

Guardianship

Review of Latest Adopted and Proposed Legislation

Judge Penick Elder Law Inn of Court

February 19, 2015

House Bill 635 - Effective July 1, 2014

- Requires that nonprofessional guardians submit to a credit history and Level 2 background screening unless waived by the court (F.S. 744.3135);
- 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;" (F.S. 744.102)
- 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;" (F.S. 744.368) 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. (F.S. 744.368)

House Bill 5/Senate Bill 366

Fiduciary Duties of a Guardian

- Amends 744.107 and 744.1075 to authorize a court to appoint the Office of Criminal Conflict and Civil Regional Counsel as a court monitor for an indigent ward.
- Creates 744.359 to provide that a guardian may not abuse, neglect, or exploit a ward under the guardian's care. Exploitation 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 DCF's central abuse hotline.

House Bill 5/Senate Bill 366

Fiduciary Duties of a Guardian Cont'd

- Amends 744.361(1) to confirm and codify pre-existing Florida law that a guardian is a fiduciary with respect to a ward under the guardian's care. Further amends 744.361 to impose additional statutory duties upon a guardian as a fiduciary:
 - To act only within the scope of the authority granted to the guardian;
 - To act in good faith;
 - To act in the ward's best interests; and
 - To keep clear, distinct, and accurate records (modeled after similar duty in Florida Trust Code, 736.0810)
- Specific to guardians of the person, creates the duty of a guardian to:
 - Consider the expressed desires of the ward;
 - Allow the ward to maintain contact with family and friends except where contact may harm the ward (court may review such decisions upon petition by an interested person);
 - Not restrict the physical liberty of the ward more than necessary;
 - Assist the ward in developing or regaining capacity if medically possible;
 - Notify the court if the guardian believes that the ward may have capacity to exercise one or more of the ward's removed rights;
 - Make provisions for medical services and, to the extent possible, acquire a clear understanding of the risks and benefits of a recommended course of treatment;
 - 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.

House Bill 5/Senate Bill 366

Guardianship Plan

- Amends 744.367 to revise when a guardian of the person must file an annual guardianship plan. Where a calendar year filing is required, the plan must be filed between September 1 and December 1 of the previous year. Otherwise, plan must be filed between 60 and 90 days before the last day of the anniversary month.
- Amends 744.369 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.

House Bill 5/Senate Bill 366

Emergency Temporary Guardianship

- Amends 744.344(4) to allow for the appointment of an emergency temporary guardian if a petition for appointment of a guardian has not been ruled upon at the time of the hearing on the petition to determine incapacity.
- Amends 744.3031 to require that notice of the filing of a petition for appointment of an emergency temporary guardian and any hearing thereon be served on an alleged incapacitated, and the alleged incapacitated person's attorney, at least 24 hours prior to commencement of the hearing unless the petitioner can demonstrate that substantial harm to the alleged incapacitated person would occur if notice was given.

House Bill 5/Senate Bill 366

Costs and Fees of Examining Committee

- Amends 744.331(7)(c) 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)
- Where 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.

House Bill 5/Senate Bill 366

Appointing a Guardian

- Amends 744.312 to provide that a court may not give the emergency temporary guardian preference in appointment of a permanent guardian.
- Requires court to appoint professional guardians on a rotating basis; unless the court finds that the special requirements of the guardianship require appointment of a specific professional guardian.
- Court may not appoint an emergency temporary guardian who is a professional guardian to be the permanent guardian, unless such professional guardian has been designated as a standby guardian or as a preneed guardian or the court makes specific written findings that such professional guardian meets special requirements of the guardianship.

House Bill 5/Senate Bill 366

Appointing a Guardian Cont'd

- Amends 744.3115 and 744.345 to provide that the court must specify in any order appointing a guardian of the person and in all letters of guardianship what authority the guardian may exercise with regard to the ward's health care decisions versus what authority, if any, a health care surrogate previously designated by the ward may continue to exercise.
- Amends 744.331(6) to require that court consider the incapacitated person's unique needs and abilities when determining what rights should be removed in a guardianship proceeding.
- Requires that the court only remove such rights which the alleged incapacitated person does not have the legal capacity to exercise.

House Bill 5/Senate Bill 366

Costs and Fees Associated with Guardianship Administration

- Adds subsection (9) to 744.108 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.
- Amends 744.108(8) 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.

House Bill 5/Senate Bill 366

Alternative Dispute Resolution

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

Restoration to Capacity

- Amends 744.464 to establish a “preponderance of the evidence” burden of proof for the restoration of an incapacitated person’s rights.
- 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.

House Bill 5/Senate Bill 366

Claims of Minors

- Amends 744.3025(1)(a) to provide that the court may appoint a guardian ad litem only “if the court believes that a guardian ad litem is necessary to protect the minor’s interest”.

Senate Bill 318

- Sen. Miguel Diaz de la Portilla, R-Miami
- Proposes to cut tenure of ETG from 90 days to 60 days
- Allows judge to suspend an abusive guardianship by freezing the guardian's assets and imposing sanctions on guardians or their attorneys.

Herald Tribune Public Guardianship Forum

- Thurs. Feb. 26, 10:15-11:45, Gulf Gate Library, Sarasota.
- Scheduled panelists are:
 - State Rep. Kathleen Passidomo, R-Naples
 - State Sen. Nancy Detert, R-Sarasota
 - Diana Noel, AARP senior legislative representative for Government Affairs
 - Dr. Bruce Robinson, chief of geriatrics, Sarasota Memorial Health Care System
- Professional Guardian and/or Guardianship Attorney missing from panel

Americans Against Abusive Probate Guardianship

- <http://aaapg.net/>
- Founded in September 2013 by Dr. Sam Sugar, retired physician based in Aventura, FL.
- ***Our goals are to:***
 - Assure due process and adherence to the Constitutional and statutory safeguards so routinely ignored in Probate court
 - Abolish the so called "Emergency Temporary Guardianship" which is the gateway to all guardianship's horrors.
 - Reform the process that evaluates and determines "incapacity" by upgrading examiner qualifications, performance, transparency and accountability
 - Assure transparency in Guardianship fees, records, estate administration and communication, especially with family members
 - Establish effective monitoring and reporting systems to identify deviations from the intent of the Statute

National Association to Stop Guardian Abuse (NASGA)

- <http://stopguardianabuse.org>
- T.S. Radio (Minnesota) with Marti Oakley, Activist, Talk Show Host
 - <http://www.blogtalkradio.com/marti-oakley/2014/02/10/ts-radio-dr-sam-sugar-on-status-of-florida-guardianship-laws>