

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 1226

INTRODUCER: Senator Detert

SUBJECT: Guardianship

DATE: March 30, 2015

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

|    | ANALYST        | STAFF DIRECTOR | REFERENCE | ACTION           |
|----|----------------|----------------|-----------|------------------|
| 1. | <u>Crosier</u> | <u>Hendon</u>  | <u>CF</u> | <b>Favorable</b> |
| 2. | <u>Davis</u>   | <u>Cibula</u>  | <u>JU</u> | <b>Favorable</b> |
| 3. | _____          | _____          | <u>FP</u> | _____            |

**I. Summary:**

SB 1226 amends and reorganizes chapter 744, F.S., the Guardianship chapter. The Statewide Public Guardianship Office, which currently exists within the Department of Elderly Affairs (DOEA) and has oversight for public guardians for indigent people in the state, is expanded and renamed the Office of Public and Professional Guardians. In its new capacity, the office is given the additional responsibility of administering professional guardians who have not previously been closely regulated by the state. The newly titled office remains housed within the Department of Elderly Affairs (DOEA).

The executive director of the new Office of Public and Professional Guardians (the Office) remains an appointee of the Secretary of the DOEA, but with expanded responsibilities. The bill establishes the additional duties and responsibilities of the executive director and requires the annual registration of professional guardians. The Department of Elderly Affairs sets the fee for registration and licensing of a professional guardian which may not exceed \$500.

The Office is directed to adopt rules to establish disciplinary oversight, including receiving and investigating complaints, conducting hearings, and taking administrative action pursuant to ch. 120, F.S.

The bill also directs the chief judge in each judicial circuit to compile a list of professional guardians and provide the list to the clerk of the court. Professional guardians must be certified by the Office to be included on the list. The court appoints professional guardians in the order in which names appear on the applicable registry, unless the court makes a finding on the record to appoint a professional guardian out of order.

The bill is effective July 1, 2015. The bill will increase costs for the DOEA associated with regulating professional guardians.

## II. Present Situation:

### Guardianship

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, in situations where an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is based on the determination of a court appointed examination committee.

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.<sup>1</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>2</sup> The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.<sup>3</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner. Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward’s overall physical and social health. A guardian is also under a duty to file an initial guardianship report,<sup>4</sup> an annual guardianship report,<sup>5</sup> and an annual accounting of the ward’s property.<sup>6</sup> The reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties.<sup>7</sup>

At the heart of a court’s interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446, F.S., explicitly states that the “fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law.” Section 744.446(4), F.S., also provides that in the event of “a breach by the guardian of the guardian’s fiduciary duty, the court shall take those necessary actions to protect the ward and the ward’s assets.”

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

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

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

<sup>4</sup> Section 744.362, F.S.

<sup>5</sup> Section 744.367, F.S.

<sup>6</sup> Section 744.3678, F.S.

<sup>7</sup> Section 744.368, F.S.

## **Professional Guardians**

In Florida, a “professional guardian” means any guardian who has, at any time, rendered services to three or more wards as their guardian.<sup>8</sup> A professional guardian must register with the Statewide Public Guardianship Office annually.<sup>9</sup> There are currently 465 professional guardians registered with the Statewide Public Guardianship Office.<sup>10</sup> Professional guardians must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 years after the initial educational requirement is met. The instruction and education must be completed through a course approved or offered by the Statewide Public Guardianship Office.<sup>11</sup> Professional guardians are subject to level 2 background checks,<sup>12</sup> an investigation of the guardian’s credit history,<sup>13</sup> and are required to demonstrate competency to act as a professional guardian by taking an examination approved by DOEA.<sup>14</sup> These requirements do not apply, however, to a professional guardian or the employees of that professional guardian when that guardian is a trust company, a state banking corporation, 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 duties in this state.<sup>15</sup>

## **Public Guardianship Act**

The Public Guardianship Act is established in s. 744.701, F.S. The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.<sup>16</sup> The executive director of the Statewide Public Guardianship Office, after consultation with the chief judge and other judges within the judicial circuit may establish one or more office of public guardian within the judicial circuit.<sup>17</sup> A public guardian may serve an incapacitated person if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian.<sup>18</sup> A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.<sup>19</sup> Public guardianship offices are established in all 20 circuits in the state.<sup>20</sup>

## **Determining Incapacity**

The process to determine incapacity and the appointment of a guardian begins with petitions filed in the appropriate circuit court. The petitions must be served on and read to the alleged incapacitated person. The notice and copies of the petitioner must be provided to the attorney for

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<sup>8</sup> Section 744.102(17), F.S.

<sup>9</sup> Section 744.1083(1) and (2), F.S.

<sup>10</sup> Telephone conversation with the Department of Elder Affairs on March 9, 2015.

<sup>11</sup> Section 744.1085(3), F.S.

<sup>12</sup> Section 744.1085(5), F.S.

<sup>13</sup> Section 744.1085(4), F.S.

<sup>14</sup> Section 744.1085(6), F.S.

<sup>15</sup> Section 744.1085(10), F.S.

<sup>16</sup> Section 744.7021, F.S.

<sup>17</sup> Section 744.703(1), F.S.

<sup>18</sup> Section 744.704(1), F.S.

<sup>19</sup> Section 744.102(17), F.S.

<sup>20</sup> Meeting with the Department of Elder Affairs on February 2, 2015.

the alleged incapacitated person, and served on all next of kin identified in the petition. The notice must include the time and place for the court hearing to inquire into the capacity of the alleged incapacitated person, that an attorney has been appointed to represent that person and that, if he or she is determined to be incapable of exercising certain rights, a guardian will be appointed to exercise those rights on his or her behalf.<sup>21</sup> In the hearing on the petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.<sup>22</sup>

The court must enter a written order determining incapacity after finding that a person is incapacitated with respect to the exercise of a particular right or all rights. A person is determined to be incapacitated only with respect to those rights specified in the court's order.<sup>23</sup> When an order determines that a person is incapable of exercising delegable rights, the court must consider whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. If an alternative to guardianship will not sufficiently address the problems of the incapacitated person, a guardian will be appointed.<sup>24</sup> If a petition for appointment of a guardian has been filed, an order appointing a guardian must be issued contemporaneously with the order adjudicating the person incapacitated.<sup>25</sup> If a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine incapacity, the court may appoint an emergency temporary guardian.<sup>26</sup>

### **Court Proceedings**

The court retains jurisdiction over all guardianships and shall review the appropriateness and extent of a guardianship annually.<sup>27</sup> At any time, any interested person, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan or is exceeding his or her authority under the guardianship plan and is not acting in the best interest of the ward. If the petition for review is found to be without merit the court may assess costs and attorney fees against the petitioner.<sup>28</sup>

Section 744.108, F.S., governs the award of compensation to a guardian or attorney in connection with a guardianship. It provides that "a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward."<sup>29</sup> Section 744.108(8), F.S., provides that fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>30</sup>

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<sup>21</sup> Section 744.331(1), F.S.

<sup>22</sup> Section 744.331(5)(c), F.S.

<sup>23</sup> Section 744.331(6), F.S.

<sup>24</sup> Section 744.331(6)(b), F.S.

<sup>25</sup> Section 744.344(3), F.S.

<sup>26</sup> Section 744.344(4), F.S.

<sup>27</sup> Section 744.372, F.S.

<sup>28</sup> Section 744.3715, F.S.

<sup>29</sup> Section 744.108(1), F.S.

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

A ward has the right to be restored to capacity at the earliest possible time.<sup>31</sup> The ward, or any interested person filing a suggestion of capacity, has the burden of proving the ward is capable of exercising some or all of the rights which were removed. Immediately upon the filing of the suggestion of capacity, the court shall appoint a physician to examine the ward. The physician must examine the ward and file a report with the court within 20 days.<sup>32</sup> All objections to the suggestion of capacity must be filed within 20 days after formal notice is served on the ward, guardian, attorney for the ward, if any, and any other interested persons designated by the court.<sup>33</sup> If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the court must set the matter for hearing.<sup>34</sup> The level of proof required to show capacity is not presently spelled out in the statute. In a study and work group report by the Florida Developmental Disabilities Council, dated February 28, 2014, Palm Beach County court personnel performed a limited review of a random sample of 76 guardianship files for persons over the age of 18. Among these, over two thirds were of persons with age-related disabilities. After reviewing the files, the senior auditor for the circuit reported that there were no cases where the guardianship plan recommended the restoration of any rights of the incapacitated persons.<sup>35</sup>

### Media Reports

Beginning on December 6, 2014, the Sarasota Herald Tribune published a series of articles titled “The Kindness of Strangers – Inside Elder Guardianship in Florida,” which detailed abuses occurring in guardianships. The paper examined guardianship court case files and conducted interviews with wards, family, and friends caught in the system against their will.<sup>36</sup> The paper concluded that Florida has cobbled together an efficient way to identify and care for helpless elders, using the probate court system to place them under guardianship. However, critics say this system often ignores basic individual rights and most often plays out in secret, with hearings and files typically closed to the public.<sup>37</sup> The paper also concluded that monitoring assets and tapping their assets is a growth business: In 2003, there were 23 registered professional guardians in Florida, according to the Department of Elder Affairs. Today there are more than 440 – an increase greater than 1,800 percent in 11 years.<sup>38</sup>

### III. Effect of Proposed Changes:

The bill renames the Statewide Public Guardianship Office and significantly expands its duties. The office is renamed the Office of Public and Professional Guardians and, as its name implies, now has oversight for both public and professional guardians. While public guardians, who provide services for indigent people, have been regulated by the state, professional guardians have not been as closely regulated.

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<sup>31</sup> Section 744.3215(1)(c), F.S.

<sup>32</sup> Section 744.464(2)(b), F.S.

<sup>33</sup> Section 744.464(2)(c),(d)

<sup>34</sup> Section 744.464(2)(e), F.S.

<sup>35</sup> Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, February 28, 2014 (on file with the Senate Committee on Children, Families and Elder Affairs).

<sup>36</sup> Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida*, HERALD TRIBUNE (December 6, 2014) <http://extra.heraldtribune.com/2014/12/06/well-oiled-machine/>.

<sup>37</sup> *Id.* at page 2.

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

This bill establishes the regulation and supervision of professional guardians by giving the Department of Elderly Affairs the authority to investigate and discipline professional guardians for misconduct.

#### **Legislative Intent (Section 4)**

The bill amends the legislative intent language in s. 744.1012, F.S., and finds that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person and such person does not have adequate income or wealth for the compensation of the private guardian. The Legislature establishes the Office of Public and Professional Guardians which allows the establishment of public guardians to provide services for incapacitated persons when no private guardian is available and that a public guardian must be provided only to those persons whose needs cannot be met through less drastic means of intervention.

#### **Office of Public and Professional Guardians (Section 8)**

The bill creates the Office of Public and Professional Guardians within the Department of Elderly Affairs. The executive director of the Office of Public and Professional Guardians must review the standards and criteria for the education, registration, and certification of public and professional guardians in Florida. The executive director is directed to develop a guardianship training program curriculum to be offered to all guardians, whether public or private.

The executive director's oversight responsibilities for professional guardians, include, but are not limited to:

- Developing and implementing a monitoring tool to use for regular monitoring activities of professional guardians; however, this monitoring tool does 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.
- Establishing disciplinary proceedings, including the authority to conduct investigations and take appropriate administrative action under ch. 120, F.S.
- Assisting the chief judge in each circuit to establish a registry to allow for the appointment of a professional guardian on a rotating basis.

#### **Discipline of Professional Guardians (Section 11)**

The bill creates s. 744.2004, F.S., and directs the Office of Public and Professional Guardians to adopt rules to review, and if appropriate, investigate allegations 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. The Office must also establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to ch. 120, F.S. Disciplinary actions may include, but are not limited to, requiring guardians to participate in additional educational courses, imposing additional monitoring of the guardianships being served by the professional guardian, and suspending and revoking the guardian's license. If the final

recommendation from a disciplinary proceeding is for the suspension or revocation of the guardian's license, the recommendation must be provided to any court that oversees any guardianship to which the professional guardian is appointed.

### **Professional Guardian Registry (Section 12)**

The bill creates a registry of professional guardians for use by the court in appointing guardians. The registry is to be compiled by the chief judge in each circuit and provided to and maintained by the clerk of the court in each county of the circuit. A professional guardian must be certified by the Office to be included on the registry. The court may appoint a professional guardian out of order only upon entering a finding of good cause into the record.

### **Joining Forces for Public Guardianship (Section 22)**

The bill provides the legislative intent to establish the Joining Forces for Public Guardianship matching grant program to assist counties in establishing and funding community-supported public guardianship programs.

### **Organizational Changes (Remaining Sections)**

The remaining sections of the bill make technical changes and relocate what is currently part II, Venue, to part I, General Provisions, retitles part II as Public and Professional Guardians and makes other conforming changes to carry out the intent of the act.

### **Effective Date (Section 36)**

The bill takes effect July 1, 2015.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

This bill does not appear to have an impact on cities or counties and as such, does not appear to be a mandate for constitutional purposes.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

B. Private Sector Impact:

Professional guardians will be regulated by Department of Elderly Affairs.

C. Government Sector Impact:

The Department of Elder Affairs will see increased costs associated with regulating private guardians. The department would need budget and FTEs to perform the duties required by the bill. There will also be increased costs to the department's general counsel's office as the professional guardians will be able to challenge decisions by the department under ch. 120, F.S. The department currently provides education to professional guardians statewide and there are 456 such guardians that would be regulated under this bill. The number of wards represented by the 456 guardians is unknown as this time and would need to be considered when estimating the cost of regulation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 744.1012, 744.2001, 744.2002, 744.2003, 744.2005, 744.2006, 744.2009, 744.2101, 744.2103, 744.2104, 744.2105, 744.2106, 744.2107, 744.2108, 744.2109, 400.148, 744.3135, 415.1102, 744.331, 20.415 and 744.524.

This bill renumbers the following sections of the Florida Statutes: 744.1096, 744.1097, 744.1098, 744.7021, 744.1083, 744.1085, 744.344, 744.703, 744.704, 744.705, 744.706, 744.707, 744.709, 744.708, 744.7081, 744.7082, 744.712, 744.713, 744.714, and 744.715.

This bill creates the following sections of the Florida Statutes: 744.2004

This bill repeals the following sections of the Florida Statutes: 744.701, 744.702, 744.7101, and 744.711.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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