

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 5 Guardianship Proceedings

**SPONSOR(S):** Justice Appropriations Subcommittee; Civil Justice Subcommittee; Passidomo; Rodriguez, J. and others

**TIED BILLS:** CS/HB 7      **IDEN./SIM. BILLS:** SB 366

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Robinson	Bond
2) Justice Appropriations Subcommittee	12 Y, 1 N, As CS	Schrader	Lloyd
3) Judiciary Committee		Robinson	Havlicak

### SUMMARY ANALYSIS

Guardianship is a concept whereby a “guardian” acts for another, called the “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a 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. Guardianships may be established for both adults and minors. The bill:

- Allows a court to refer contested guardianship matters to mediation or alternative dispute resolution;
- Allows the court to appoint the Office of Criminal Conflict and Civil Regional Counsel to act as a court monitor if the ward is indigent;
- Allows a court to authorize payments to experts and professionals acting on behalf of the guardianship without the need for expert testimony;
- Allows a court to waive appointment of a guardian ad litem in a guardianship case regarding the settlement of a claim by a minor;
- Requires notice to an alleged incapacitated person and his or her counsel of the appointment of an emergency temporary guardian unless such notice would cause the alleged incapacitated person harm;
- Allows a business entity that has met the registration requirements to act as guardian of a ward;
- Requires letters of guardianship to specify, where applicable, the authority of a health care surrogate;
- Prohibits preference to the emergency temporary guardian when selecting the permanent guardian;
- Requires appointment of professional guardians on a rotating basis, except where the court believes that the special needs of the guardianship require a specific guardian;
- Prohibits a professional guardian in most circumstances from being appointed as a permanent guardian if he or she was appointed as the emergency temporary guardian;
- Requires the state to pay the fees of an examining committee in the event that the court finds that an adult is not incapacitated. In such case, if the court finds the petitioner acted in bad faith, the court may require the petitioner to reimburse these fees;
- Prohibits abuse, exploitation, or neglect of a ward by a guardian;
- Creates additional duties of a guardian;
- Requires that annual guardianship plans be filed prior to the time that they take effect; and
- Provides the legal standard for restoration to capacity and requires a court to give priority to hearings thereon.

The bill appears to have a minimal negative fiscal impact on state government expenditures. The bill does not appear to have a fiscal impact on local governments.

The bill takes effect upon becoming law and applies to all pending proceedings.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Guardianship is a concept whereby a “guardian,” acts for another, called the “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property (or a combination of both), which may be limited or plenary. Guardianships may be established for both adults and minors. 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 mentally competent this can be accomplished voluntarily. However, in situations where an individual’s mental competence is in question, an involuntary guardianship may be required. The involuntary guardianship is established through an adjudication of incompetence, which is based upon the determination of an examination committee.

#### **Fiduciary Duties of a Guardian**

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 relation.<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 and ensuring that the ward is personally visited by the guardian periodically to assess 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> Such 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.”

One of the tools available to a court when the breach of a guardian’s fiduciary duty is alleged or suspected is the appointment of a court monitor under s. 744.107, F.S., or an emergency court monitor under s. 744.1075, F.S., if the court finds there is imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward’s property is in danger of being wasted, misappropriated, or lost. A monitor may investigate allegations of wrongdoing, seek information, examine documents, and interview the ward. A monitor must report his or her findings to the court for

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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> s. 744.362, F.S.

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

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

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

judicial action.<sup>8</sup> The court may appoint any person as monitor except a family member of the ward or any person with a personal interest in the proceedings.<sup>9</sup>

In addition to action by the court in response to a report from a court monitor finding fraud, including removal as guardian,<sup>10</sup> guardians may be subject to criminal penalties under s. 825.103(1)(c), F.S., for breaching certain fiduciary duties to the ward, including committing fraud in obtaining their appointments, abusing their powers, or wasting, embezzling, or intentionally mismanaging the assets of the ward.

The public is also required to report abuse, neglect, or exploitation of vulnerable adults to the Department of Children and Families by s. 415.1034, F.S.

### **Effect of Proposed Changes - Fiduciary Duties of a Guardian**

The bill amends s. 744.107, F.S. and s. 744.1075, F.S. to authorize a court to appoint the Office of Criminal Conflict and Civil Regional Counsel as a court monitor for an indigent ward.<sup>11</sup> The bill would serve to codify current practice in that the Office of Criminal Conflict and Civil Regional Counsel are currently providing this service.

The bill creates s. 744.359, F.S., to provide that a guardian may not abuse, neglect, or exploit a ward under the guardian's care. Exploitation is described as any action whereby a guardian commits fraud in obtaining appointment as a guardian, abuses his or her power as guardian, or wastes, embezzles, or intentionally mismanages the ward's assets. Any person believing that a guardian is abusing, neglecting, or exploiting a ward must report the incident to the central abuse hotline of the Department of Children and Families. The court is directed to interpret s. 744.359, F.S. in conformance with s. 825.103, F.S., which creates criminal penalties related to the exploitation of an elderly person or disabled adult.

The bill amends s. 744.361(1), F.S., to confirm and codify pre-existing Florida law that a guardian is a fiduciary with respect to a ward under the guardian's care. The bill further amends s. 744.361, F.S., to impose additional statutory duties upon a guardian as a fiduciary:

- To act only within the scope of the authority granted to the guardian;
- To act in good faith;
- To act in the ward's best interests; and
- To keep clear, distinct, and accurate records.<sup>12</sup>

Specific to guardians of the person, the bill creates the duty of a guardian to:

- Consider the expressed desires of the ward;
- Allow the ward to maintain contact with family and friends except where contact may harm the ward (the court may review such decisions upon petition by an interested person);
- Not restrict the physical liberty of the ward more than necessary;
- Assist the ward in developing or regaining capacity if medically possible;
- Notify the court if the guardian believes that the ward may have capacity to exercise one or more of the ward's removed rights;
- Make provisions for medical services and, to the extent possible, acquire a clear understanding of the risks and benefits of a recommended course of treatment;

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<sup>8</sup> s. 744.107(2), F.S.

<sup>9</sup> s. 744.107(1), F.S.

<sup>10</sup> s. 744.474, F.S.

<sup>11</sup> The Offices of Criminal Conflict and Civil Regional Counsel are created at s. 27.511, F.S. They provide representation to persons entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law in criminal cases where Office of the Public Defender has a conflict of interest as well as in certain civil proceedings, including the appointment of counsel for an indigent alleged incapacitated person under ch. 744, F.S.

<sup>12</sup> The language here is modeled after that creating a similar duty in the Florida Trust Code at s. 736.0810, F.S.

- Evaluate the ward's medical and health care options, financial resources, and desires in making decisions regarding the ward's residence; and
- Advocate for the ward in institutional and residential settings.

### **Guardianship Plan**

In order that the court may monitor and supervise a guardian's compliance as a fiduciary, a guardian must file reports and plans. A guardian of the person must file an annual plan. If the court requires calendar year planning, the plan must be filed by April 1 of the plan year. Otherwise, the plan must be filed within 90 days after the anniversary month that the letters of guardianship were filed.<sup>13</sup> An approved plan is a court order giving the guardian power to act within its terms and limits the powers of the guardian to such terms.<sup>14</sup>

Because proposed plans are filed within the term in which they are effective, it is unclear which plan controls. Also unclear is the effect of failure to file or what is the effect of the court failing to timely review and approve a plan.

### **Effect of Proposed Changes - Guardianship Plan**

The bill amends s. 744.367, F.S. to revise when a guardian of the person must file an annual guardianship plan. Where a calendar year filing is required, the plan must be filed between September 1 and December 1 of the previous year. Otherwise, the plan must be filed between 60 and 90 days before the last day of the anniversary month.

The bill amends s. 744.369, F.S. to provide that a guardian may continue to act under a previous year's annual guardianship plan until the next year's annual guardianship plan has been approved by the court unless otherwise ordered by the court.

### **Emergency Temporary Guardianship**

A guardianship is initiated when a competent adult, who can attest as to why he or she believes a person may be incapacitated, files with a court a petition to determine another person's incapacity.<sup>15</sup> Upon the filing of the petition, the court must appoint an examining committee of relevant medical professionals to conduct a comprehensive examination of the alleged incapacitated person, review the reports of the examining committee, and hold an adjudicatory hearing prior to finding that a person is incapacitated. Accordingly, establishing a guardianship can take several weeks.<sup>16</sup> However, where 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, the court may appoint an emergency temporary guardian any time after the filing of the petition to determine incapacity.<sup>17</sup> This may occur on the court's own motion or in response to a petition for an emergency temporary guardian. A court may also appoint an emergency temporary guardian if a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine capacity.<sup>18</sup>

Although the alleged incapacitated person and his or her attorney are entitled to notice and copies of the petition to determine incapacity and any subsequent petition for the appointment of a permanent guardian<sup>19</sup>, s. 744.3031, F.S., which governs the appointment of an emergency temporary guardian, is silent regarding notice to the alleged incapacitated person and his or her counsel of the petition to appoint an emergency temporary guardian and any hearing thereon. Practitioners and members of the

<sup>13</sup> s. 744.367(1), F.S.

<sup>14</sup> s. 744.369(8), F.S.

<sup>15</sup> s. 744.3201, F.S.

<sup>16</sup> Section 744.331, F.S. provides for up to 34 days, or longer upon a showing of good cause, for a court to hold an adjudicatory hearing on a petition to determine incapacity.

<sup>17</sup> s. 744.3031, F.S.

<sup>18</sup> s. 744.344(4), F.S.

<sup>19</sup> s. 744.331(1), F.S.

public have reported that emergency temporary guardians are often appointed without notice to the alleged incapacitated person.

### **Effect of Proposed Changes - Emergency Temporary Guardianship**

The bill amends s. 744.344(4), F.S., to allow for the appointment of an emergency temporary guardian if a petition for appointment of a guardian has not been ruled upon at the time of the hearing on the petition to determine incapacity.

The bill amends s. 744.3031, F.S., to require that notice of the filing of a petition for appointment of an emergency temporary guardian and any hearing thereon be served on an alleged incapacitated person, and the alleged incapacitated person's attorney, at least 24 hours prior to commencement of the hearing unless the petitioner can demonstrate that substantial harm to the alleged incapacitated person would occur if notice was given.

### **Costs and Fees of Examining Committee**

When a petition for incapacity is filed, the court is required to appoint an examining committee consisting of three members, at least one of which must be a psychiatrist or other physician.<sup>20</sup> The remaining members must be either a psychologist or gerontologist, another psychiatrist or physician, a registered nurse, nurse practitioner, licensed social worker with an advanced degree in gerontology from an accredited institution of higher education, or 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."<sup>21</sup>

Each member of the examining committee is charged with examining the alleged incapacitated person, making a comprehensive assessment, and rendering to the court a professional opinion as to a diagnosis, a prognosis and a recommended course of treatment. This evaluation includes an assessment of the capacity of the individual to exercise enumerated rights in s. 744.3215, F.S.

Compensation of examining committee members is governed by s. 744.331(7), F.S., which provides generally that the examining committee and any attorney appointed to represent the alleged incapacitated person are entitled to reasonable fees to be determined by the court. Under current law, the fees awarded are to be paid by the guardian from the property of the ward or if the ward is indigent, "by the state."<sup>22</sup> If the court finds the petition was brought in bad faith, the costs may be assessed against the petitioner.<sup>23</sup>

The statute is silent, however, with respect to how the examining committee members are to be compensated in the event the petition is dismissed and the court finds no bad faith in the filing of the petition to determine incapacity. Under such circumstances, no guardian is appointed and no property ever comes into the hands of a guardian or under the authority of the court. Likewise, there is no authority for assessing such fees against the petitioner or against the alleged incapacitated person.

This "gap" in s. 744.331(7), F.S., as to who is responsible for the payment of such fees has been recognized in several reported decisions, all of which have recognized the need for remedy by the Legislature.<sup>24</sup>

### **Effect of Proposed Changes - Costs and Fees of Examining Committee**

This bill amends s. 744.331(7)(c), F.S., to provide that if the petition is dismissed or denied, the fees of the examining committee are paid upon court order as "expert witness" fees under s. 29.004(6), F.S. This change implements the provisions of s. 29.004(6), F.S., which awards fees to court appointed

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<sup>20</sup> s. 744.331(3)(a), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> s. 744.331(7)(b), F.S.

<sup>23</sup> *Id.*

<sup>24</sup> See *Faulkner v. Faulkner*, 65 So. 3d 1167 (Fla. 1st DCA 2011); *Levine v. Levine*, 4 So. 3d 730 (Fla. 5th DCA 2009); and *Ehrlich v. Severinson*, 985 So. 2d 639 (Fla. 4th DCA 2008).

experts generally, and provides a secure source of funding to insure that the members of the examining committee are reasonably compensated as contemplated by s. 744.331, F.S., without incentive to find incompetency. The bill also provides that, where the petitioner was found to have filed a petition in bad faith and the state has paid the members of the examining committee, the petitioner must reimburse the state for fees paid.

### **Appointing a Guardian**

An order appointing a guardian indicates the nature of the guardianship as either plenary or limited and the specific powers and duties of the guardian.<sup>25</sup> A plenary guardian exercises all delegable rights<sup>26</sup> and powers of the ward, while a limited guardian may exercise only the rights and powers of the ward specifically designated by the court order.<sup>27</sup>

A court may appoint any person qualified under s. 744.309, F.S., to serve as guardian of the ward. However, in appointing a guardian, the court is required to give preference to certain qualified persons.<sup>28</sup>

The court issues letters of guardianship upon the entry of the order appointing a guardian. Letters evidence the guardian's authority to act on behalf of the ward to the public, similar to letters of administration in probate proceedings. Letters of guardianship also state the nature of the guardianship as plenary or limited, but only specify the powers and duties of the guardian if the guardianship is limited.<sup>29</sup> Additionally, a court must address the authority of a guardian to act with regard to a previously executed advance directive in the letters of guardianship for a limited guardianship.<sup>30</sup>

### **Effect of Proposed Changes**

The bill amends s. 744.309 F.S., allowing a business entity that has met the registration requirements in s. 744.1083 F.S. to act as a guardian of a ward.

The bill amends s. 744.312, F.S., to provide that a court may not give the emergency temporary guardian preference in appointment of a permanent guardian. Additionally, the bill requires a court to appointment professional guardians on a rotating basis; unless the court finds that the special requirements of the guardianship require appointment of a specific professional guardian. Also, a court may not appointment an emergency temporary guardian who is a professional guardian to be the permanent guardian, unless such professional guardian had been designated as a standby guardian or preneed guardian<sup>31</sup> or the court makes specific written findings that such professional guardian meets special requirements of the guardianship.

The bill amends ss. 744.3115 and 744.345, F.S., to provide that the court must specify in any order appointing a guardian of the person and in all letters of guardianship what authority the guardian may exercise with regard to the ward's health care decisions versus what authority, if any, a health care surrogate previously designated by the ward may continue to exercise.

The bill amends s. 744.331(6), F.S., to require that a court consider the incapacitated person's unique needs and abilities when determining what rights should be removed in a guardianship proceeding. It

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<sup>25</sup> s. 744.344(1), F.S.

<sup>26</sup> The delegable rights of a ward include the right to contract, to sue and defend lawsuits, to apply for government benefits, to manage property or to make any gift or disposition of property, to determine his or her residence, to consent to medical and mental health treatment, and to make decisions about his or her social environment or other social aspects of his or her life. s. 744.3215(3), F.S.

<sup>27</sup> s. 744.102(9), F.S.

<sup>28</sup> s. 744.312, F.S.

<sup>29</sup> s. 744.345, F.S.

<sup>30</sup> *Id.*

<sup>31</sup> A standby guardian is a guardian selected by the natural guardians (primarily parents) of a minor child in anticipation of the future need for a guardian of the minor. See s. 744.304, F.S. A preneed guardian is a guardian nominated by a competent adult while the adult is still competent, in anticipation of a future guardianship. See s. 744.3045, F.S.

further requires that the court only remove such rights which the alleged incapacitated person does not have the legal capacity to exercise.

### **Costs and Fees Associated with Guardianship Administration**

Section 744.108, F.S., governs awards 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>32</sup> Similarly, s. 744.311(7), F.S.,<sup>33</sup> provides that any attorney appointed under s. 744.311(2), F.S., is entitled to a reasonable fee to be determined by the court.

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>34</sup> It is unclear whether the scope of this subsection covers all requests for attorney’s fees or is limited to only fees for the guardian’s attorney. Specifically, the statute does not address whether an attorney who has rendered services to a ward, such as court-appointed counsel for the ward, is entitled to recover attorney fees and costs associated with proceedings to review and determine compensation.

Further, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108, F.S., is silent on the subject. Practitioners report that many attorneys and judges interpret the current law as requiring testimony from an expert witness to establish a reasonable attorney’s fee unless a statute dispenses with that requirement.<sup>35</sup> If this is a correct interpretation of existing law, then expert testimony is presently required in all guardianship proceedings for an award of attorney’s fees.

Cost considerations are a significant factor in many guardianships. Requiring expert testimony at every hearing for determination of interim guardian’s fees or attorney’s fees adds a layer of costs that deplete the ward’s estate. Practitioners report that the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases. In those cases where expert testimony would be necessary, the interested party may present such testimony.

### **Effect of Proposed Changes - Costs and Fees Associated with Guardianship Administration**

The bill adds subsection (9) to s. 744.108, F.S., dispensing with any requirement for expert testimony to support an award of fees unless requested. Expert testimony may be offered at the option of either party after giving notice to interested persons. If expert testimony is offered, a reasonable expert witness fee must be awarded by the court and paid from the assets of the ward.<sup>36</sup>

The bill amends s. 744.108(8), F.S., to provide that the court may award attorneys’ fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel.

### **Alternative Dispute Resolution**

Disputes may arise in guardianship proceedings regarding the extent of the guardianship (limited or plenary), guardianship care plans, the ward’s right to choose a guardian, real estate and property sale and division issues, methods of accounting for finances, use of funds, medical care, the ward’s right to travel and manage affairs, whether to use independent care professionals, less restrictive alternatives for the ward, visitation, and issues involving respect among family members and care providers. Such

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<sup>32</sup> s. 744.108(1), F.S.

<sup>33</sup> This section provides that an attorney will be provided for the alleged incompetent.

<sup>34</sup> s. 744.108(8), F.S.

<sup>35</sup> See *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So. 2d 1044 (Fla. 4th DCA 1989); *Estate of Cordiner v. Evans*, 497 So. 2d 920 (Fla. 2d DCA 1986); *Clark v. Squire, Sanders & Dempsey*, 495 So. 2d 264 (Fla. 3d DCA 1986).

<sup>36</sup> This provision is derived from and similar to s. 733.6175(4), F.S., of the Florida Probate Code.

disputes are litigated within the guardianship proceeding which burden judicial calendars, delay resolution of critical guardianship issues, and increase the cost of the guardianship to wards and family members.

Alternative dispute resolution ("ADR") is a term that refers broadly to many different methods of settling disputes outside of litigation. ADR typically includes negotiation, conciliation, mediation, and arbitration. Mediation is an alternative to judicial action whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.<sup>37</sup> Courts are required to refer certain cases to mediation under s. 44.102, F.S. Although the statute does not specifically provide for guardianship mediation, courts have the general discretion to refer to mediation all or any part of a filed civil action for which mediation is not required under s. 44.102, F.S.

Florida Probate Rules also allow the referral of adversarial matters to mediation.<sup>38</sup> However, because only proceedings to remove a guardian or surcharge a guardian are adversarial, it is unclear whether the types of disputes described above may be referred to mediation.

### **Effect of Proposed Changes - Alternative Dispute Resolution**

The bill creates s. 744.1065, F.S. to authorize a court, upon its own motion or the motion of an interested person, to refer a guardianship matter under ch. 744, F.S., to alternative dispute resolution, including mediation. Alternative dispute resolution may only be ordered if it is in the best interest of the alleged incapacitated person, ward or minor.

### **Restoration to Capacity**

A ward has the right to be restored to capacity at the earliest possible time.<sup>39</sup> Section 744.464, F.S., describes the legal procedure for restoration to capacity in Florida. 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, but the statute is silent regarding the evidentiary standard used to determine restoration to capacity. In the adjudicatory hearing on a petition alleging incapacity, the petitioner must establish the partial or total incapacity of the person by clear and convincing evidence.<sup>40</sup> However, a circuit court case<sup>41</sup>, suggests that the standard for restoration to capacity is a preponderance of evidence.<sup>42</sup> Without clear statutory guidance, uncertainty remains in the law regarding the proper evidentiary standard in restoration to capacity proceedings.

### **Effect of Proposed Changes - Restoration to Capacity**

The bill amends s. 744.464, F.S., to establish a "preponderance of the evidence" burden of proof for the restoration of an incapacitated person's rights. The bill also requires that a court make specific findings of fact regarding competency and that a court to give priority to any suggestion of capacity and advance such cause on the judicial calendar.

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<sup>37</sup> s. 44.1011, F.S.

<sup>38</sup> Florida Rules of Civil Procedure govern an adversary proceeding under the Florida Probate Rules. Fla. Prob. R. 5.025.; See also Fla. R. Civ. P. 1.700(a): "The presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration."

<sup>39</sup> s. 744.3215(1)(c), F.S.

<sup>40</sup> Section 744.331(5)(c), F.S. Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *Inquiry Concerning a Judge*, 645 So. 2d 398, 404 (Fla.1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

<sup>41</sup> *In re Guardianship of Branch*, 10 FLW Supp. 23, 25 (2nd Cir. 2002).

<sup>42</sup> A preponderance of the evidence is the greater weight of the evidence or evidence that more likely than not tends to prove a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n. 1 (Fla. 2000).



## **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 minor's claim in any case in which the gross settlement of the claim exceeds \$15,000.<sup>43</sup> The statute is silent as to the specific criteria to be utilized by the court in its determination of the need for the appointment of a guardian ad litem.

### **Effect of Proposed Changes - Claims of Minors**

The bill amends s. 744.3025(1)(a), F.S., to provide that the court may appoint a guardian ad litem only "if the court believes that a guardian ad litem is necessary to protect the minor's interest."

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

Section 1 creates s. 744.1065, F.S., regarding mediation and alternative dispute resolution.

Section 2 amends s. 744.107, F.S., regarding court monitors.

Section 3 amends s. 744.1075, F.S., regarding emergency court monitors.

Section 4 amends s. 744.108, F.S., regarding guardian and attorney fees and expenses.

Section 5 amends s. 744.3025, F.S., regarding claims of minors.

Section 6 amends s. 744.3031, F.S., regarding emergency temporary guardianship.

Section 7 amends s. 744.309, F.S., regarding business entity acting as a guardian.

Section 8 amends s. 744.3115, F.S., regarding advance directives for health care.

Section 9 amends s. 744.312, F.S., regarding considerations in the appointment of a guardian.

Section 10 amends s. 744.331, F.S., regarding procedures to determine incapacity.

Section 11 amends s. 744.344, F.S., regarding the order of appointment of a guardian.

Section 12 amends s. 744.345, F.S., regarding letters of guardianship.

Section 13 creates s. 744.359, F.S., regarding abuse, neglect, or exploitation by a guardian.

Section 14 amends s. 744.361, F.S., regarding the powers and duties of a guardian.

Section 15 amends s. 744.367, F.S., regarding the duty to file the annual guardianship report.

Section 16 amends s. 744.369, F.S., regarding judicial review of guardianship reports.

Section 17 amends s. 744.3715, F.S., regarding petition of guardian's failure to comply with duties.

Section 18 amends s. 744.464, F.S., regarding restoration to capacity.

Section 19 provides that the bill applies to all guardianship proceedings pending on the effective date.

Section 20 provides an effective date of upon becoming a law.

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<sup>43</sup> Under current law, parents as natural guardians may settle a claim of less than \$15,000 without appointment of a guardian ad litem. ss. 744.301 and 744.3025, F.S. These settlements are typically related to a personal injury case.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues. However, if the court finds a petition to determine incapacity has been filed in bad faith the petitioner will be assessed such fees reimbursable to the State Courts System.

#### 2. Expenditures:

In part, this bill provides that if a petition to determine incapacity is dismissed, the guardianship examining committee must be paid from state funds as court-appointed expert witnesses. This requirement is likely to create an insignificant fiscal impact on state expenditures. The Real Property, Probate, and Trust Law Section of the Florida Bar reports that compensation awarded to an examining committee is modest, generally \$600 or less per appointment. A finding that an alleged incapacitated person is competent is uncommon and the state currently pays the examining committee fees for indigent cases dismissed before hearing, so the provision would affect only payment of examining committee fees in the cases of non-indigent persons. The data on filings addressed in the bill fall under the general title of Guardianship;<sup>44</sup> the total number of statewide Guardianship filings dismissed before hearing in Fiscal Year 2013-14 was 629. The bill addresses a small subset of the Guardianship filings, specifically the dismissal of petitions to determine incapacity. An informal survey conducted of a sample of judicial circuits did not indicate that a significant number of petitions to determine incapacity (competency cases) are dismissed before hearing. Of the competency cases dismissed before hearing a percentage were indigent filings, and an indeterminate amount were filed in bad faith in which costs and attorney fees will be assessed against the petitioner and the petitioner will be required to reimburse the State Courts System for amounts paid to the examining committee. Additionally, some circuits are already paying examining committee fees in situations where the alleged incapacitated person is not indigent and a good faith petition is dismissed.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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

None.

### D. FISCAL COMMENTS:

The provisions of the bill that lessen the need for expert testimony regarding fees may lower the cost to individuals for maintenance of a guardianship case. In the majority of guardianship cases the cost of presenting expert testimony will be avoided and the situations where expert testimony is used will be minimized.

The provision in this bill regarding mediation and alternative dispute resolution may lessen the costs to individuals of resolving disputed issues in guardianship proceedings.

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<sup>44</sup> Collected "Guardianship" data includes all matters relating to determination of status; contracts and conveyances of incompetents; maintenance custody of wards and their property interests; control and restoration of rights; appointment and removal of guardians pursuant to ch. 744, F.S.; appointment of guardian advocates for individuals with developmental disabilities pursuant to s. 393.12, F.S., and actions to remove the disabilities of non-age minors pursuant to ss. 743.08 and 743.09, F.S.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 2 and 3 of the bill provides that the Office of Criminal Conflict and Civil Regional Counsel ("office") may be appointed as a court monitor if the ward is indigent. Current law provides that the same office may be appointed as an attorney for an alleged incapacitated person<sup>45</sup>. Where the office had been previously appointed to represent the ward when the ward was an alleged incapacitated person, it is possible that the second appointment as monitor, while similar in nature (both appointments are for the protection of the ward), may create a potential conflict of interest that would require the office to decline.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 22, 2015, the Civil Justice Subcommittee adopted six amendments to a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute passed by the subcommittee differs from the bill as filed by:

- Authorizing a court to refer disputed guardianship matters under ch. 744, F.S. to mediation and alternative dispute resolution.
- Authorizing a court to appoint the office of criminal conflict and civil regional counsel as a court monitor if a ward is indigent.
- Specifying the time of service for notice of the filing of a petition to appoint an emergency temporary guardian and the hearing thereon, but authorizing a court to omit such notice if the notice would cause substantial harm to the incapacitated person.
- Requiring appointment of professional guardians on a rotating basis, except where the court believes that the special needs of the guardianship require a specific guardian.
- Prohibiting a professional guardian in most circumstances from being appointed as a permanent guardian if he or she was appointed as the emergency temporary guardian.
- Requiring that proposed s. 744.359, F.S., which prohibits the abuse, neglect, or exploitation of a ward by a guardian, be interpreted in conformance with s. 825.103, F.S. Section 825.103, F.S. is a criminal law that prohibits the exploitation of an elderly person or disabled adult.
- Authorizing a court to review decisions of a guardian regarding visitation of the ward by family and friends.
- Requiring a court to give priority to a suggestion of capacity.
- Providing that the bill applies to all pending proceedings.

On February 17, 2015, the Justice Appropriations Subcommittee adopted five amendments to the committee substitute and reported the bill favorably as amended. The committee substitute passed by the subcommittee differs from the bill as filed by:

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<sup>45</sup> s. 744.331(2)(a), F.S.  
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- Amending s. 744.108 F.S., providing that expert witness fees are recoverable by the prevailing interested person.
- Authorizing a business entity that has met the registration requirements in s. 744.1083 F.S., to be qualified to act as guardian of a ward.
- Clarifying limitation where an interested party objects to appointment of the emergency temporary guardian as a permanent guardian, excluding standby guardian and preneed guardian.
- Requiring the court to make specific findings of fact that justify an appointment of a professional guardian with a special talent or specific prior experience without reference to the rotation.
- Clarifying reimbursement of fees if case is dismissed or denied.
- Authorizing an interested person, including the ward to petition the court when a guardian has denied visitation between the ward and his or her relatives in violation of s. 744.361(13) F.S.

This analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.