office of criminal conflict and civil regional counsel to serve as a court monitor or emergency court monitor if a ward is indigent.

Guardian and Attorney Fees and Expenses in Guardianship Proceedings (Section 5)

This bill amends s. 744.108, F.S., to clarify that attorneys for the ward, whether court appointed or otherwise, are entitled to compensation from the guardianship estate. Language is created to clarify that expert testimony is not necessary to establish compensation for the guardian or the guardian's attorney. This change will benefit wards in many instances by eliminating charges for expert witness fees.

Claims of Minors (Section 6)

The bill amends s. 744.3025(1)(a), F.S., to provide that a court may appoint a guardian ad litem only if the court believes a guardian ad litem is necessary to protect the minor's interest in a claim that exceeds \$15,000. A new subsection (3) is created and states that the settlement of a claim under this section is subject to the confidentiality provisions of the guardianship chapter.⁶⁰

Emergency Temporary Guardian (Section 7)

Notice Provisions

The bill amends s. 744.3031, F.S., relating to emergency temporary guardianships. The existing law provides that a court can appoint an emergency temporary guardian for an alleged incapacitated person before the person has notice of the proceeding. Under the bill, the alleged incapacitated person and his or her attorney must be given at least 24-hours advance notice of the hearing, unless the petitioner demonstrates that substantial harm will occur if notice is given.

Filing of a Final Report

Currently, an emergency temporary guardian must file a final report within 30 days after the emergency temporary guardianship expires.⁶¹ Under this bill, a court may not authorize final payment for the emergency temporary guardian's fee or the fees of his or her attorney until the final report is filed.

⁶⁰ This language links this bill to SB 360 which creates a public records exemption to protect the confidentiality of records relating to the settlement of a claim on behalf of a minor or ward.

⁶¹ Section 744.3031(8), F.S.

For Profit Corporation as Guardian (Section 8)

This bill amends s. 744.309, F.S., regarding who may be appointed guardian of a resident ward. Generally, there is one public guardian who handles guardianships for indigent cases in each county or each judicial circuit. The public guardian is subject to a significant amount of oversight by the state. These public guardians, however, sometimes structure their businesses in corporate forms and provide services to indigent and non-indigent wards using the same staff. The bill validates these existing practices, but limits the use of corporate structures to public guardians and requires them to maintain a bond or liability insurance in the amount of \$250,000.

Advance Directives (Section 9)

This bill amends s. 744.3115, F.S., to provide that, in circumstances in which the ward executed any advance directive before his or her incapacity, the court must specify in the order and letters of guardianship what authority the guardian may exercise over the ward regarding health care decisions and what authority, if any, the surrogate shall continue to exercise over the ward regarding health care decisions. Any order revoking or modifying the authority of the surrogate must be supported by specific written findings of fact. If the court determines that the guardian will be responsible for making health care decisions for the ward, the guardian will assume the surrogate's responsibilities. These changes are designed to strengthen a person's choice regarding who should make medical decisions on his or her behalf.

Considerations When Appointing a Guardian (Section 10)

This bill amends the existing group of factors a court must consider when determining who to appoint as a guardian for an incapacitated person. The court must now also consider the wishes of close relatives if the person cannot express a preference.

Unless a standby or preneed guardian is appointed and a court does not use a rotation system for the appointment, the court must make specific findings of fact and state why the person was selected.

Additionally, an emergency temporary guardian who is a professional guardian may not be appointed as the permanent guardian unless that person's appointment is requested by the ward's next of kin. This limitation may be waived if the guardianship has special requirements that demand that the court appoint a guardian because of his or her special talent or specific prior experience. However, the court is required to make specific findings of fact justify waiving the limitation.

Order Determining Incapacity (Section 12)***Examining Committee Fees***

In guardianship proceedings, generally the participating professionals are paid from the assets of the ward or alleged incapacitated person, including the examining committee of medical professionals. In some instances, courts have required the alleged incapacitated person who was determined to have capacity to pay the examining committee. The bill provides that when an

alleged incapacitated person is determined not to be incapacitated, the examining committee will be paid from court funds for expert witnesses, not from the alleged incapacitated person's funds.

Limitation on the Removal of Rights

Guardianship law allows a court to remove an incapacitated person's rights and delegate them to a guardian. The bill directs courts to consider an incapacitated person's unique needs and abilities and remove only the right the person does not have the capacity to exercise.

Order of Appointment of Guardian (Section 13)

The bill amends s. 744.344(4), F.S., to provide that, if a petition for the appointment of a guardian has not been ruled upon when the hearing to determine capacity is held, the court may appoint an emergency temporary guardian in the same manner and for the same purposes as the appointment of an emergency temporary guardian.

Letters of Guardianship (Section 14)

This section provides that letters of guardianship for all guardianships, not just limited guardianships, must specify the authority of a guardian with respect to a ward's advance directive. In a sense, this is a conforming change to reflect the amendment made to s. 744.3115, F.S., relating to advance directives.

Abuse, Neglect, or Exploitation by a Guardian (Section 15)

The bill creates a code of conduct or ethical standards for guardians and requires a person to report abuse, neglect, or exploitation of a ward by a guardian to the Department of Children and Families. The section must be interpreted in conformity with s. 825.103, F.S., pertaining to the exploitation of an elderly person or disabled adult.

Powers and Duties of a Guardian (Section 16)

The bill amends s. 744.361(1), F.S., to confirm that a guardian of an incapacitated person is a fiduciary who may exercise only those rights removed from the ward and delegated to the guardian. That section is further amended to provide that a guardian:

- Shall act within the scope of the authority granted and as provided by law;
- Shall act in good faith;
- May not act in a manner contrary to the ward's best interests; and
- Shall use certain special skills or expertise, if any, when acting on the ward's behalf.

The bill also requires that a guardian over the property keep clear, distinct, and accurate records of the property.

Additional responsibilities of a guardian of a ward's person are enumerated. A professional guardian must also assess the nature and extent of visitation and communication with the ward's family and friends during a personal visit.

Annual Guardianship Reports (Section 17)

Existing law allows annual guardianship plans to be filed well after the plan year has begun. The changes under this bill require guardianship plans to be filed in advance.

Judicial Review of Guardianship Reports (Section 18)

The bill amends this section to provide that a guardian may continue to act under the authority of the last approved guardianship report until the next year's report is approved.

Petition for Interim Judicial Review (Section 19)

The bill amends this section to provide that at any time, an interested person may petition the court for review that the guardian is acting in a manner contrary to the power and duties of a guardian or is denying visitation between the ward and his or her relatives.

Restoration to Capacity (Section 20)

The bill amends s. 744.464(3), F.S., to establish a "preponderance of the evidence" burden of proof for the restoration of all or some of the ward's rights and requires the court to make specific findings of fact. The bill also provides that the ward has the burden of proving that the restoration of capacity is warranted. A new provision is added stating that a court must give priority to any suggestion of capacity and must advance the cause on the calendar.⁶²

Effective Date (Section 21 and 22)

The bill takes effect July 1, 2015. The amendments made in the bill to s. 709.2109, F.S., and s. 744.3203, F.S., pertaining to terminations or suspensions of the powers of attorney, apply to all proceedings filed on or after July 1, 2015. The amendments made to other provisions of the bill apply to all proceedings pending on July 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not appear to affect the spending, revenues, or tax authority of cities or counties. As such, the bill does not appear to be a mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁶² Section 744.464(4), F.S.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 744.3203(3), F.S., suspension of a power of attorney before an incapacity determination, could be drafted more precisely for clarity. The intent appears to be that, in an emergency situation, a specific power can be reinstated without a hearing and notice being served on all interested persons. Perhaps an amendment could be developed to clarify the meaning of this subsection.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 709.2105, 709.2109, 709.2119, 744.107, 744.1075, 744.108, 744.3025, 744.3031, 744.309, 744.3115, 744.312, 744.331, 744.344, 744.345, 744.361, 744.367, 744.369, 744.3715, and 744.464.

This bill creates the following sections of the Florida Statutes: 744.3203 and 744.359.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS by Appropriations on April 21, 2015:

The committee substitute:

- Provides that a power of attorney granted to a close relative remains in effect unless the petitioner makes a showing of wrongdoing or neglect by the principal;
- Deletes provisions limiting an emergency temporary guardian's authority to 60 days and leaves in force the current 90 day authority of the emergency temporary guardian;
- Limits the use of certain guardian structures involving public and private guardianships and requires them to maintain a bond or liability insurance in the amount of \$250,000;
- Requires the court to make specific findings when selecting a professional guardian;

- Provides that the fees of a medical examining committee, when an alleged incapacitated person is found not to be incapacitated, shall be paid by the expert witness fees of the court; and
- Includes the substance of CS/SB 362, which authorizes not-for-profit corporations to serve as an agent for a principal under a power of attorney if certain conditions are satisfied.

CS by Judiciary on March 10, 2015:

The committee substitute differs from the original bill in the following ways:

- A power of attorney may be suspended automatically during guardianship proceedings but only if the petitioner specifically requests the suspension and states facts under oath supporting the suspension.
- Courts may refer guardianship matters to mediation or alternative dispute resolution.
- Courts may appoint the office of criminal conflict counsel as court monitors and emergency court monitors for indigent wards.
- Attorneys for the ward, whether court appointed or otherwise, are entitled to compensation from the guardianship estate.
- Expert testimony is not necessary to establish compensation for the guardian or the guardian's attorney.
- If a court has already appointed a guardian to represent a minor, an additional appointment of a guardian ad litem is not necessary to represent a minor's interest in the settlement of a claim.
- Advance notice is not necessary to the alleged incapacitated person and his or her attorney before appointing an emergency temporary guardian if a petitioner demonstrates that substantial harm will occur if notice is given.
- A nonprofit charitable corporation is expressly authorized to serve as a guardian.
- If a court modifies the authority of a health care surrogate in an advance directive, the modification must be based on findings of fact.
- The factors a court must consider in determining who to appoint as guardian are revised. A court is discouraged from appointing as a permanent guardian a professional guardian who has served as an emergency temporary guardian.
- A code of conduct or ethical standards for guardians is established. A person is required to report abuse, neglect, or exploitation of a ward by a guardian to the Department of Children and Families.
- Guardianship plans are required to be filed in advance of the plan year.
- Family members of wards are authorized to challenge a decision by a guardian which denies visitation to family members.
- The results of a court-ordered medical exam after a suggestion of capacity is filed is evidence that may be used for determining capacity or restoring rights. Courts must give priority to scheduling restoration of capacity proceedings.

B. Amendments:

None.