IN THE SUPREME COURT OF FLORIDA

Case No. SC16-1312
L.T. Case No. 4D14-1436

Glenda Martinez Smith,
petitioner,

v.

J. Alan Smith,
respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

AMICUS CURIAE BRIEF OF THE REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("RPPTL Section") is a group of Florida lawyers who practice in the areas of real estate, guardianship, trust, and estate law. The RPPTL Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.[1] The RPPTL Section has over 10,000 members.

Pursuant to RPPTL Section bylaws, the Executive Committee of the RPPTL Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

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[1] For example, see *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015); *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014); *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007); *McKean v. Warburton,* 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

[2] The Executive committee of the RPPTL Section approved the filing of this brief. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the amicus committee of the RPPTL Section, which is charged with preparing amicus briefs for the RPPTL Section. We are careful to keep lawyers involved with the litigants or other *amicus curiae* away from our process of analyzing, debating and writing briefs of the RPPTL Section. Mr. Cope and his firm have not participated in this matter due to a conflict.

The RPPTL Section's interest in the issue before the Court stems from the need to have this important fundamental guardianship question properly resolved for the benefit of guardianship practitioners and Florida citizens in general.

SUMMARY OF ARGUMENT

The district court of appeal certified the following question as one of great public importance:

> Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?

Smith v. Smith, ---So. 3d ---, 2016 WL 3540953 (Fla. 4th DCA, June 29, 2016).

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membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

The certified question challenges the Court to harmonize, if possible, the state's parenting role (for those incapable of protecting themselves) with an incapacitated citizen's fundamental right to marry. As the Court searches for the correct policy and answer to the certified question, we offer the cautionary words from the same court that certified the question:

> In our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights.

In re McDonnell, 266 So. 2d 87, 88 (Fla. 4th DCA 1972); *Adelman v. Elfenbein*, 174 So. 3d 516, 518-19 (Fla. 4th DCA 2015).

The state's *parens patriae* role in this case is limited to protecting a ward whose general right to contract was removed by the circuit court, but whose right to marry was retained by the ward. Under that limited circumstance, the state statute requires (albeit in a poorly drafted sentence) that the ward's marriage be approved by the circuit court. §744.3215(2) (a), Fla. Stat. That statute, however, does not specify when that approval has to occur.

This statutory ambiguity should be interpreted to allow the circuit court to approve the marriage before or after the marriage has occurred. First, such a construction is consistent with legislative intent to make the least restrictive form of guardianship available. *See* Section 744.1012, Florida Statutes. Interpreting section 744.3215(2) (a) to allow circuit court approval of the marriage before ***or***

after the marriage has occurred is most consistent with this intent. Second, this interpretation allows the Court to uphold the statute's constitutionality. *See Miami Dolphins LTD., v. Metropolitan Dade County*, 394 So. 2d 981, 988 (Fla. 1981) ("Given that an interpretation upholding the constitutionality of the act is available to this Court, it must adopt that construction."). Finally, and most determinative, this interpretation of section 744.3215(2)(a) is the least restrictive on a ward's fundamental right to marry. *See Obergefell v. Hodges*, 576 U.S. ---,135 S.Ct. 2584 (2015) (right to marry is fundamental personal right); *Loving v. Virginia,* 388 U.S. 1 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *See City of Mobile v. Bolden*, 446 U.S. 55 (1980) (state's infringement on a fundamental right must be by least restrictive means).

ARGUMENT

I. STANDARD OF REVIEW

The question certified to this Court requires that it construe section 744.3215 (2) (a), Florida Statutes. To our knowledge as an *amicus*, there are no issues of fact presented on discretionary review. Therefore, the Court will apply the *de novo* standard of review to the decision below. *Citizens Property Ins. Corp. v. Perdido Sun Condomininium Ass'n*, 164 So. 3d 663, 666 (Fla. 2015) ("As the issue

presented involves a question of statutory construction, this Court's review is de novo.").

II. THE APPLICABLE GUARDIANSHIP LAW AND CERTIFIED QUESTION

Section 744.3215, Florida Statutes, provides a checklist of rights that courts employ to adjudicate the extent to which a ward is incapacitated. Rights removed can be restored to a ward under certain circumstances. Section 744.3215 (2) (a), Florida Statutes, provides:

> (2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:
> (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.

The statute is silent as to whether court approval of the marriage must occur prior to the marriage.

All aspects of the Florida Guardianship Law (§744.101, Fla. Stat.) are to be read and interpreted in accordance with section 744.1012, Florida Statutes. There, the Legislature expressly states the intent underlying the Florida Guardianship Law. Section 744.1012 provides, in pertinent part:

> The Legislature finds that:
>
> (1) Adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary.

> (2) *It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs* and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed.
>
> (3) By recognizing that every individual has unique needs and differing abilities, *it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them*; that assists such persons in meeting the essential requirements for their physical health and safety, *in protecting their rights*, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; *and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.*

(Emphasis supplied).

Faced with a scenario in which a ward did not have the right to contract, but retained the right to marry, and married before asking the court for permission, the district court of appeal certified the following question of great public importance:

> Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?

Smith v. Smith, ---So. 3d ---, 2016 WL 3540953 (Fla. 4th DCA, June 29, 2016).

III. STATUTORY CONSTRUCTION

Section 744.3215(2) (a) does not answer the district court of appeal's question and, in that regard, is ambiguous and mandates statutory construction.

See Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010) (" 'If, however, the language of the [statute] is ambiguous and capable of different meanings, this Court will apply established principles of statutory construction to resolve the ambiguity.' ").

The expression of legislative intent in section 744.1012 resolves any ambiguity in section 744.3215(2) (a).[3] It emphasizes that the ward's exercise of the ward's individual rights is paramount and should be intruded upon as little as possible; and, it dictates that all provisions of the Florida Guardianship Law should be liberally interpreted to achieve that end. §744.1012, Fla. Stat. (2016).[4] Further, when prior court approval of an action under the Florida Guardianship law is intended, the statutes say so very clearly. See, for example section 744.441, Florida Statutes ("after obtaining approval of the court..."). To be consistent with legislative intent, the circuit court should be able to grant or deny approval of the ward's marriage even after it occurs.

As more fully explained below, this interpretation also has the advantage of being more protective of the ward's fundamental right to marry than an interpretation restricting a ward to obtaining approval of his or her marriage *prior*

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[3] The limited legislative history only begs the question posed by the court---and does not answer it. *See* Appendix to Amicus Brief.

[4] This statement of intent was expressed in the predecessor version of this same statute. *See* §744.1012 (1997); 97-102, §1067, Laws of Fla.

to marrying. *See Miami Dolphins LTD., v. Metropolitan Dade County*, 394 So. 2d 981, 988 (Fla. 1981) ("Given that an interpretation upholding the constitutionality of the act is available to this Court, it must adopt that construction.").

IV. THE FUNDAMENTAL RIGHT TO MARRY

That marriage is a core liberty interest of all U.S. citizens, protected by the United States Constitution, is unassailable. Against state action to regulate interracial marriages, marriage by fathers behind on child support, prisoners who wish to marry, and same sex marriages, the United States Supreme Court has not wavered on the fundamental nature of the right to marry. *Loving v. Virginia,* 388 U.S. 1 (1967); *Zablocki v. Redhail,* 434 U.S. 374 (1978); *Turner v. Safley,* 482 U.S. 78 (1987); and *Obergefell v. Hodges*, 576 U.S. ---,135 S.Ct. 2584 (2015). This fundamental liberty interest is protected by the due process clause of the Fourteenth Amendment oftentimes in concert with equal protection. *See Obergefell*, 135 S.Ct. at 2602-03. Further, the decision or choice to marry has been protected as a privacy right. *See Zablocki,* 434 U.S. at 384; *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).[5]

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[5] Florida's right to privacy in article I, section 23, Florida Constitution may offer even greater protection of one's privacy interests than the United States Constitution. *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995). Further the right to privacy is a right retained by all wards in Florida. §744.3215(1)(o), Fla. Stat. To be sure, in a plenary guardianship, the expectation of privacy in deciding

V. RESTRICTIONS ON FUNDAMENTAL RIGHTS

State action restricting the exercise of an individual's fundamental right, as we have here, must be based on a compelling state interest that is tailored to be least restrictive on the fundamental right on which the state is intruding. Under this exacting test, the state's intrusion on a fundamental right is presumptively unconstitutional. *See North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612, 625-26 (Fla. 2003); *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980).

The RPPTL Section believes that the least restrictive intrusion on the ward's fundamental right to marry mandates an interpretation of section 744.3215, Florida Statutes, that allows a court to approve or disapprove a marriage before *or after* it occurs.[6]

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to marry may not exist, but under the scenario posited by the district court of appeal, that expectation might be legitimately expected by a ward who has retained the right to marry.

[6] The hearing process for determining whether approval of a marriage will be granted or denied is not at issue here but obviously that process must also satisfy the due process standards inherent when a court addresses and perhaps intrudes on the fundamental right to marry. *See Guardianship of O'Brien*, 847 N.W.2d 710 (Ct. App. Minn. 2014).

CONCLUSION

In order to bring clarity to the fundamental issue presented by this case, and to preserve the constitutionality of section 744.3215 (2) (a), Florida Statutes, we respectfully suggest that the holding of this Court be as follows:

> The approval of a ward's marriage required by section 744.3215(2) (a), Florida Statutes, may be granted or denied before or after the ward's marriage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this motion was served through the Florida E-Portal this 28th day of September, 2016, on Jennifer S. Carroll, Counsel for Petitioner, jc@lojscarroll.com; Lynne K. Hennessey, lkhpa@bellsouth.net; and Alan Fishman, ASF@afishmanlaw.com; Ellen S. Morris, Chair of Elder Law Section, emorris@elderlawassociates.com; Cary L. Moss, cmoss@sawyerandsawyerpa.com; and Gerald L. Hemness, Gerald@hemnesslaw.com.

/s/ Robert W. Goldman, FBN 39180

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ Robert W. Goldman, FBN339180

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APPENDIX

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HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 457 Guardianship
SPONSOR(S): Sands
TIED BILLS: HB 459 **IDEN./SIM. BILLS:** CS/SB 472

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Future of Florida's Families Committee		Preston	Collins
2) Civil Justice Committee			
3) Judiciary Appropriations Committee			
4) Health & Families Council			
5)			

SUMMARY ANALYSIS

HB 457 incorporates the recommendations of the 2003 Guardianship Task Force, the Florida State Guardianship Association, the Statewide Public Guardianship Office, and the State Long-term Care Ombudsman Program within the Department of Elder Affairs (DOEA). Provisions of the bill address:

- Creating definitions for the terms "audit" and "surrogate guardian," and amending the definition of the term "professional guardian."
- Increasing the dollar threshold required for a court to appoint a guardian ad litem to review a settlement from $15,000 to $50,000 when the settlement involves a minor.
- Creating new reporting requirements related to the appointment of emergency temporary guardians.
- Creating new requirements related to investigations of credit history and background screening for guardians, including background investigations using inkless electronic fingerprints instead of fingerprint cards.
- Decreasing the amount of time during which a guardian must complete the required instruction and education from 1 year to 4 months.
- Emphasizing the importance of an incapacitated person's right to quality of life, clarifying which rights cannot be delegated, reinforcing the significance of the right to marry, and subjecting the right to marry to court approval.
- Creating new restrictions and requirements relating to the appointment of an attorney for an alleged incapacitated person and providing for new requirements for members of examining committees.
- Creating requirements for additional information that must be included in an annual guardianship plan.
- Creating additional requirements relating to proof of payment for expenditures and disbursements made on behalf of a ward.
- Providing clerks of court with the authority to audit simplified and final accountings.
- Creating a new section of law related to the appointment of surrogate guardians.

The bill allows for the imposition of a surcharge on non-criminal traffic infractions and certain criminal violations to fund a county's participation in the public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an $18 surcharge to be added to the fine for all misdemeanors; $15 of which would be used to fund public guardianship programs, with the remaining $3 to be retained by the clerks of the court as a service fee.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill increases requirements and duties for a number of entities, including guardians, the clerks of court, and the Statewide Public Guardianship Office, with the goal of reducing risk to those being served through the guardianship process. The bill also requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations. The Florida Department of Law Enforcement must adopt a rule to establish procedures for the retention of guardian fingerprints and dissemination of search results of all arrest fingerprint cards.

Ensure lower taxes – The bill allows the imposition of a surcharge on non-criminal traffic infractions and some criminal violations to fund a county's public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an additional surcharge on the fine for all misdemeanors; a portion of which would be used to fund public guardianship programs, with the remaining portion being retained by the clerks of court as a service fee.

Safeguard individual liberty – The bill contains provisions designed to reduce risk to wards and ensure that they are better served by the guardianship process.

Empower families – The bill has the potential to increase the number of individuals able to access the services of a public guardian.

B. EFFECT OF PROPOSED CHANGES:

Guardianship and Public Guardianship

Guardianship is the process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions when they have not otherwise planned in advance for such a loss of capacity. Those individuals in need of guardianship may have dementia, Alzheimer's disease, a developmental disability, chronic mental illness or other such conditions that may limit function. In such instances, a guardian may be appointed by the court to manage some or all the affairs of another.

Prior to a guardianship being established, it must first be determined that a person lacks the capacity required to make decisions concerning his or her personal and/or financial matters and that no other less restrictive alternatives exist. Upon making such a determination, the court may appoint either a limited guardian[1] or a plenary guardian.[2] In the vast majority of cases that result in guardianship, the court will appoint a family member or close friend of the ward to act as guardian. However, when a family member or close friend is unavailable or unwilling to act as guardian, there are generally two options a court may use to provide assistance to the incapacitated person:

[1] A limited guardian is defined as a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of limited guardian. See section 744.102(8)(a), Florida Statutes.

[2] A plenary guardian is defined as a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property. See section 744.102(8)(b), Florida Statutes.

- Appoint a professional guardian to act on the ward's behalf when the ward has assets that may be used to pay for guardianship services provided;[3] or

- Appoint a public guardian in instances where the incapacitated ward does not have enough assets to afford a professional guardian.[4]

Department of Elder Affairs, the Statewide Public Guardianship Office, and the Guardianship Task Force

In order to ensure that Florida's incapacitated residents who are indigent receive appropriate public guardianship services, the 1999 Florida Legislature created the Statewide Public Guardianship Office (SPGO). The SPGO is responsible for establishing local offices of public guardian and ensuring the registration and education of public and professional guardians.[5] Currently, public guardianship services are provided to persons in 22 counties through 15 local offices of public guardian and during 2003, those 15 offices served a total of 1716 wards. In May 2003, the SPGO was transferred under the direct supervision of the Secretary of Elder Affairs.[6]

The 2003 Legislature also created the Guardianship Task Force within DOEA, for the purpose of recommending specific statutory and other changes for achieving best practices in guardianship and for achieving citizen access to quality guardianship services. The final report was submitted to the Secretary of Elder Affairs on January 1, 2005.[7]

Public Guardianship Funding Through Court Filing Fees

Until July 2004, each county was authorized under section 28.241, Florida Statutes, to impose, by ordinance or by special or local law, a fee of up to $15 for each civil action filed, for the establishment, maintenance, or supplementation of a public guardian. However, this authority was rescinded as part of the legislative implementation of Constitutional Revision 7 to Article V of the State Constitution. Revision 7, adopted by the voters in 1998, required the state to shift primary costs and funding for the operation of the state courts system to the state and to reallocate other costs and expenses among the local governments and other users and participants in the state courts system. As part of this implementation, all filing fees for trial and appellate proceedings were regulated by the state, with a portion to revert directly to the Department of Revenue to be used to fund court proceedings. However, the $15 allowable for additional expenses that counties were formerly authorized to implement in order to fund public guardianship programs was also removed.[8]

HB 457

The bill incorporates the recommendations of the Guardianship Task Force, the Florida State Guardianship Association, the Statewide Public Guardianship Office, and the State Long-term Care Ombudsman Program within the Department of Elder Affairs. Specifically, the bill contains provisions related to the following:

Definitions

The bill defines the term "audit" for purposes of Chapter 744 as a systematic review of financial documents in accordance with generally accepted auditing standards. The term "surrogate guardian" is defined as a professional guardian who is designated by a guardian to exercise the powers of the guardian if the guardian is unavailable to act. A change to the definition of professional guardian

[3] See sections 744.102(16) and 744.334, Florida Statutes.
[4] See section 744.703, Florida Statutes.
[5] See section 744.7021, Florida Statutes and Chapter 99-227, Laws of Florida.
[6] See Chapter 2003-57, Laws of Florida.
[7] See Chapter 2003-57, Laws of Florida.
[8] See Chapter 2003-402, Laws of Florida.

clarifies that professional guardians do not have to receive compensation in order to serve as professional guardians as long as they meet all statutory requirements.

Natural Guardians

The bill clarifies that if a parent of a minor child dies, the surviving parent remains as the sole natural guardian even if he or she remarries. Regarding claims or causes of action on behalf of minor children, the bill clarifies that natural guardians are authorized to make certain financial decisions for minor children when the aggregate amount is not more than $15,000. Natural guardians are precluded from using a ward's property for the guardian's benefit or to satisfy the guardian's support obligation to the ward without court approval.

Guardian ad Litem Appointments for Minors

- The court is authorized to appoint a guardian ad litem to represent the minor's interest, before approving a settlement in which a minor has a damages claim in which the gross settlement is more than $15,000, and the court is required to appoint a guardian ad litem where the gross settlement is $50,000 or more;
- The guardian ad litem appointment is required to be without the necessity of bond or notice;
- The duty of the guardian ad litem is to protect the minor's interests in accordance with Florida Probate Rules;
- A court is not required to appoint a guardian ad litem if a guardian has previously been appointed who does not have an adverse interest to the minor; however, a court may appoint a guardian ad litem if the court believes it necessary to protect the minor's interests; and
- The court is required to award reasonable fees and costs to the guardian ad litem, unless waived, to be paid against the gross proceeds of the settlement.

Emergency Temporary Guardians

- The bill increases the initial length of time of an emergency temporary guardianship from 60 days to 90 days;
- An emergency temporary guardian is a guardian for the property and, as such, must include certain information related to accounting and inventory in the final report;
- In instances where the emergency temporary guardian is a guardian of the person, the final report must include such information as residential placement, medical condition, mental health and rehabilitative services, and the social condition of the ward; and
- An emergency temporary guardian is required to file a final report within 30 days upon expiration of the guardianship and a copy of the final report must be provided to the successor guardian and the ward.

Standby Guardianships

- The court may appoint a standby guardian upon petition by the natural guardians or a legally appointed guardian;
- The court may also appoint an alternate if the standby guardian does not serve or ceases to serve;
- The court must serve a notice of hearing on the parents, next of kin, and any currently serving guardian unless notice is waived in writing or by the court for good cause shown; and
- The standby guardian must submit to a credit and criminal investigation.

Credit and Criminal Background Checks

- If a credit or criminal investigation is required, the court must consider investigation results before the appointment of a guardian;
- The court may require a credit investigation at any time;
- The clerk of the court is required to keep a file on each appointed guardian, retain investigation documents, and is required to collect up to $7.50 from each professional guardian for handling and processing of files;
- The court and the Statewide Public Guardianship Office are required to accept the satisfactory completion of a criminal background investigation by any method stated in these provisions;
- A guardian complies with background requirements by paying for and undergoing an electronic fingerprint criminal history check or a criminal history record check using a fingerprint card. The results of the criminal history check shall be immediately forwarded to the clerk who will maintain the results in the guardian's file, and the Statewide Public Guardianship Office;
- A professional guardian is required to complete and pay for a level 2 background screening every five years, a level 1 background screening every two years, unless screened using inkless electronic fingerprinting equipment, and a credit history investigation at least once every two years after appointment;
- Effective December 15, 2006, all fingerprints electronically submitted to Department of Law Enforcement shall be retained as provided by rule and entered into the statewide automated fingerprint identification system. The Department of Law Enforcement shall search all arrest fingerprint cards against those in the system, reporting any matches to the clerk of the court;
- The clerk of the court is required to forward any arrest records to the Statewide Public Guardianship Office within five days upon receipt;
- Guardians who elect to participate in electronic criminal history checks are required to pay a fee, unless the clerk of the court absorbs the fee;
- The Statewide Public Guardianship Office is required to adopt a rule detailing acceptable methods for completing a credit investigation, and may set a fee of up to $25 to reimburse costs; and
- The Statewide Public Guardianship Office may inspect at any time the results of any credit or criminal history check of a public or professional guardian.

Procedures to Determine Incapacity

- Attorneys representing the ward must be appointed from an attorney registry compiled by the circuit's Article V indigent services committee and must, effective January 1, 2007, have completed a minimum of 8 hours education in guardianship;
- A member appointed is precluded from subsequently being appointed as a guardian of the person;
- Each member must file an affidavit certifying completion of course requirements or that they will be completed within four months upon appointment;
- The initial training and continuing education program must be established by the Statewide Public Guardianship Office, in conjunction with other listed entities; and
- The committee's report must include the names of all persons present during the member's examination, the signature of each member, and the date and time each member examined the alleged incapacitated person.

Voluntary Guardianships

- A guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward no more than 90 days before the annual report is filed with the court, which certifies that the ward is competent to understand the nature of the guardianship and is also aware of the ward's authority to delegate powers to the voluntary guardian; and
- Where a ward files a notice of termination of guardianship with the court, the notice must include a certificate from a licensed physician who has examined the ward no more than 30 days before the ward filed the notice, certifying that the ward is competent to understand the significance of the termination.

Surrogate Guardians

- A guardian may designate a surrogate guardian if the guardian is unavailable, but the surrogate must be a professional guardian;
- A guardian must file a petition with the court requesting permission to designate a surrogate;
- Upon approval, the court's order must contain certain information, including the duration of appointment, which is up to 30 days, extendable for good cause; and
- The guardian is liable for the acts of the surrogate guardian and may terminate the surrogate's authority by filing a written notice with the court.

Other Provisions

- An incapacitated person retains the right to receive necessary services and rehabilitation necessary to maximize the quality of life and the right to marry unless the right to enter into a contract has been removed, in which case the court must approve the right to marry;
- Professional and public guardians are required to ensure that each of the guardian's wards is personally visited by the guardian or staff at least once every calendar quarter, unless appointed only as a guardian of the property. During the visit, the guardian or staff person must assess the ward's physical appearance and condition, current living situation, and need for additional services;
- The annual guardianship report is required to be filed by April 1, rather than within 90 days after the end of the calendar year, which is current law;
- Annual guardianship plans for minors must include information about the minor's residence, medical and mental health conditions, and treatment and rehabilitation needs of the minor, and the minor's educational progress;
- Property that is under the guardian's control, including any trust of which the ward is a beneficiary but not under the control or administration of the guardian, is not subject to annual accounting requirements;
- If the ward dies, the guardian must file a final report with the court within 45 days after being served with letters of administration or curatorship, rather than the prompt filing requirement under current law; and
- Regarding the discharge of a guardian named as a personal representative for the ward's estate, any interested person may file a notice of a hearing on any objections filed by the beneficiaries of the ward's estate. If a notice is not served within 90 days after filing, objections are considered abandoned.

C. SECTION DIRECTORY:

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

Section 2. Amends s. 744.1083, F.S., relating to professional guardian registration.

Section 3. Amends s. 744.301, F.S., relating to natural guardians.

Section 4. Creates s. 744.3025, F.S., relating to claims of minors.

Section 5. Amends s. 744.3031, F.S., relating to emergency temporary guardianship.

Section 6. Amends s. 744.304, F.S., relating to standby guardianship.

Section 7. Amends s. 744.3115, F.S., relating to advance directives for health care.

Section 8. Amends s. 744.3135, F.S., relating to credit and criminal investigation.

Section 9. Amends s. 744.3145, F.S., relating to guardian education requirements.

Section 10. Amends s. 744.3215, F.S., relating to rights of persons determined to be incapacitated.

Section 11. Amends s. 744.331, F.S., relating to procedures to determine incapacity.

Section 12. Amends s. 744.341, F.S., relating to voluntary guardianship.

Section 13. Amends s. 744.361, F.S., relating to powers and duties of a guardian.

Section 14. Amends s. 744.365, F.S., relating to verified inventory.

Section 15. Amends s. 744.367, F.S., relating to the duty to file an annual guardianship report.

Section 16. Amends s. 744.3675, F.S., relating to the annual guardianship plan.

Section 17. Amends s. 744.3678, F.S., relating to annual accounting.

Section 18. Amends s. 744.3679, F.S., relating to simplified accounting procedures in certain cases.

Section 19. Amends s. 744.368, F.S., relating to responsibilities of the clerk of the circuit court.

Section 20. Amends s. 744.441, FS., relating to the powers of a guardian upon court approval.

Section 21. Creates s. 744.442, F.S., relating to the delegation of authority.

Section 22. Amends s. 744.464, F.S., relating to the restoration to capacity.

Section 23. Amends s. 744.474, F.S., relating to reasons for removing a guardian.

Section 24. Amends s. 744.511, F.S., relating to the accounting upon removal of a guardian.

Section 25. Amends s. 744.527, F.S., relating to final reports and application for discharge of guardian.

Section 26. Amends s. 744.528, F.S., relating to the discharge of a guardian named as a personal representative.

Section 27. Amends s. 744.708, F.S., relating to reports and standards.

Section 28. Amends s. 765.101, F.S., relating to definitions.

Section 29. Amends s. 28.345, F.S., relating to the exemption from court-related fees and charges.

Section 30. Amends s. 121.091, F.S., relating to benefits payable.

Section 31. Amends s. 121.4501, F.S., relating to Public Employee Optional Retirement Program.

Section 32. Amends s. 709.08, F.S., relating to durable power of attorney.

Section 33. Amends s. 744.1085, F.S., relating to the regulation of professional guardians.

Section 34. Reenacts s. 117.107, F.S., relating to prohibited acts.

Section 35. Amends s. 318.18, F.S., relating to amount of civil penalties.

Section 36. Creates s. 938.065, F.S., relating to additional costs for public guardianship programs.

Section 37. Provides for an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See Fiscal Comments.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons involved in guardianship will be required to have additional training. These persons may also have to spend more time drafting reports regarding a person's capacity. The cost of these reports may be borne by the ward. Guardians will have to visit their wards more frequently.

D. FISCAL COMMENTS:

The bill allows for the imposition of a $15 surcharge on non-criminal traffic infractions and criminal violations listed in section 318.17, Florida Statutes, to fund a county's public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an $18 surcharge on all misdemeanors; $15 of which would be used to fund public guardianship programs, with the remaining $3 going to the clerks of court as a service fee.

According to the Department of Highway Safety and Motor Vehicles in 2004 the traffic statistics for criminal traffic, non-criminal moving, and non-moving infractions were as follows:

Total Violations: 4,418,401
Guilty: 434,691
Pending Disposition: 563,948

Adjudication withheld by Judge: 515,594
Adjudication withheld by Clerk: 541,581

Guilty: $6,520,365
Adjudication withheld by Judge: $7,733,910
Total: $14,254,275

These numbers assume 100% collection, that each county would utilize this mechanism for public guardianship funding, and that fines are imposed for each adjudication withheld.

The department estimates there is a minimum of 5,000 to 10,000 indigent and incapacitated persons per year that require the services of a public guardian. Currently, public guardians serve slightly over 1,700 of those individuals. The majority of the state does not have access to a public guardian, and even those areas that do have a public guardian, services are not readily available because the current office is at capacity. These provisions replace the public guardianship funding that was removed in July 2004 in implementing Article V revisions.

The number of misdemeanors where a fine would be imposed for 2004 was:191,432. Multiplying that figure by $15 (not the full $18) results in a possible $2,871,480 for public guardianship. Again, this assumes 100% collection. The clerks of court would retain $574,296 in service fees.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations. It also requires the Florida Department of Law Enforcement to adopt a rule to establish procedures for the retention of guardian fingerprints and dissemination of search results of all arrest fingerprint cards.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES