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DATE: March 3, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
Real Property and Probate
ANALYSIS**

BILL #: HB 213
RELATING TO: Guardianship
SPONSOR(S): Rep. Crow & others
COMPANION BILL(S): SB 702 (i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) ELDER AFFAIRS & LONG TERM CARE YEAS 10 NAYS 0
 - (2) REAL PROPERTY & PROBATE
 - (3) GOVERNMENTAL RULES & REGULATIONS
 - (4) HEALTH & HUMAN SERVICES APPROPRIATIONS
 - (5)
-

I.

HB 213 creates the Statewide Public Guardianship Office within the Department of Elderly Affairs. The responsibility for oversight of existing public guardianship offices will be removed from the courts and transferred to the Statewide Public Guardianship Office. In addition to providing oversight of the public guardian offices, the statewide office is required to conduct a number of reviews, to set up a training program, and to seek innovative ways of meeting the state's guardianship needs.

The Statewide Public Guardianship Office must make an annual report to the Governor, the Legislature, and the Chief Justice of the Supreme Court regarding its progress in meeting its statutorily defined goals. The report must include a plan incorporating alternatives for meeting the state's guardianship needs. HB 213 provides that the office is permitted to conduct or contract for demonstration projects.

This bill provides that the court, pursuant to its review of guardianship reports, may require an appointed general or special master to conduct random field audits. Additionally, the clerk of court is to receive the results of the federal and state fingerprint background checks on affected guardians, and requires that the court consider the results of the required investigations in appointing a guardian.

This bill has a fiscal impact. See "Fiscal Analysis & Economic Impact Statement".

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

In 1986, the Legislature created the Public Guardianship Act. See ch. 86-120, L.O.F.; Part IX of ch. 744, F.S. The Act authorizes the establishment of Offices of Public Guardian for the purpose of providing guardianship services for individuals who have been adjudicated incapacitated, when the person meets specified income criteria, and when there is no family member, friend, or private guardian who is willing and able to act as the person's guardian.

Section 744.703, Florida Statutes, provides that the chief judge of the judicial circuit, after consultation with the circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county or within the circuit, an office of public guardian.

Currently, six of the twenty judicial circuits have offices of public guardians. Three of the six offices receive some state funding.

In 1995, the Office of Program Policy Analysis and Government Accountability (OPPAGA) reviewed the public guardianship program. In that report OPPAGA concluded that the current placement of the public guardian program in the State Courts System is not the most appropriate placement. OPPAGA suggested that alternatives to the current situation should be considered and recommended that the Legislature consider:

- discontinuing state funding of existing offices and allow local governments to determine how guardianship services can best be provided to indigent persons; or
- transferring responsibility for the office to an executive agency. Review of Public Guardianship Within The State Courts System, Office of Program Policy Analysis and Government Accountability, Sept. 6, 1995.)

In 1997, OPPAGA issued a follow-up report on the public guardianship program. In that report, OPPAGA noted:

- public guardianship is not a necessary function for state government;
- the current allocation of state program funds is not based on a statewide evaluation that prioritizes and addresses statewide need; and
- state funds are provided in only three circuits despite requests from chief judges in other circuits for state-funded offices.

OPPAGA recommended that the Legislature discontinue state funding for the three public guardian offices. (Follow-Up Report on the Review of Public Guardianship Within the State Courts System, Office of Program Policy Analysis And Government Accountability, July 1997.)

As a result of the foregoing OPPAGA reports, the House Committee on Real Property & Probate held two public hearings prior to the introduction of a committee bill for to the 1998 Legislative session. The committee bill failed to pass the Legislature.¹

¹ On May 1, 1998, HB 3923 died in Senate messages.

Section 744.368, F.S., provides that in addition to the duty to serve as the custodian of the guardianship files, the clerk of the circuit court must review each initial and annual guardianship report to ensure that it contains certain specified information. The clerk must, within 30 days after the date of filing of the initial or annual report of the guardian of the person, complete his or her review of the report.

Section 744.369, Florida Statutes, provides that the court must review initial guardianship reports within 60 days after the filing of the clerk's report, and must review the annual guardianship report within 15 days after the filing of the clerk's report of findings to the court. The court is permitted to appoint general or special masters to assist the court in its review function.

Section 744.3135, Florida Statutes, was amended in 1997, s. 2 ch. 97-161, L.O.F., to apparently require² a professional guardian to submit to a credit history investigation and an investigatory check by the National Crime Information Center and the Florida Crime Information Center systems by means of a fingerprint check by the Federal Bureau of Investigation and the Department of Law Enforcement, respectively. This provision took effect October 1, 1997. However, no federal criminal background checks have occurred since that time.

The 1997 amendatory language also provides that the court must waive the credit and criminal investigation for a guardian who is the spouse or child of the ward.³

B. EFFECT OF PROPOSED CHANGES:

HB 213 creates the Statewide Public Guardianship Office, and places it for administrative purposes within the Department of Elderly Affairs. The existing public guardianship program, within the Judicial Branch, is moved to this new office.

The Statewide Public Guardianship Office is required to review specified issues relating to public guardianship and vulnerable citizens and to report to the Governor, the Legislature, and the Chief Justice of the Supreme Court. The office is, among other things, to recommend ways to provide public guardianship services statewide, if possible; to develop a training program for public guardians; and to assist counties and circuits in finding ways to provide public guardianship services. Provision is made for the appointment of an Executive Director who must appoint a public guardian(s) who meets certain current requirements. The appointment of a public guardian(s) was previously made by the chief judge.⁴

² The 1997 amendment to s. 744.3135, Florida Statutes, added professional guardian to its requirements, but then failed to consistently use that reference throughout.

³ According to the Aging News Alert, No. 98-22, at 1, "[i]n nearly 90% of elder abuse and neglect incidents with a known perpetrator, that person is a family member; in fact, two-thirds of perpetrators are adult children or spouses." Accordingly, when the guardian of an elderly ward is an adult child or spouse it is of concern that no credit or criminal history check is conducted, especially in light of the abuse statistics. Whether a credit or criminal history check would screen out the majority of abusers is uncertain, but it would seem that a guardian (child or spouse) with an assault and battery record may not be a good choice for guardian. Additionally, a guardian (child or spouse) with a bad credit record may not be the appropriate candidate to handle the ward's assets. The intent behind waiving the credit and criminal investigation for a guardian who is the spouse or child may have been to eliminate the cost of so doing, which the guardian must pay. Nevertheless, waiving the criminal investigation requirement because of the \$15 fee, payable to the Florida Department of Law Enforcement, in order to encourage a child or spouse to become the guardian, may be subject to criticism in light of the possible negative ramifications.

⁴ Although the public guardian or guardians are appointed by the Executive Director of the Statewide Public Guardianship Office, the judge in a case requiring a public guardian still must appoint the guardian as the guardian of a particular ward. This bill limits the judge's selection of a guardian to the one appointed by the director, or if more than one guardian is appointed, then the judge would be able to select from among them. (Section 744.102(8), F.S., defines "guardian" to mean "a person who has been appointed by the court to

Additionally, this bill provides that nonprofessional or public guardians may be required, at his or her own expense, to have a credit history check and a criminal history check.⁵ A professional guardian, at his or her own expense, is already required to have such checks. The clerk of court is to receive the results of the federal and state fingerprint background check on a guardian, and the clerk must maintain the results in a guardian file. A professional guardian, but not a nonprofessional or public guardian, must pay the clerk of the court a \$5 fee for handling and processing his or her guardian file. Furthermore, this bill requires the court to consider the results of the required investigations in appointing a guardian.

HB 213 permits the courts, pursuant to their review of guardianship reports, to require a general or special master to conduct random field audits. Also, HB 213 allows a fee of up to \$15 (was \$10) for each civil action filed in order to provide for the establishment, maintenance, or supplementation of a public guardian office and raises the \$200 cap on civil filing fees to \$210, if the additional money is used for the public guardian office.

Finally, this bill expressly provides for an appropriation of \$300,000 in order to carry out its purposes.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This bill permits the new Statewide Public Guardianship Office to make rules.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

This bill moves the responsibilities for administering the public guardianship programs from the various circuit courts to the new Statewide Public Guardianship Office.

(3) any entitlement to a government service or benefit?

No

b. If an agency or program is eliminated or reduced:

act on behalf of a ward's person or property, or both." This definition is not amended by HB 213.)

⁵ "The FBI has reviewed HB 213. As it is currently proposed, the language for professional guardians would be approved for federal access [because a criminal history check is statutorily mandatory]. Because of the wording for nonprofessional or public guardians [a criminal history check is optional], they would not be eligible for federal access." FAX FDLE by Wright, M., Bureau Chief, User Services Bureau, Criminal Justice Information Services, Florida Department of Law Enforcement, Jan. 6, 1999.

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

This bill moves the responsibilities for administering the public guardianship program from the various circuit courts to the new Statewide Public Guardianship Office.

- (2) what is the cost of such responsibility at the new level/agency?

The Statewide Public Guardianship Office requires an appropriation of \$300,000. This amount is included in the Governor's recommended budget request.

- (3) how is the new agency accountable to the people governed?

Currently, public guardians are appointed by the chief judge of the circuit courts. The public guardians act as advocates on behalf of the wards they represent. This bill moves the hiring and oversight of the public guardians to the statewide office. The bill requires the Executive Director to appoint the public guardians from a list prepared at the local level and maintains the significant involvement of the chief judges.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No

- b. Does the bill require or authorize an increase in any fees?

The law currently permits local governments to impose a fee of up to \$10 for each civil action filed for purposes of establishing or maintaining a public guardian office. This bill raises that fee limit to \$15. Also, the current filing fee cap is \$200. Broward, Hillsborough, Martin, and Palm Beach Counties are at that filing fee cap. This bill allows the cap to be increased to \$210 if the increase is to establish or maintain a public guardian office.

- c. Does the bill reduce total taxes, both rates and revenues?

No

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

See b. above.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

The beneficiaries of this legislation will be the state's poor and vulnerable citizens who are functionally incapacitated, and they do not directly pay for the cost of implementation or operation.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

The bill amends sections 744.369, 744.702, 744.703, 744.706, 744.707, 744.708, 744.1085, 744.3135, and 28.241, and creates section 744.7021, Florida Statutes.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 744.369, F.S., to extend the time the court has to review the annual guardianship report from 15 days to 30 days and provides that the court may require a general or special master to conduct random field audits.

Section 2. Amends s. 744.702, F.S., to provide that the Legislature intends to establish the Statewide Public Guardianship Office. This section is amended to specify that guardian advocacy should be explored as one of the less intrusive means of assistance before an individual's rights are removed through an adjudication of incapacity.

Section 3. Creates s. 744.7021, F.S. This section creates the Statewide Public Guardianship Office within the Department of Elderly Affairs. The office is placed in the Department for administrative purposes, but will not be subject to control, supervision or direction by the Department. This section provides that the Statewide Public Guardianship Office may request the assistance of the Inspector General of the Department of Elderly Affairs in providing auditing services. Also, the Office of the General Counsel may provide assistance in rulemaking and other matters as needed.

The Executive Director of the Statewide Public Guardianship Office is required to be a licensed attorney with a background in guardianship law and knowledge of social services available to meet the needs of incapacitated persons. The Executive Director is to be appointed by the Governor.

The Statewide Public Guardianship Office has the following duties:

- ▶ within available resources, oversee the public guardians;
- ▶ review the current public guardian programs in Florida, and review public guardian programs in other states;
- ▶ in consultation with local guardianship offices, develop statewide performance measures and standards;
- ▶ review the various methods of funding guardianship programs, and the demographics of the wards;
- ▶ review and make recommendations regarding the feasibility of recovering a portion or all of the costs of providing public guardianship services from the assets or income of the wards;
- ▶ prepare an interim report by October 1, 2000, describing the office's progress in meeting its goals; and no later than October 1, 2001, the office shall submit a proposed public guardianship plan including alternatives for meeting the state's guardianship needs. The interim and annual plans shall be submitted to the Governor, President of the Senate, Speaker of the House of Representatives, and the Chief Justice of the Supreme Court. The plan may include recommendations for less than the entire state, may include a phase-in system, and shall include estimates of the cost of each of the alternatives. The office must report each year thereafter and provide further recommendations to address the need for public guardianship services and related issues;
- ▶ may provide assistance to local governments or entities in pursuing grant opportunities;
- ▶ shall review and make recommendations in the annual report on the availability and efficacy of seeking Medicaid matching funds;
- ▶ diligently seek ways to use existing programs and services to meet the needs of public wards;
- ▶ develop a guardianship training program. This program may be offered to all guardians whether public or private. A fee may be charged to private guardians in order to defray the cost of providing the training; and
- ▶ may conduct or contract for demonstration projects, within funds appropriated, or through gifts, grants, or contributions for such purposes, to determine the feasibility or desirability of new concepts of organization, administration, financing, or service delivery designed to preserve the civil and constitutional rights of indigent persons of marginal or diminished capacity.

This section gives the Statewide office rulemaking authority to carry out the provisions of this section.

Section 4. Amends s. 744.703, F.S., to provide that the Executive Director of the Statewide Public Guardianship Office, after consultation with the chief judge and other circuit judges within

the circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish an office of the public guardian. This same group must also create a list of persons best qualified to serve as the public guardian. This section requires the Executive Director to appoint the public guardian from the list of candidates promulgated in this way. Currently, the selection is made by the chief judge of the circuit.

The public guardians are to be appointed for a term of 4 years, after which time their appointments must be reviewed. A guardian may be reappointed for a term of up to 4 years. This section provides that a public guardian may be suspended with or without the request of the chief judge. If a public guardian is suspended, the Executive Director must appoint an acting public guardian as soon as possible to serve until such time as a permanent replacement is selected. A public guardian can be removed from his or her position by the Executive Director after consultation with the chief judge.

This section provides that existing public guardians will continue in their current positions until the expiration of their term. Upon expiration of their term, the Executive Director will be responsible for future appointments.

Section 5. Amends s. 744.706, F.S., to require that budgets be submitted to the Statewide Public Guardianship Office for inclusion in the Department of Elderly Affairs' legislative budget request. The Department is directed to make a separate and distinct request for an appropriation for the Statewide Public Guardianship Office. All public guardians must submit a copy of their budget to the Statewide Public Guardianship Office annually.

Section 6. Section 744.707, F.S., is amended to include a recognition of the Statewide Public Guardianship Office oversight responsibilities over public guardians.

Section 7. Amends s. 744.708, F.S., to provide that annual reports, the report indicating the public guardian's efforts to locate a family member or friend or other person or entity to act as guardian of the ward, and the biennial audit reports are to be submitted to the Statewide Public Guardianship Office rather than to the chief judge of the circuit court. In addition, this section is amended to specify that the office of public guardian is subject to audits by the Auditor General pursuant to s. 11.45.

This section provides that the ratio of professional staff to wards can be changed after consultation with the local public guardian and the chief judge of the circuit court. Currently, the law requires good cause for changing the ratio. This provision was removed based upon testimony that it had no practical meaning. The basis of the decision to change the ratio must be reported in the annual report of the Statewide Public Guardianship Office.

This section specifies that the Executive Director of the Statewide Public Guardianship Office is not a "professional" for purposes of the ratio determination.

Section 8. Section 744.1085, F.S., is amended to provide that a guardian's continuing education must be completed through a course approved by or offered by the Statewide Public Guardianship Office. Currently such courses are approved by the chief judge.

Section 9. Section 744.3135, F.S., is amended to specify that the clerks of court will obtain fingerprint cards from the Federal Bureau of Investigation, that the guardians will forward the cards and their check in the appropriate amount to the Florida Department of Law Enforcement for

processing, and that the clerks will receive the results of the investigations and will make them available for the court's consideration in determining whether to appoint a particular guardian.

The 1997 Legislature passed a provision requiring criminal history checks and credit checks be performed on "professional" guardians. This requirement took effect October 1, 1997. However, no federal criminal background checks have occurred as a result of the change in law. This bill clarifies the process by which these criminal checks will be obtained.

Section 10. Section 28.241, F.S., increases the optional fee from \$10 to \$15 for each civil action filed, for the establishment, maintenance, or supplementation of a public guardian and provides that the \$200 cap on civil filing fees may be increased by \$10 in order to provide for the establishment, maintenance, or supplementation of a public guardian.

Section 11. This bill provides for a \$300,000 appropriation.

Section 12. Provides for a type two transfer from the Circuit Court budget entity within the Judicial Branch to the Department of Elderly Affairs.

Section 13. Provides an effective date of October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

The cost of establishing the Statewide Public Guardianship Office, and providing for personnel, equipment, and travel is estimated to be \$300,000. In addition, currently three circuits receive state funding for public guardianship offices. That funding is provided in the circuit court budget, administered by the Office of the State Courts Administrator. The total budget for the three offices is approximately \$700,000 for FY 1998-99. This appropriation will be moved to the Department of Elderly Affairs' budget to continue the existing public guardianship offices.

2. Long Run Effects Other Than Normal Growth:

Unknown

3. Total Revenues and Expenditures:

\$300,000 for the Statewide Public Guardianship Office

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

This bill should have a positive impact on the circuit courts' workload. The oversight responsibilities, contracting and hiring responsibilities, training program approval, and program administration responsibilities will be removed from the various chief judges of the circuit courts and transferred to the Statewide Public Guardianship Office.

The 1997 Legislature enacted a provision in law requiring "professional guardians" to have a federal and state criminal background check. However, the clerks of court opined that the language did not give them specific direction to receive the results of the background checks. Therefore, this bill contains clarifying language that the clerk of court will be the recipient of the investigation results for consideration by the judge in appointing guardians.

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

None

3. Effects on Competition, Private Enterprise and Employment Markets:

None

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The Department of Elderly Affairs (DOEA) recommends amending s. 744.709, F.S., relating to surety bonds. The section provides in the last sentence, that “[t]he bond shall be purchased with funding provided in the funds appropriated to the judicial circuit for the office of public guardian.” DOEA recommends that this provision be amended as follows:

The bond shall be purchased ~~with funding provided in from~~ the funds appropriated to of the judicial circuit for the local office of public guardian.

The Department of Elderly Affairs strongly supports this legislation. The Department notes that, although the bill contains an appropriation for \$300,000, the Governor’s recommended budget also contains an appropriation request in this amount. DOEA suggests that, if the Governor’s request is accepted by the Legislature, the appropriation language in the bill needs to be removed.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 1, 1999, the Committee on Elder Affairs and Long Term Care adopted an amendment to s. 744.709, F.S., which is described above in the “Comments” section.

VII. SIGNATURES:

COMMITTEE ON Elder Affairs & Long Term Care:

Prepared by:

Staff Director:

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Tom Batchelor, Ph.D.

AS REVISED BY THE COMMITTEE ON Real Property and Probate:

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