



Florida State Guardianship Association

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Position Paper on House Bill 5

House Bill 5 was created with collaboration of numerous elder law attorneys, real property and probate lawyers and other interested parties throughout the State of Florida to provide some revision to Guardianship Chapter 744.

THE WHEEL

Recently a provision was added to HB 5 in Section 744.312. This section is titled Considerations in Appointment of Guardian. The recent addition was to add a subsection that requires any appointment of a professional guardian by the court shall be on a rotating basis of professional guardians that are deemed qualified by the Chief Judge of the Circuit. The provision allows the court to appoint a professional guardian without reference to the rotation where the special requirements of the guardianship demand. This provision has become known as "The Wheel" provision which envisions a rotating selection list of professional guardians.

This provision should be opposed for the following reasons:

1. This section removes the ability of parties, including the alleged incapacitated person themselves or through their counsel, to propose and select a professional guardian that best fits with the personal needs and personalities of the alleged incapacitated person and other interested parties, such as families.
2. This removes the family's ability to propose a carefully selected professional guardian, after consideration, which would meet the unique circumstances of the alleged incapacitated person.
3. It mandates an arbitrary mechanism for the selection of one of the most intimate and trusted relationships and removes all ability of the alleged incapacitated or other people interested in the vulnerable adults special circumstances to pick the best match for the circumstances. This is as negative to the alleged incapacitated person as to family.
4. This provision also assumes that all professional guardians come with the same and equal skill sets. Although, the provision allows the court to appoint or ignore the random wheel for special requirements it would now require special finding of fact on factors that are often intangible personality traits and bedside manners that are difficult to quantify or establish with appropriate findings of fact.
5. The purpose of the wheel was to prevent favoritism by a Judge in appointing professional guardians. This provision does not eliminate that risk as the Judge is entitled to make a substitution to ignore the mandatory wheel anytime the Judge believes there are special requirements. As a result the very difficulty, "the wheel" is designed to replace can easily be circumvented by a Judge who is predisposed to this type of behavior.
6. It is common in our state for elders who have no family that they trust, to establish a relationship with professional guardians who are educated specifically to this task are bonded and have undergone rigorous background checks. Individuals of this State have selected through a pre-need guardian these professional guardians for the very reason of their credentials. This wheel provision arbitrarily discriminates against the citizens of this States their right to exercise their choice of trusted advisor and advocate by eliminating the ability to appoint a guardian through pre-need designation as a result of the very competence that we would seek in a professional guardian.

Therefore, you should contact your legislator to mention these specific talking points and oppose the inclusion of "the wheel" provision in house bill 5 as found in 744.312. The bill should be opposed in totality if this provision is not removed.



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Position Paper on House Bill 5 – Continued

EMERGENCY TEMPORARY GUARDIAN

House Bill 5 was also recently amended to include in this same Section 744.312 “Considerations in Appointment of Guardian.” This section prohibits a professional guardian that has been appointed as emergency temporary guardian from becoming the permanent guardian of the alleged incapacitated person unless the professional guardian has been designated as a stand by guardian or pre-need guardian.

This subsection was intended to prohibit a professional guardian that is appointed under emergency circumstances from being treated as the presumed solution and therefore, have some automatic and presumptive right to continue as the permanent guardian. However, that presumption was already provided for in House Bill 5 under the new subsection 4 of that statute. This additional provision becomes an arbitrary barrier to prohibit a professional guardian who is appointed to act quickly and gain immediate knowledge and assistance for the alleged incapacitated from ever being able to participate as the permanent guardian and solution for the alleged incapacitated person even if that professional guardian is in the best interest of the alleged incapacitated person. This proposed subsection 6 should be opposed for the following reasons:

1. This provision creates an arbitrary prohibition of who can serve as guardian and could automatically exclude the best person for the job. There is no exception to this provision – see below.
2. This provision also creates a barrier to finding professional guardian to serve in the initial and temporary circumstances when no one else can be found which is often at times of exploitation, abuse and neglect. The professional guardian would absolutely bar themselves from consideration of being appointed in the case if they were the one willing to take on the hard and unknown circumstances presented under the emergency temporary guardian. The position of emergency temporary guardian, is often the most difficult to balance between the safety of the alleged incapacitated persons rights and properties but at the same time protecting the assets and alleged incapacitated from harm. The vulnerable citizens of this State would want the most skilled professional guardian to serve in this circumstance and yet this provision would automatically and arbitrarily prohibit the skilled professional guardian from serving in a continued role if that professional guardian was willing to take on the hard unpredictable circumstances of an emergency temporary guardianship. There is an exception if the emergency temporary guardian is previously appointed as stand by guardian or pre-need guardian, but factually that circumstance can never arise. If a professional guardian was named in either of those roles there would not be exploitation, neglect or abuse as that fiduciary would already be on the scene and involved in the assistance and advocacy for the alleged incapacitated person.
3. This provision forces on the alleged incapacitated person an unnecessary transition from one professional guardian to another professional guardian after the emergency temporary guardian already managed to get the finances and circumstances under control. This includes the unnecessary additional counsel for no apparent benefit to the alleged incapacitated person.

Finally the provision speaks in terms of professional guardian. Public Guardians in our State are also designated as professional guardians. This provision conflicts directly with all public guardians serving.

This provision should be stricken and if this section is not stricken the entire House Bill 5 should be opposed in totality.