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# Civil Justice Subcommittee

**Thursday, January 22, 2015  
9:00 AM - 11:00 AM  
Sumner Hall (404 HOB)**

**MEETING PACKET**

**Steve Crisafulli  
Speaker**

**Kathleen Passidomo  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Civil Justice Subcommittee

**Start Date and Time:** Thursday, January 22, 2015 09:00 am  
**End Date and Time:** Thursday, January 22, 2015 11:00 am  
**Location:** Sumner Hall (404 HOB)  
**Duration:** 2.00 hrs

**Consideration of the following bill(s):**



PCS for HB 5 -- Guardianship Proceedings  
HB 7 Pub. Rec./Claim Settlement on Behalf of Minor or Ward by Passidomo

**NOTICE FINALIZED on 01/15/2015 16:11 by Ingram.Michele**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 5 Guardianship Proceedings  
**SPONSOR(S):** Civil Justice Subcommittee  
**TIED BILLS:** HB 7 **IDEN./SIM. BILLS:** None

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

### 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 an alternative to guardianship which will sufficiently address the problems of the incapacitated person. 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 if mediation is in the best interests of the alleged incapacitated person, ward, or minor;
- 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 against a minor;
- Requires that notice of the filing of a petition for the appointment of an emergency temporary guardian and any hearing thereon be served on an alleged incapacitated person and his or her counsel;
- Requires letters of guardianship to specify, where applicable, the authority of a health care surrogate;
- Prohibits a court from giving preference to the emergency temporary guardian when selecting the permanent guardian;
- Requires appointment of permanent 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;
- Allows the clerk of court to share confidential information regarding guardians, attorneys and caregivers with other clerks and with law enforcement authorities;
- Provides the legal standard for restoration to capacity; and
- Requires a court to give priority to hearings on restoration to capacity.

The bill appears to have a minimal negative fiscal impact on state government. 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.

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

STORAGE NAME: pcs0005.CJS DOCX

DATE: 1/20/2015

## 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 an alternative to guardianship which will sufficiently address the problems of the incapacitated person. 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 estate. 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 the 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. 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. 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. In addition to the duty of loyalty, the 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>1</sup> an annual guardianship report<sup>2</sup>, and an annual accounting of the ward’s property<sup>3</sup>. Such reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties and are reviewable and auditable by the clerk of court.<sup>4</sup> The reports are confidential under s.744.3701, F.S. and the clerk of court is not authorized to share evidence of fraud or potential criminal activities contained within such reports with other clerks of court that may supervise the same guardians, attorneys, or caregivers, or with law enforcement.

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 an court monitor under s. 744.107, or an emergency court monitor under s. 744.1075 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,

<sup>1</sup> Section 744.362, F.S.

<sup>2</sup> Section 744.367, F.S.

<sup>3</sup> Section 744.3678, F.S.

<sup>4</sup> Section 744.368, F.S.

examine documents, or interview the ward. A monitor must report his or her findings to the court for judicial action.<sup>5</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>6</sup>

The public is also required to report abuse, neglect, or exploitation of vulnerable adults 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>7</sup>

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 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:

- The 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>8</sup>

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

- Consider the expressed desires of the ward;
- Allow and maintain contact with the family except where contact may harm the ward;
- 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;
- 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 Reports**

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 reports, the report must be filed by April 1 of the plan year. Otherwise, the plan must be

<sup>5</sup> Section 744.107(2), F.S.

<sup>6</sup> Section 744.107(1), F.S.

<sup>7</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>8</sup> The language here is modeled after that creating a similar duty in the Florida Trust Code at s. 736.0810, F.S.

filed within 90 days after the anniversary month that the letters of guardianship were filed.<sup>9</sup> An approved report is a court order giving the guardian power to act within its terms and limits the powers of the guardian to such terms.<sup>10</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 of a plan.

Guardianship reports are confidential unless the court orders otherwise.<sup>11</sup>

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

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 report 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.

The bill creates two new subsections in s. 744.3701, F.S. to authorize a court or the clerk of court to share confidential guardianship information with a court or clerk of court in another jurisdiction regarding a guardian, attorney, caregiver, or other service provider to protect the public from fraudulent actions by such actors in guardianship proceedings. A court or clerk may also refer or allow access to such confidential information to law enforcement where there is evidence of criminal activity. Information shared pursuant to the clerk's authority under this section remains confidential.

### **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>12</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>13</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>14</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>15</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

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<sup>9</sup> Section 744.367(1), F.S.

<sup>10</sup> Section 744.369(8), F.S.

<sup>11</sup> Section 744.3701, F.S.

<sup>12</sup> Section 744.3201, F.S.

<sup>13</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>14</sup> Section 744.3031, F.S.

<sup>15</sup> Section 744.344(4), F.S.

guardian<sup>16</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 public have reported that 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 guardian has not been ruled upon, or filed, 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 a hearing on a petition for appointment of an emergency temporary guardian be served on an alleged incapacitated person, and the alleged incapacitated person's attorney, at least 24 hours prior to commencement of the hearing.

### **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>17</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>18</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>19</sup> If the court finds the petition was brought in bad faith, the costs may be assessed against the petitioner.<sup>20</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>21</sup>

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<sup>16</sup> Section 744.331(1), F.S.

<sup>17</sup> Section 744.331(3)(a), F.S.

<sup>18</sup> *Id.*

<sup>19</sup> Section 744.331(7)(b), F.S.

<sup>20</sup> Section 744.331(7)(c), F.S.

<sup>21</sup> See, *Ehrlich v. Severinson*, 985 So.2d 639 (Fla. 4th DCA 2008), *Levine v. Levine*, 4 So 3d 730 (Fla. 5th DCA 2009); and *Faulkner v. Faulkner*, 65 So.3d 1167 (Fla. 1st DCA 2011).



## **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, 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 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>22</sup> A plenary guardian exercises all delegable rights<sup>23</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>24</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>25</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>26</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>27</sup>

## **Effect of Proposed Changes**

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 requirement 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>28</sup>

The bill amends ss. 744.3115 and 744.345, F.S., to provide that the court must specify in an 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.

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<sup>22</sup> Section 744.344(1), F.S.

<sup>23</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. Section 744.3215(3), F.S.

<sup>24</sup> Section 744.102(9), F.S.

<sup>25</sup> Section 744.312, F.S.

<sup>26</sup> Section 744.345, F.S.

<sup>27</sup> Id.

<sup>28</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.

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 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>29</sup> Similarly, s. 744.311(7), F.S.,<sup>30</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>31</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>32</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 parties. 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>33</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.

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

<sup>30</sup> This section provides that an attorney will be provided for the alleged incompetent.

<sup>31</sup> Section 744.108(8), F.S.

<sup>32</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>33</sup> This provision is derived from and similar to s. 733.6175(4), F.S., of the Florida Probate Code.

## **Mediation**

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 processes with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.<sup>34</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.

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.

Florida Probate Rules allow the referral of adversarial matters to mediation.<sup>35</sup> Because only proceedings to remove a guardian or surcharge a guardian are adversarial, it is unclear whether other issues may be referred to mediation.

### **Effect of Proposed Changes - Mediation**

The bill creates s. 744.1065, F.S. to authorize a court, upon its own motion or the motion of any interested person, to refer any guardianship matter under ch. 744, F.S., to mediation. Mediation 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>36</sup> Section 744.464, F.S., describes the legal procedure for restoration in Florida, 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 partial or total incapacity of the person must be established by clear and convincing evidence.<sup>37</sup> However, a circuit court case, *In re Guardianship of Branch*, 10 FLW Supp. 23, 25 (2nd Cir. 2002), suggests that the standard for restoration is a preponderance of evidence. Without clear statutory guidance, uncertainty remains in the law regarding the proper evidentiary standard in restoration of 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>34</sup> Section 44.1011, F.S.

<sup>35</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. 1.070(a): "The presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration".

<sup>36</sup> Section 744.3215(1)(c), F.S.

<sup>37</sup> Section 744.331(5)(c), F.S.

## **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>38</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 "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 in guardianship proceedings.

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's and attorney's 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. 744.3115, F.S., regarding advance directives for health care.

Section 8 amends s. 744.312, F.S., regarding considerations in the appointment of a guardian.

Section 9 amends s. 744.331, F.S., regarding procedures to determine incapacity.

Section 10 amends s. 744.344, F.S., regarding the order of appointment of a guardian.

Section 11 amends s. 744.345, F.S., regarding letters of guardianship.

Section 12 creates s. 744.359, F.S., regarding abuse, neglect, or exploitation by a guardian.

Section 13 amends s. 744.361, F.S., regarding the powers and duties of a guardian.

Section 14 amends s. 744.367, F.S., regarding the duty to file the annual guardianship report.

Section 15 amends s. 744.369, F.S., regarding judicial review of guardianship reports.

Section 16 amends s. 744.3701, F.S., regarding inspection of report.

Section 17 amends s. 744.464, F.S., regarding restoration to capacity.

Section 18 provides that the bill applies to all guardianship proceedings pending on the effective date.

Section 19 provides an effective date of upon becoming a law.

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<sup>38</sup> Under current law, parents as natural guardians may settle a claim of less than \$15,000 without appointment of a guardian ad litem. Sections 744.301 and 744.3025, F.S. These settlements are typically related to a personal injury case.  
STORAGE NAME pcs0005.CJS DOCX  
DATE. 1/20/2015

## 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 in general does not appear to have any impact on state expenditures.

The provision of this bill regarding payment to an examining committee in limited circumstances appears to create an unknown minimal negative fiscal impact on state revenues. A finding that an alleged incapacitated person is competent is uncommon. The Office of State Courts Administration (OSCA) reports an anticipated fiscal impact because the bill will require the State Courts System to pay examining committee fees in situations in which it is not currently required by statute to do so (i.e., when the petition is dismissed and there is no "ward," indigent or otherwise). Information from the circuits indicates that some currently pay examining committee fees only when the ward/alleged incapacitated person is indigent. Other circuits report that they also pay the fees in those situations in which the alleged incapacitated person is not indigent and a good faith petition is dismissed (e.g., to ensure that the examining committee members do not go uncompensated for their services). Thus, in some cases circuits are already paying the fees in situations contemplated by the bill. 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.

### 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 may lessen the costs to individuals of resolving disputed issues in guardianship proceedings.

## 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 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 that same office may be appointed as an attorney for an alleged incapacitated person. 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**

n/a

1 A bill to be entitled  
 2 An act relating to guardianship proceedings; creating  
 3 s. 744.1065, F.S.; authorizing a court to refer  
 4 guardianship matters to mediation under certain  
 5 circumstances; amending ss. 744.107 and 744.1075,  
 6 F.S.; authorizing a court to appoint the office of  
 7 criminal conflict and civil regional counsel as a  
 8 court monitor in guardianship proceedings; amending s.  
 9 744.108, F.S.; providing that fees and costs incurred  
 10 by an attorney who has rendered services to a ward in  
 11 compensation proceedings are payable from guardianship  
 12 assets; providing that expert testimony is not  
 13 required in proceedings to determine compensation for  
 14 an attorney or guardian; requiring a person offering  
 15 expert testimony to provide notice to interested  
 16 persons; providing that expert witness fees are  
 17 recoverable by the prevailing party; amending s.  
 18 744.3025, F.S.; providing that a court may appoint a  
 19 guardian ad litem to represent a minor if necessary to  
 20 protect the minor's interest in a settlement;  
 21 providing that a settlement of a minor's claim is  
 22 subject to certain confidentiality provisions;  
 23 amending s. 744.3031, F.S.; requiring notification of  
 24 an alleged incapacitated person and such person's  
 25 attorney of a petition for appointment of an emergency  
 26 temporary guardian before a hearing on the petition

27 commences; amending s. 744.3115, F.S.; directing the  
 28 court to specify authority for health care decisions  
 29 with respect to a ward's advance directive; reordering  
 30 and amending s. 744.312, F.S.; prohibiting a court  
 31 from giving preference to the appointment of certain  
 32 persons as guardians; providing requirements for the  
 33 appointment of professional guardians; amending s.  
 34 744.331, F.S.; directing the court to consider certain  
 35 factors when determining incapacity; requiring that  
 36 the examining committee be paid from state funds as  
 37 court-appointed expert witnesses if a petition for  
 38 incapacity is dismissed; requiring that a petitioner  
 39 reimburse the state for such expert witness fees if  
 40 the court finds the petition to have been filed in bad  
 41 faith; amending s. 744.344, F.S.; providing conditions  
 42 under which the court is authorized to appoint an  
 43 emergency temporary guardian; amending s. 744.345,  
 44 F.S.; revising provisions relating to letters of  
 45 guardianship; creating s. 744.359, F.S.; prohibiting  
 46 abuse, neglect, or exploitation of a ward by a  
 47 guardian; requiring reporting thereof to the  
 48 Department of Children and Families central abuse  
 49 hotline; amending s. 744.361, F.S.; providing  
 50 additional powers and duties of a guardian; amending  
 51 s. 744.367, F.S.; revising the period during which a  
 52 guardian must file an annual guardianship plan with



53 | the court; amending s. 744.369, F.S.; providing for  
 54 | the continuance of a guardian's authority to act under  
 55 | an expired annual report under certain circumstances;  
 56 | amending s. 744.3701, F.S.; allowing a clerk to  
 57 | provide access to confidential portions of  
 58 | guardianship files in certain circumstances;  
 59 | authorizing a clerk of court to refer certain matters  
 60 | to law enforcement; amending s. 744.464, F.S.;  
 61 | establishing the burden of proof for determining  
 62 | restoration of capacity of a ward in pending  
 63 | guardianship cases; requiring a court to advance such  
 64 | cases on the calendar; providing applicability;  
 65 | providing an effective date.

66 |  
 67 | Be It Enacted by the Legislature of the State of Florida:

68 |  
 69 | Section 1. Section 744.1065, Florida Statutes, is created  
 70 | to read:

71 | 744.1065 Mediation.—At any time, the court may, upon its  
 72 | own motion or the motion of any interested person, refer any  
 73 | matter under the jurisdiction of this chapter to mediation if  
 74 | the court finds that mediation is in the best interests of the  
 75 | alleged incapacitated person, ward, or minor.

76 | Section 2. Subsection (5) is added to section 744.107,  
 77 | Florida Statutes, to read:

78 | 744.107 Court monitors.—

79        (5) The court may appoint the office of criminal conflict  
 80 and civil regional counsel as monitor if the ward is indigent.

81        Section 3. Subsection (6) is added to section 744.1075,  
 82 Florida Statutes, to read:

83        744.1075 Emergency court monitor.—

84        (6) The court may appoint the office of criminal conflict  
 85 and civil regional counsel as monitor if the ward is indigent.

86        Section 4. Subsections (5) and (8) of section 744.108,  
 87 Florida Statutes, are amended, and subsection (9) is added to  
 88 that section, to read:

89        744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees  
 90 and expenses.—

91        (5) All petitions for guardian ~~guardian's~~ and attorney  
 92 ~~attorney's~~ fees and expenses must be accompanied by an itemized  
 93 description of the services performed for the fees and expenses  
 94 sought to be recovered.

95        (8) When court proceedings are instituted to review or  
 96 determine a guardian's or an attorney's fees under subsection  
 97 (2), such proceedings are part of the guardianship  
 98 administration process and the costs, including costs and  
 99 attorney fees for the guardian's attorney, an attorney appointed  
 100 under s. 744.331(2), or an attorney who has rendered services to  
 101 the ward, shall be determined by the court and paid from the  
 102 assets of the guardianship estate unless the court finds the  
 103 requested compensation under subsection (2) to be substantially  
 104 unreasonable.

105       (9) The court may determine that a request for  
 106 compensation by the guardian, the guardian's attorney, a person  
 107 employed by the guardian, an attorney appointed under s.  
 108 744.331(2), or an attorney who has rendered services to the  
 109 ward, is reasonable without receiving expert testimony. A person  
 110 or party may offer expert testimony for or against a request for  
 111 compensation after giving notice to interested persons.  
 112 Reasonable expert witness fees shall be awarded by the court and  
 113 paid from the assets of the guardianship estate to the  
 114 prevailing party.

115       Section 5. Section 744.3025, Florida Statutes, is amended  
 116 to read:

117       744.3025 Claims of minors.—

118       (1)(a) The court may appoint a guardian ad litem to  
 119 represent the minor's interest before approving a settlement of  
 120 the minor's portion of the claim in a any case in which a minor  
 121 has a claim for personal injury, property damage, wrongful  
 122 death, or other cause of action in which the gross settlement of  
 123 the claim exceeds \$15,000 if the court believes a guardian ad  
 124 litem is necessary to protect the minor's interest.

125       (b) Except as provided in paragraph (e), the court shall  
 126 appoint a guardian ad litem to represent the minor's interest  
 127 before approving a settlement of the minor's claim in a any case  
 128 in which the gross settlement involving a minor equals or  
 129 exceeds \$50,000.

130       (c) The appointment of the guardian ad litem must be

131 without the necessity of bond or notice.

132 (d) The duty of the guardian ad litem is to protect the  
133 minor's interests as described in the Florida Probate Rules.

134 (e) A court need not appoint a guardian ad litem for the  
135 minor if a guardian of the minor has previously been appointed  
136 and that guardian has no potential adverse interest to the  
137 minor. ~~A court may appoint a guardian ad litem if the court  
138 believes a guardian ad litem is necessary to protect the  
139 interests of the minor.~~

140 (2) Unless waived, the court shall award reasonable fees  
141 and costs to the guardian ad litem to be paid out of the gross  
142 proceeds of the settlement.

143 (3) A settlement of a claim pursuant to this section is  
144 subject to the confidentiality provisions of this chapter.

145 Section 6. Subsections (2) through (8) of section  
146 744.3031, Florida Statutes, are renumbered as subsections (3)  
147 through (9), respectively, and a new subsection (2) is added to  
148 that section, to read:

149 744.3031 Emergency temporary guardianship.—

150 (2) Notice of filing of the petition for appointment of an  
151 emergency temporary guardian and any hearing on the petition  
152 must be served on the alleged incapacitated person and on the  
153 alleged incapacitated person's attorney at least 24 hours before  
154 the hearing on the petition is commenced.

155 Section 7. Section 744.3115, Florida Statutes, is amended  
156 to read:

157           744.3115 Advance directives for health care.—In each  
 158 proceeding in which a guardian is appointed under this chapter,  
 159 the court shall determine whether the ward, prior to incapacity,  
 160 has executed any valid advance directive under chapter 765. If  
 161 any advance directive exists, the court shall specify in its  
 162 order and letters of guardianship what authority, if any, the  
 163 guardian shall exercise over the ward with regard to health care  
 164 decisions and what authority, if any, the surrogate shall  
 165 continue to exercise over the ward with regard to health care  
 166 decisions ~~surrogate~~. Pursuant to the grounds listed in s.  
 167 765.105, the court, upon its own motion, may, with notice to the  
 168 surrogate and any other appropriate parties, modify or revoke  
 169 the authority of the surrogate to make health care decisions for  
 170 the ward. For purposes of this section, the term "health care  
 171 decision" has the same meaning as in s. 765.101.

172           Section 8. Section 744.312, Florida Statutes, is reordered  
 173 and amended to read:

174           744.312 Considerations in appointment of guardian.—

175           ~~(2)~~ (1) If a guardian cannot be appointed under subsection  
 176 (1) subject to the provisions of subsection (4), the court may  
 177 appoint any person who is fit and proper and qualified to act as  
 178 guardian, whether related to the ward or not.

179           ~~(2)~~ The court shall give preference to the appointment of  
 180 a person who:

- 181           (a) Is related by blood or marriage to the ward;
- 182           (b) Has educational, professional, or business experience

183 relevant to the nature of the services sought to be provided;

184 (c) Has the capacity to manage the financial resources  
185 involved; or

186 (d) Has the ability to meet the requirements of the law  
187 and the unique needs of the individual case.

188 (3) The court shall also:

189 (a) Consider the wishes expressed by an incapacitated  
190 person as to who shall be appointed guardian.†

191 (b) Consider the preference of a minor who is age 14 or  
192 over as to who should be appointed guardian.†

193 (c) Consider any person designated as guardian in any will  
194 in which the ward is a beneficiary.

195 ~~(1)(4)~~ If the person designated is qualified to serve  
196 pursuant to s. 744.309, the court shall appoint any standby  
197 guardian or preneed guardian, unless the court determines that  
198 appointing such person is contrary to the best interests of the  
199 ward.

200 (4) The court may not give preference to the appointment  
201 of a person under subsection (2) solely based on the fact that  
202 such person was appointed by the court to serve as an emergency  
203 temporary guardian.

204 (5) Appointment of professional guardians by the court  
205 shall be on a rotating basis of professional guardians deemed  
206 qualified by the chief judge of the circuit. However, the court  
207 may appoint a professional guardian without reference to the  
208 rotation where the special requirements of the guardianship

209 demand.

210 (6) An emergency temporary guardian who is a professional  
 211 guardian may not be appointed as the permanent guardian of the  
 212 ward unless such professional guardian had been designated as a  
 213 standby guardian or preneed guardian.

214 Section 9. Subsection (6) and paragraph (c) of subsection  
 215 (7) of section 744.331, Florida Statutes, are amended to read:

216 744.331 Procedures to determine incapacity.—

217 (6) ORDER DETERMINING INCAPACITY.—If, after making  
 218 findings of fact on the basis of clear and convincing evidence,  
 219 the court finds that a person is incapacitated with respect to  
 220 the exercise of a particular right, or all rights, the court  
 221 shall enter a written order determining such incapacity. In  
 222 determining incapacity, the court shall consider the person's  
 223 unique needs and abilities and may only remove those rights that  
 224 the court finds the person is incapable of exercising. A person  
 225 is determined to be incapacitated only with respect to those  
 226 rights specified in the order.

227 (a) The court shall make the following findings:

- 228 1. The exact nature and scope of the person's  
 229 incapacities;
- 230 2. The exact areas in which the person lacks capacity to  
 231 make informed decisions about care and treatment services or to  
 232 meet the essential requirements for her or his physical or  
 233 mental health or safety;
- 234 3. The specific legal disabilities to which the person is

235 subject; and

236 4. The specific rights that the person is incapable of  
237 exercising.

238 (b) When an order determines that a person is incapable of  
239 exercising delegable rights, the court must consider and find  
240 whether there is an alternative to guardianship that will  
241 sufficiently address the problems of the incapacitated person. A  
242 ~~guardian must be appointed to exercise the incapacitated~~  
243 ~~person's delegable rights unless the court finds there is an~~  
244 ~~alternative.~~ A guardian may not be appointed if the court finds  
245 there is an alternative to guardianship which will sufficiently  
246 address the problems of the incapacitated person. If the court  
247 finds there is not an alternative to guardianship that  
248 sufficiently addresses the problems of the incapacitated person,  
249 a guardian must be appointed to exercise the incapacitated  
250 person's delegable rights.

251 (c) In determining that a person is totally incapacitated,  
252 the order must contain findings of fact demonstrating that the  
253 individual is totally without capacity to care for herself or  
254 himself or her or his property.

255 (d) An order adjudicating a person to be incapacitated  
256 constitutes proof of such incapacity until further order of the  
257 court.

258 (e) After the order determining that the person is  
259 incapacitated has been filed with the clerk, it must be served  
260 on the incapacitated person. The person is deemed incapacitated



261 only to the extent of the findings of the court. The filing of  
 262 the order is notice of the incapacity. An incapacitated person  
 263 retains all rights not specifically removed by the court.

264 (f) Upon the filing of a verified statement by an  
 265 interested person stating:

266 1. That he or she has a good faith belief that the alleged  
 267 incapacitated person's trust, trust amendment, or durable power  
 268 of attorney is invalid; and

269 2. A reasonable factual basis for that belief,

270

271 the trust, trust amendment, or durable power of attorney shall  
 272 not be deemed to be an alternative to the appointment of a  
 273 guardian. The appointment of a guardian does not limit the  
 274 court's power to determine that certain authority granted by a  
 275 durable power of attorney is to remain exercisable by the agent  
 276 ~~attorney in fact.~~

277 (7) FEES.—

278 (c) If the petition is dismissed: ~~r~~

279 1. The fees of the examining committee shall be paid upon  
 280 court order as expert witness fees under s. 29.004(6).

281 2. Costs and attorney ~~attorney's~~ fees of the proceeding  
 282 may be assessed against the petitioner if the court finds the  
 283 petition to have been filed in bad faith. The petitioner shall  
 284 also reimburse the state courts system for any amounts paid  
 285 under subparagraph 1. upon such a finding.

286 Section 10. Subsection (4) of section 744.344, Florida

287 Statutes, is amended to read:

288 744.344 Order of appointment.—

289 (4) If a petition for the appointment of a guardian has  
 290 not been filed or ruled upon at the time of the hearing on the  
 291 petition to determine capacity, the court may appoint an  
 292 emergency temporary guardian in the manner and for the purposes  
 293 specified in s. 744.3031.

294 Section 11. Section 744.345, Florida Statutes, is amended  
 295 to read:

296 744.345 Letters of guardianship.—Letters of guardianship  
 297 shall be issued to the guardian and shall specify whether the  
 298 guardianship pertains to the person, or the property, or both,  
 299 of the ward. The letters must state whether the guardianship is  
 300 plenary or limited, and, if limited, the letters must state the  
 301 powers and duties of the guardian. ~~If the guardianship is~~  
 302 ~~limited,~~ The letters shall state whether or not and to what  
 303 extent the guardian is authorized to act on behalf of the ward  
 304 with regard to any advance directive previously executed by the  
 305 ward.

306 Section 12. Section 744.359, Florida Statutes, is created  
 307 to read:

308 744.359 Abuse, neglect, or exploitation by a guardian.—

309 (1) A guardian may not abuse, neglect, or exploit the  
 310 ward.

311 (2) A guardian has committed exploitation when the  
 312 guardian:

313 |       (a) Commits fraud in obtaining appointment as a guardian.

314 |       (b) Abuses his or her powers.

315 |       (c) Wastes, embezzles, or intentionally mismanages the  
 316 | assets of the ward.

317 |       (3) A person who believes that a guardian is abusing,  
 318 | neglecting, or exploiting a ward shall report the incident to  
 319 | the central abuse hotline of the Department of Children and  
 320 | Families.

321 |       Section 13. Section 744.361, Florida Statutes, is amended  
 322 | to read:

323 |       744.361 Powers and duties of guardian.—

324 |       (1) The guardian of an incapacitated person is a fiduciary  
 325 | and may exercise only those rights that have been removed from  
 326 | the ward and delegated to the guardian. The guardian of a minor  
 327 | shall exercise the powers of a plenary guardian.

328 |       (2) The guardian shall act within the scope of the  
 329 | authority granted by the court and as provided by law.

330 |       (3) The guardian shall act in good faith.

331 |       (4) A guardian may not act in a manner that is contrary to  
 332 | the ward's best interests under the circumstances.

333 |       (5) A guardian who has special skills or expertise, or is  
 334 | appointed in reliance upon the guardian's representation that  
 335 | the guardian has special skills or expertise, shall use those  
 336 | special skills or expertise when acting on behalf of the ward.

337 |       (6)~~(2)~~ The guardian shall file an initial guardianship  
 338 | report in accordance with s. 744.362.

339        ~~(7)(3)~~ The guardian shall file a guardianship report  
 340 annually in accordance with s. 744.367.

341        ~~(8)(4)~~ The guardian of the person shall implement the  
 342 guardianship plan.

343        ~~(9)(5)~~ When two or more guardians have been appointed, the  
 344 guardians shall consult with each other.

345        ~~(10)(6)~~ A guardian who is given authority over any  
 346 property of the ward shall:

347            (a) Protect and preserve the property and invest it  
 348 prudently as provided in chapter 518, apply it as provided in s.  
 349 744.397, and keep clear, distinct, and accurate records of the  
 350 administration of the ward's property ~~account for it faithfully.~~

351            (b) Perform all other duties required of him or her by  
 352 law.

353            (c) At the termination of the guardianship, deliver the  
 354 property of the ward to the person lawfully entitled to it.

355        ~~(11)(7)~~ The guardian shall observe the standards in  
 356 dealing with the guardianship property that would be observed by  
 357 a prudent person dealing with the property of another, ~~and, if~~  
 358 ~~the guardian has special skills or is named guardian on the~~  
 359 ~~basis of representations of special skills or expertise, he or~~  
 360 ~~she is under a duty to use those skills.~~

361        ~~(12)(8)~~ The guardian, if authorized by the court, shall  
 362 take possession of all of the ward's property and of the rents,  
 363 income, issues, and profits from it, whether accruing before or  
 364 after the guardian's appointment, and of the proceeds arising

365 from the sale, lease, or mortgage of the property or of any  
 366 part. All of the property and the rents, income, issues, and  
 367 profits from it are assets in the hands of the guardian for the  
 368 payment of debts, taxes, claims, charges, and expenses of the  
 369 guardianship and for the care, support, maintenance, and  
 370 education of the ward or the ward's dependents, as provided for  
 371 under the terms of the guardianship plan or by law.

372 (13) Recognizing that every individual has unique needs  
 373 and abilities, a guardian who is given authority over a ward's  
 374 person shall, as appropriate under the circumstances:

375 (a) Consider the expressed desires of the ward as known by  
 376 the guardian when making decisions that affect the ward.

377 (b) Allow the ward to maintain contact with family and  
 378 friends unless the guardian believes that such contact may cause  
 379 harm to the ward.

380 (c) Not restrict the physical liberty of the ward more  
 381 than reasonably necessary to protect the ward or another person  
 382 from serious physical injury, illness, or disease.

383 (d) Assist the ward in developing or regaining his or her  
 384 own capacity, if medically possible.

385 (e) Notify the court if the guardian believes that the  
 386 ward has regained capacity and that one or more of the rights  
 387 that have been removed should be restored to the ward.

388 (f) To the extent applicable, make provision for the  
 389 medical, mental, rehabilitative, or personal care services for  
 390 the welfare of the ward.

391 (g) To the extent applicable, acquire a clear  
392 understanding of the risks and benefits of a recommended course  
393 of health care treatment before making a health care decision.

394 (h) Evaluate the ward's medical and health care options,  
395 financial resources, and desires when making residential  
396 decisions that are best suited for the current needs of the  
397 ward.

398 (i) Advocate on behalf of the ward in institutional and  
399 other residential settings.

400 ~~(14)(9)~~ A professional guardian must ensure that each of  
401 the guardian's wards is personally visited by the guardian or  
402 one of the guardian's professional staff at least once each  
403 calendar quarter. During the personal visit, the guardian or the  
404 guardian's professional staff person shall assess:

405 (a) The ward's physical appearance and condition.

406 (b) The appropriateness of the ward's current living  
407 situation.

408 (c) The need for any additional services and the necessity  
409 for continuation of existing services, taking into consideration  
410 all aspects of social, psychological, educational, direct  
411 service, health, and personal care needs.

412 (d) The nature and extent of visitation and communication  
413 with the ward's family and friends.

414

415 This subsection does not apply to a professional guardian who  
416 has been appointed only as guardian of the property.

417 Section 14. Subsection (1) of section 744.367, Florida  
 418 Statutes, is amended to read:

419 744.367 Duty to file annual guardianship report.—

420 (1) Unless the court requires filing on a calendar-year  
 421 basis, each guardian of the person shall file with the court an  
 422 annual guardianship plan at least 60 days, but no more than  
 423 ~~within~~ 90 days, before ~~after~~ the last day of the anniversary  
 424 month that the letters of guardianship were signed, and the plan  
 425 must cover the coming fiscal year, ending on the last day in  
 426 such anniversary month. If the court requires calendar-year  
 427 filing, the guardianship plan for the forthcoming calendar year  
 428 must be filed on or after September 1 but no later than December  
 429 1 of the current year ~~before April 1 of each year.~~

430 Section 15. Subsection (8) of section 744.369, Florida  
 431 Statutes, is amended to read:

432 744.369 Judicial review of guardianship reports.—

433 (8) The approved report constitutes the authority for the  
 434 guardian to act in the forthcoming year. The powers of the  
 435 guardian are limited by the terms of the report. The annual  
 436 report may not grant additional authority to the guardian  
 437 without a hearing, as provided for in s. 744.331, to determine  
 438 that the ward is incapacitated to act in that matter. Unless the  
 439 court orders otherwise, the guardian may continue to act under  
 440 authority of the last approved report until the forthcoming  
 441 year's report is approved.

442 Section 16. Subsections (3) and (4) are added to section

443 744.3701, Florida Statutes, to read:

444 744.3701 Inspection of report.—

445 (3) The court or the clerk may share confidential  
 446 information with a court or a clerk in another jurisdiction  
 447 regarding a guardian, attorney, caregiver or other service  
 448 provider for the purpose of protecting the public. All  
 449 information shared shall remain confidential.

450 (4) The clerk may refer alleged criminal matters for  
 451 prosecution or investigation to an appropriate law enforcement  
 452 agency on his or her own initiative and with notification to the  
 453 court. The clerk may allow an appropriate law enforcement  
 454 agency or state agency with jurisdiction to access the  
 455 guardianship file for purposes of criminal or agency  
 456 investigation with notification to the court. All information  
 457 accessed or shared shall remain confidential by the law  
 458 enforcement agency or state agency unless disclosure is required  
 459 after a finding of probable cause.

460 Section 17. Paragraphs (a) and (b) of subsection (3) of  
 461 section 744.464, Florida Statutes, are amended, and subsection  
 462 (4) is added to that section, to read:

463 744.464 Restoration to capacity.—

464 (3) ORDER OF RESTORATION.—

465 (a) If no objections are filed, and the court is satisfied  
 466 that with the medical examination establishes by a preponderance  
 467 of the evidence that restoration of all or some of the ward's  
 468 rights is appropriate, the court shall enter an order of



469 restoration of capacity, restoring all or some of the rights  
 470 which were removed from the ward in accordance with those  
 471 findings. ~~The order must be issued within 30 days after the~~  
 472 ~~medical report is filed.~~

473 (b) At the conclusion of a hearing, conducted pursuant to  
 474 s. 744.1095, the court shall make specific findings of fact and,  
 475 based on a preponderance of the evidence, enter an order either  
 476 denying the suggestion of capacity or restoring all or some of  
 477 the rights which were removed from the ward. The ward has the  
 478 burden of proving by a preponderance of the evidence that the  
 479 restoration of capacity is warranted.

480 (4) TIMELINESS OF HEARING.—The court shall give priority  
 481 to any suggestion of capacity and shall advance the cause on the  
 482 calendar.

483 Section 18. The amendments made by this act apply to all  
 484 proceedings pending on the effective date of this act.

485 Section 19. This act shall take effect upon becoming a  
 486 law.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment (with title amendment)**

Remove lines 71-74 and insert:

6 744.1065 Mediation; alternative dispute resolution.-At any  
 7 time, the court may, upon its own motion or the motion of any  
 8 interested person, refer any matter under the jurisdiction of  
 9 this chapter to mediation or alternative dispute resolution if  
 10 the court finds that mediation or alternative dispute resolution  
 11 is in the best interests of the

13 -----  
 14 **T I T L E A M E N D M E N T**

Remove line 4 and insert:

16 guardianship matters to mediation or alternative dispute  
 17 resolution under certain



Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment**

Remove line 154 and insert:

6 the hearing on the petition is commenced, unless the petitioner  
 7 demonstrates that substantial harm to the alleged incapacitated  
 8 person would occur if the 24 hour notice is given.



Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment**

Remove line 213 and insert:

6 standby guardian or preneed guardian or the court makes specific  
 7 written findings that such professional guardian meets special  
 8 requirements of the guardianship.



Amendment No. 4

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment (with title amendment)**

Between lines 320 and 321, insert:

6 (4) This section shall be interpreted in conformity with s.  
 7 825.103.

9 -----  
 10 **T I T L E A M E N D M E N T**

11 Remove line 49 and insert:

12 hotline; providing for interpretation; amending s. 744.361,  
 13 F.S.; providing



Amendment No. 5

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment**

Remove line 379 and insert:

6 harm to the ward. Upon petition by an interested party, the  
 7 court may review a decision of a guardian regarding visitation.



Amendment No. 6

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee  
 2 Representative Passidomo offered the following:

**Amendment (with title amendment)**

Remove lines 442-459

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**T I T L E A M E N D M E N T**

Remove lines 56-60 and insert:  
 amending s. 744.464, F.S.;





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7 Pub. Rec./Claim Settlement on Behalf of Minor or Ward

SPONSOR(S): Passidomo

TIED BILLS: HB 5 IDEN./SIM. BILLS: SB 360

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson TR	Bond YB
2) Government Operations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Litigation settlement agreements in guardianship cases routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of \$15,000 without court approval. The court approval process requires a petition setting forth the terms of the settlement. An order is eventually entered that may also contain the terms of settlement, or may refer to the petition. The petition and the order are part of a court file, and therefore are a matter of public record and open for inspection under current law.

The bill amends the guardianship law to provide that the petition requesting permission for settlement of a claim, the order on the petition, and any document associated with the settlement, are confidential and exempt from public records requirements. The court may order partial or full disclosure of the confidential and exempt record upon a showing of good cause.

The bill provides a statement of public necessity as required by the State Constitution.

The bill provides that the exemption will take effect on the same date as House Bill 5 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands the current public record exemption for certain information related to guardianship; thus, it requires a two-thirds vote for final passage.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### Public Records Law - In General

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

###### Court Records

Florida courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S.<sup>2</sup> However, the Florida Supreme Court found that "both civil and criminal proceedings in Florida are public events" and that the court will "adhere to the well-established common law right of access to court proceedings and records."<sup>3</sup> There is a Florida constitutional guarantee of access to judicial records.<sup>4</sup> The constitutional provision provides for public access to judicial records, except for those records expressly exempted by the State Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.<sup>5</sup>

###### Exempt versus Confidential and Exempt

There is a difference between records the Legislature has determined to be exempt and those which have been determined to be confidential and exempt.<sup>6</sup> If the Legislature has determined the information to be confidential then the information is not subject to inspection by the public.<sup>7</sup> Also, if the information is deemed to be confidential it may only be released to those person and entities designated in the statute.<sup>8</sup> However, the agency is not prohibited from disclosing the records in all circumstances where the records are only exempt.<sup>9</sup>

###### Settlements in Guardianship Cases

Litigation settlement agreements routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of \$15,000 without court approval.<sup>10</sup> The court approval process requires a petition setting forth the terms of the settlement.<sup>11</sup> An order is eventually entered that also may contain the terms of settlement, or may refer to the petition.<sup>12</sup> The petition and the order are part of a court file, and therefore, are a matter of public record and open for inspection under current law.

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<sup>1</sup> Art I., s. 24(c), Fla. Const.

<sup>2</sup> See e.g., *Times Publishing Company v. Ake*, 660 So.2d 255 (Fla. 1995).

<sup>3</sup> *Barron v. Florida Freedom Newspapers*, 531 So.2d 113, 116 (Fla. 1988).

<sup>4</sup> Art I., s. 24(a), Fla. Const.

<sup>5</sup> Art I., ss. 24(c) and (d), Fla. Const.

<sup>6</sup> *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, 53 (Fla. 5<sup>th</sup> DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

<sup>10</sup> See s. 744.301(2), F.S.

<sup>11</sup> Section 744.387, F.S.

<sup>12</sup> *Id.*

## Effect of the Bill

The bill amends s. 744.3701, F.S., to provide that any court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and may not be disclosed except as specifically authorized.

Because the record is made confidential and exempt, it may not be disclosed except as provided in law. Current law allows the court, the clerk of court, the guardian and the guardian's attorney to review the guardianship court file. The bill amends s. 744.3701, F.S., to provide that record of a settlement may also be disclosed to the guardian ad litem (if any) related to the settlement, to the ward (the minor) if he or she is 14 years of age or older and has not been declared incompetent, and to the attorney for the ward. The record may also be disclosed as ordered by the court.

The bill includes a public necessity statement.

### B. SECTION DIRECTORY:

Section 1 amends s. 744.3701, F.S., regarding confidentiality.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of House Bill 5, if adopted in the same legislative session.

## 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 expenditures.

### 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:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the court system and clerks of court. Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and court and clerk offices could incur costs associated with redacting the confidential and

exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the court system and clerks.

### 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:

###### Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it requires a two-thirds vote for final passage.

###### Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it includes a public necessity statement.

###### Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption related to guardianships. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

#### B. RULE-MAKING AUTHORITY:

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

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

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled  
 2 An act relating to public records; amending s.  
 3 744.3701, F.S.; providing an exemption from public  
 4 records requirements for records relating to the  
 5 settlement of a claim on behalf of a minor or ward;  
 6 authorizing a guardian ad litem, a ward, a minor, and  
 7 a minor's attorney to inspect guardianship reports and  
 8 court records relating to the settlement of a claim on  
 9 behalf of a minor or ward, upon a showing of good  
 10 cause; authorizing the court to direct disclosure and  
 11 recording of an amendment to a report or court records  
 12 relating to the settlement of a claim on behalf of a  
 13 minor or ward, in connection with real property or for  
 14 other purposes; providing a statement of public  
 15 necessity; providing a contingent effective date.

16  
 17 Be It Enacted by the Legislature of the State of Florida:

18  
 19 Section 1. Section 744.3701, Florida Statutes, is amended  
 20 to read:

21 744.3701 Confidentiality ~~Inspection of report.~~—

22 (1) Unless otherwise ordered by the court, upon a showing  
 23 of good cause, an any initial, annual, or final guardianship  
 24 report or amendment thereto, or a court record relating to the  
 25 settlement of a claim, is subject to inspection only by the  
 26 court, the clerk or the clerk's representative, the guardian and

27 | the guardian's attorney, the guardian ad litem with regard to  
 28 | the settlement of the claim, and the ward if he or she is at  
 29 | least 14 years of age and has not, unless he or she is a minor  
 30 | ~~or has~~ been determined to be totally incapacitated, and the  
 31 | ward's attorney, the minor if he or she is at least 14 years of  
 32 | age, or the attorney representing the minor with regard to the  
 33 | minor's claim, or as otherwise provided by this chapter.

34 |       (2) The court may direct disclosure and recording of parts  
 35 | of an initial, annual, or final report or amendment thereto, or  
 36 | a court record relating to the settlement of a claim, including  
 37 | a petition for approval of a settlement on behalf of a ward or  
 38 | minor, a report of a guardian ad litem relating to a pending  
 39 | settlement, or an order approving a settlement on behalf of a  
 40 | ward or minor, in connection with a ~~any~~ real property  
 41 | transaction or for such other purpose as the court allows, ~~in~~  
 42 | ~~its discretion.~~

43 |       (3) A court record relating to the settlement of a ward's  
 44 | or minor's claim, including a petition for approval of a  
 45 | settlement on behalf of a ward or minor, a report of a guardian  
 46 | ad litem relating to a pending settlement, or an order approving  
 47 | a settlement on behalf of a ward or minor, is confidential and  
 48 | exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I  
 49 | of the State Constitution and may not be disclosed except as  
 50 | specifically authorized.

51 |       Section 2. The Legislature finds that it is a public  
 52 | necessity to keep confidential and exempt from public disclosure

53 information contained in a settlement record which could be used  
54 to identify a minor or ward. The information contained in these  
55 records is of a sensitive, personal nature, and its disclosure  
56 could jeopardize the physical safety and financial security of  
57 the minor or ward. In order to protect minors, wards, and others  
58 who could be at risk upon disclosure of a settlement, it is  
59 necessary to ensure that only those interested persons who are  
60 involved in settlement proceedings or the administration of the  
61 guardianship have access to reports and records. The Legislature  
62 finds that the court retaining discretion to direct disclosure  
63 of these records is a fair alternative to public access.

64       Section 3. This act shall take effect on the same date  
65 that HB 5 or similar legislation takes effect if such  
66 legislation is adopted in the same legislative session or an  
67 extension thereof and becomes law.