

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 635 Guardianship
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 634

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Ward	Bond

SUMMARY ANALYSIS

A guardian is a person who has been appointed by the court to act on behalf of a ward's person or property, or both. Guardians are appointed according to statutory criteria, and are deemed to be professional guardians if they manage the property of more than three wards. Professional guardians, among other requirements, must submit to a criminal background check and a credit history report. Every guardian of the property must file an annual guardianship report with the court, which includes the annual accounting. The accounting is subject to review by the clerk and the court. The bill:

- Requires that nonprofessional guardians submit to a credit history and Level 2 background screening unless waived by the court;
- Authorizes nonprofessional guardians to petition the court for reimbursement for screening costs;
- Provides that a guardian may be removed for failure to submit guardianship records during the clerk's audit of the annual report;
- Provides that a proposed guardian may not deny or fail to acknowledge a sealed or expunged offense;
- Adds to the definition of the term, "audit," to include, "various practices that meet professional standards such as verifications, reviews of substantiating papers and accounts, interviews, and hearings, inspections, and investigations;"
- Provides that the clerk may, at the direction of the court, "obtain and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship;" and
- Provides that the clerk may, upon application to the court supported by affidavit, exercise the power to issue and serve subpoenas upon parties and nonparties and compel the production of books, papers, documents, and other evidence.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Guardians and Guardianship, In General

"A guardianship has been defined as a trust relationship of the most sacred character, in which one person, called a 'guardian,' acts for another, called the 'ward,' whom the law regards as incapable of managing his own affairs."¹

A "ward" is a "person for whom a guardian has been appointed."² "A 'guardian' is a person who has been appointed by the court to act on behalf of a ward's person or property, or both."³

The statutes recognize both professional⁴ and nonprofessional⁵ guardians. Potential professional guardians and their employees must submit to a "Level 2" criminal background⁶ and credit history check.⁷

Nonprofessional guardians must complete a state and national criminal history check by submitting fingerprints to the Florida Department of Law Enforcement, which returns the results to the clerk of court. The clerk is directed to keep the results and make them known to the court.⁸ The court in its discretion may require an employment screening as described below of any nonprofessional guardian as well.⁹

Employment background screenings required by law¹⁰ are addressed in Chapter 435, F.S. A "Level 1" background screening includes but is not limited to checks of:

- Employment history;
- Statewide criminal history through the Department of Law Enforcement;
- The Dru Sjodin National Sex Offender Public Website; and
- Optional checks through local law enforcement agencies.¹¹

A Level 1 screening also eliminates any person with an arrest awaiting adjudication or a plea of nolo contendere to any felony listed in the succeeding statute,¹² or any history of domestic violence. A Level 2 screening¹³ includes the above requirements, plus the submission of fingerprints, and national criminal history records check through the Federal Bureau of Investigation.¹⁴

Persons currently disqualified from acting as a guardian include those who have been convicted of or pled nolo contendere to any of the offenses listed in the Level 2 employment screening standards given

¹ 28 Fla. Jur 2d Guardian and Ward §1.

² Section 744.102(22), F.S.

³ 28 Fla. Jur 2d Guardian and Ward §1, citing s. 744.102(9), F.S.

⁴ "Professional guardian" means any guardian who has at any time rendered services to three or more wards as their guardian." s. 744.102(17), F.S.

⁵ Section 744.3135(2), F.S.

⁶ Sections 744.1083(4), 744.1085(5), and 744.3135(4)(a), F.S.

⁷ Sections 744.1083(4), 744.1085(4), and 744.3151(1) and (5), F.S.,

⁸ Section 744.3135(2), F.S.

⁹ Section 744.3135(1), F.S. currently provides for a Level 1 screening pursuant to s. 435.03, F.S.

¹⁰ Section 435.01(1)(a), F.S.

¹¹ Section 435.03, F.S.

¹² Section 435.04, F.S.(2).

¹³ Section 435.04, F.S.

¹⁴ Section 435.04(1)(a), F.S.

in s. 435.04, F.S., and persons convicted of committing abuse, abandonment or neglect of a child.¹⁵ Further, a guardian may be removed for a number of reasons as set out in s. 744.474, F.S., including abuse of his or her powers,¹⁶ embezzlement of the ward's property,¹⁷ conviction of a felony¹⁸ or having been found guilty of or pleading nolo contendere or guilty to any offense set out in the Level 1 employment screening statute,¹⁹ among other reasons.²⁰ Proceedings for removal of a guardian may be instituted by the court or other interested person, including the ward.²¹

When a guardian of the property resigns,²² is removed,²³ or the guardianship terminates, the guardian is required to file a final accounting with the court.²⁴

Annual Accountings

An initial verified inventory as part of the initial guardianship plan is required of every guardian of the property within 60 days of appointment.²⁵ The inventory must include all assets and sources of income of the ward.²⁶ The initial inventory is audited by the clerk,²⁷ which receives a fee for the audit, according to the value of the assets.²⁸ Upon reasonable written request, the guardian must make substantiating information available to all persons entitled to inspect the inventory, which includes the clerk.²⁹

Annual accountings are required of all guardians of the property.³⁰ Every guardian of the property must file an annual guardianship report with the court, which includes the annual accounting.³¹ Guardians not filing a timely report are subject to court sanctions, including contempt of court.³² These accounting records are sealed from public view.³³

The clerk of court is required to review³⁴ and audit³⁵ the annual accounting, for which the clerk receives a fee tied to the value of the guardianship estate.³⁶ Upon reasonable written request, the guardian of the property must make the substantiating documents available for examination to persons entitled to receive or inspect the annual accounting.³⁷ Interim records may also be requested by the clerk, the court, the attorney for the guardian, or the ward.³⁸ Interim judicial review of the guardianship may be requested by any interested party.³⁹

¹⁵ Section 744.309(3), F.S.

¹⁶ Section 744.474(3), F.S.

¹⁷ Section 744.474(7), F.S.

¹⁸ Section 744.474(9), F.S.

¹⁹ Section 744.474(12).

²⁰ See *generally*, s. 744.474, F.S., "Reasons for removal of guardian."

²¹ Section 744.477, F.S.

²² Section 744.467, F.S.

²³ Section 744.511, F.S.

²⁴ Sections 744.521, 744.524, and 744.527, F.S.

²⁵ Section 744.362(1), F.S.

²⁶ Section 744.365, F.S.

²⁷ Section 744.368(1)(f), F.S.

²⁸ Section 744.365(6), F.S.

²⁹ Fla. R. Prob. 5.620; Section 744.3701(1), F.S.

³⁰ Section 744.367(3), and 744.3678(1), F.S.

³¹ Section 744.367(3), and 744.3678(1), F.S.

³² Section 744.3685, F.S.

³³ "Unless otherwise ordered by the court, any initial, annual, or final guardianship report or amendment thereto is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and the guardian's attorney, . . ."

Section 744.3701(1), F.S.

³⁴ Section 744.368(1)(f), F.S.

³⁵ Section 744.368(3), F.S.

³⁶ Section 744.3678(4), F.S. The statute also provides that the fee may be waived.

³⁷ Section 744.373, F.S.; Fla. Prob. R. 5.696(b).

³⁸ Fla. Prob. R. 5.696(c).

³⁹ Sections 744.3715(1) and 744.372, F.S.

Audits

An "audit" is defined in the guardianship statute as, "a systematic review of financial and all other documents to ensure compliance⁴⁰ with s. 744.368, rules of court, and local procedures using generally accepted accounting principles." The Florida Probate Rules provide: "On the petition of an interested person, or on its own motion, the court may require any personal representative or guardian to produce satisfactory evidence that the assets of the estate are in the possession or under the control of the personal representative or guardian and may order production of the assets in the manner and for the purposes directed by the court."⁴¹

Sealed or Expunged Records

Sections 943.0585 and 943.059, F.S., provide for the court ordered sealing or expunction⁴² of certain criminal history records. One effect of a sealing or expunction is that the subject of a sealed or expunged history may lawfully deny or fail to acknowledge an arrest. There are numerous exceptions whereby the existence of a sealed or expunged record will be revealed by state authorities and accordingly the subject cannot lawfully deny the prior arrest.⁴³ Appointment as a guardian is not such an exception.

Effect of the Bill

Guardians and Guardianship, In General

The bill amends s. 744.3135, F.S., in respect to nonprofessional guardians to:

- Require that they submit to a credit history investigation and Level 2 background screening;⁴⁴
- Provide that they may petition the court to waive either or both; and
- Provide that they may petition the court for reimbursement of the reasonable expenses of the credit history investigation and background screening.

The bill adds to s. 744.3135, F.S. that at any time the court may order a guardian to undergo a Level 1 or a Level 2 employment background screening.

The bill adds to section 744.474, F.S., that a guardian may be removed for a "bad faith failure to submit guardianship records during the audit pursuant to s. 744.368." This provision creates grounds for removal of a guardian for failure to comply with the clerk's request for supporting documentation under the amendments to s. 744.368, F.S.

Annual Accountings and Audits

The bill expands the definition of the term "audit" in s. 744.102, F.S., to include, "various practices that meet professional standards such as verifications, reviews of substantiating papers and accounts, interviews, and hearings, inspections, and investigations."

The bill amends s. 744.368, F.S., to provide that the clerk may, if further review is deemed appropriate, in the context of an audit, "request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship." The bill also amends s. 744.3685, F.S., to provide the court with means

⁴⁰ Section 744.102(2), F.S.

⁴¹ Fla. Prob. R. 5.160

⁴² Section 943.045(16), F.S.

⁴³ For instance, the subject of an expunged record must acknowledge the arrest if applying for a job with a criminal justice agency, is a defendant in a criminal prosecution, if applying for a subsequent sealing or expunction, applies for admission to the Florida Bar, is seeking employment or licensing where he or she will be in contact with children, disabled or elderly persons, or is seeking employment in a school or day care center. Section 943.0585(4)(a), F.S.

⁴⁴ Under s. 435.04, F.S.

to compel a guardian to produce records for audit; and amends s. 744.474, F.S., to add that a guardian's bad faith failure to submit records during an audit is ground for removal.

The bill also provides that the clerk may, upon application to the court, supported by affidavit, issue and serve subpoenas on parties and nonparties to compel the production of books, papers, documents, and other evidence. A nonparty, guardian or ward may object to production from a nonparty. Upon objection, the nonparty is not required to comply with the subpoena until the court rules on the objection. A subpoena to a nonparty must give 10 days for objection unless the court, for cause, shortens the period.

Sealed or Expunged Criminal Records of Guardians

The bill provides that a proposed guardian may not deny or fail to acknowledge an offense which has been sealed or expunged pursuant to ss. 943.0585 or 943.059, F.S., respectively. Accordingly, a court appointing or investigating a guardian will have access to additional criminal records that the court may use as grounds to disqualify or remove a guardian.

The bill also includes grammatical and stylistic changes that do not affect the meaning of the statutes.

The bill has an effective date of July 1, 2014.

B. SECTION DIRECTORY:

Section 1 amends s. 744.102, F.S., relating to definitions.

Section 2 amends s. 744.3135, F.S., relating to credit and criminal investigation.

Section 3 amends s. 744.368, F.S., relating to responsibilities of the clerk of circuit court.

Section 4 amends s. 744.3685, F.S., relating to order requiring guardianship report; contempt.

Section 5 amends s. 744.474, F.S., relating to reasons for removal of a guardian.

Section 6 amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history.

Section 7 amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 8 gives an effective date of July 1, 2014.

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.

2. Expenditures:

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

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 revenues.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

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:

Current law on sealing or expunction of criminal records includes references to two sub-paragraphs that do not exist. See references to sub-paragraph (4)(a)7. in s. 943.0585(4)(c), F.S., and sub-paragraph (4)(a)8. in s. 943.059(4)(c), F.S. This bill creates new sub-paragraphs with those designations, effectively creating new public records exemptions. The creation of those new exemptions, albeit apparently inadvertently, do not comply with the requirements of art. I, s. 21, FLA.CONST. and thus may be found invalid under Florida law.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. Lines 64 through 67 of the bill provide: "if appointed, a nonprofessional guardian may petition the court for reimbursement of the reasonable expenses of the credit history investigation and background screening." The bill does not specify if this is a guardianship expense or if it would be paid from another source.

2. Lines 48 through 51 of the bill provide: "744.3135 Credit and criminal investigation.— (1) The court shall require all guardians who are seeking appointment by the court, other than a corporate guardian as described in s. 744.309(4) may require a nonprofessional . . ."

However, s. 733.3135(2), F.S., already requires a nonprofessional guardian to submit fingerprints to FDLE for a state and national criminal background check. FDLE is then to return the results to the clerk who makes the results known to the court. Section 744.309, F.S., provides the requirements for a guardian, and disqualifies any person who has been convicted of a felony, and anyone who has been adjudicated or who has pled nolo contendere to any offense listed in s. 435.04, F.S., which is the Level 1 employment screening provision referenced in the bill's revisions.⁴⁵

3. Prospective guardians may not serve if they are felons, or have pleaded nolo contendere to a felony. Grounds for removal of a guardian include subsequent conviction of a felony⁴⁶ or pleading guilty of or nolo contendere to offenses in s. 453.04, F.S., the Level 1 employment screening statute.

4. An initial verified inventory as part of the initial guardianship plan is required of every guardian of the property within 60 days of appointment.⁴⁷ The inventory must include all assets and sources of

⁴⁵ Section 744.309(3), F.S.

⁴⁶ Section 744.474(9), F.S.

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income of the ward.⁴⁸ The initial inventory is audited by the clerk,⁴⁹ which receives a fee for the audit, according to the value of the assets.⁵⁰ "Unless otherwise ordered by the court, any initial, annual, or final guardianship report or amendment thereto is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and the guardian's attorney, . . ." ⁵¹ Therefore, clerks currently have access to the initial inventory balance, thus perhaps making "the beginning inventory balance" change to s. 744.368, F.S. (line 85) unnecessary.

5. Most other records of sealed or expunged criminal history records that are made available to an employing or reviewing agency are made confidential while held by the employing or reviewing agency. See ss. 943.0585(4)(c) and 943.059(4)(c), F.S. While this bill inadvertently may include such an exemption, the proper means for creating an exemption from public records law is in compliance with the state constitution and state law is by separate bill with a public necessity statement, a 5 year review, and requiring a 2/3 vote of each chamber.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

⁴⁷ Section 744.362(1), F.S.

⁴⁸ Section 744.365, F.S.

⁴⁹ Section 744.368(f), F.S.

⁵⁰ Section 744.365(6), F.S.

⁵¹ Section 744.3701(1), F.S.