

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 399 Guardianship

SPONSOR(S): Civil Justice & Claims Subcommittee, Diamond and Spano

TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 172

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	12 Y, 1 N, As CS	Aziz	Bond
2) Children, Families & Seniors Subcommittee	12 Y, 1 N	Langston	Brazzell
3) Judiciary Committee	17 Y, 1 N	Aziz	Camechis

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. Before a guardian may be appointed to act for the ward, a court must determine the ward is incapable of handling his or her affairs.

When a petition to determine incapacity is filed, the court appoints a three member examining committee to examine the alleged incapacitated person. If two of the three examining committee members conclude that the person is incapacitated then a hearing is scheduled on the petition. A copy of each examining committee member's report must be served on the petitioner and the attorney for the alleged incapacitated person within three days after filing and at least five days before a hearing is held on the petition. While examining committee reports are typically received into evidence without testimony at the hearings, a recent Florida appellate decision has found these reports are inadmissible hearsay. In order for the examining committee report to be admissible, an examining committee member must be present at the adjudicatory hearing on incapacity.

CS/HB 399 provides an examining committee report is admissible at an adjudicatory hearing on incapacity unless an objection is raised. All or any portion of the examining committee member's reports may be objected to by filing and serving a written objection on the other party prior to the adjudicatory hearing. If no objection is made, then the examining committees' reports are admissible into evidence without further proof. The bill creates time limits for serving the examining committee reports on the parties and for raising objections. The bill also extends the deadline for the adjudicatory hearing, unless otherwise waived by the parties, from two weeks after the filing of the examining committee reports to no more than 30 days after the filing of the last filed report.

Following appointment by the court, the guardian files an annual guardianship plan with the court. Currently, if on a calendar-year basis or annual basis, the guardian must file the annual guardianship plan at least 60 days but no more than 90 days before the last day of the anniversary month that the letters of guardianship were signed. The bill requires the guardian to file the plan within 90 days after the last day of the anniversary month that the letters of guardianship were signed unless the court requires a calendar-year filing. Currently, if the court requires a calendar-year filing the plan must be filed after September 1 but no later than December 1 of the current year. The bill requires that, if the court requires a calendar-year filing, the guardianship plan must be filed on or before April 1 of each year.

Currently, a guardian may not initiate a petition for dissolution of marriage for the ward without receiving court approval and consent from the ward's spouse. The bill removes the requirement to obtain the consent of the ward's spouse.

The bill also removes the statutory cap of \$6,000 for funeral, interment, and grave marker expenses from the ward's estate. Additionally, the bill changes the time that the guardian has to file a required annual guardianship plan with the court.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2017.

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

STORAGE NAME: h0399f.JDC

DATE: 3/23/2017

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview

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 a sufficient alternative to guardianship, such as a power of attorney. There are two main forms of guardianship: guardianship over the person and 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 affairs. 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 an examining committee.

Examining Committee

Current Situation

Section 744.331, F.S., sets forth the procedures for determining whether a person is incapacitated. The notice of filing of a petition to determine incapacity and the petition for appointment of a guardian must be read to the alleged incapacitated person.¹ The alleged incapacitated person must be provided with an attorney, who cannot serve as the guardian or counsel for the guardian.² Within five days of filing a petition for determination of incapacity, the court must appoint an examining committee consisting of three members, which must include a psychiatrist or physician and two other persons, such as a psychologist, a nurse, social worker, gerontologist, or other qualified persons with sufficient knowledge, skill, experience, or training.³

Each committee member must examine the person and then issue a report evaluating the person’s mental health, functional ability, and physical health.⁴ The examining committee members must each submit their examining reports within 15 days after appointment.⁵ Within three days after the report is filed and at least five days before the hearing, a copy of the committee member’s report must be served on the petitioner and on the attorney for the alleged incapacitated person.⁶ If the committee determines that the person is not incapacitated in any respect, the court must dismiss the petition.⁷ However, if two of the three examining committee members conclude the person is incapacitated in some respect, the court proceeds to a hearing on the petition and makes a final determination based on the evidence presented by the parties.⁸

¹ s. 744.331(1), F.S.

² *Id.* at (2).

³ *Id.* at (3).

⁴ *Id.* at (3)(e)-(f).

⁵ *Id.* at (3)(e).

⁶ *Id.* at (4).

⁷ *Id.* at (4).

⁸ *Id.* at (5).

While examining committee reports are typically received into evidence without testimony at the hearings, a recent Florida appellate decision has found these reports are inadmissible hearsay.⁹ In *Shen v. Parkes*, a petition was filed to determine the incapacity of Bishullang Shen.¹⁰ An adjudicatory hearing was held in which none of the examining committee members testified but the written reports of the examining committee were accepted by the court over Mr. Shen's hearsay objection.¹¹ The hearsay rule requires any assertion offered as testimony can only be received if it is or has been open to test by cross examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, court rules, or by statute.¹² The Fourth District Court of Appeals reversed the trial court's ruling and held the examining committee reports are not an exception to the hearsay rule.¹³ Therefore, the Fourth District Court of Appeals reversed the lower court's finding of incapacity because the lower court relied upon inadmissible hearsay.

Due to the *Shen* decision, many practitioners feel compelled to require the attendance of examining committee members at every hearing out of concern over a potential hearsay objection relating to the admission of the examining committee report, even when such an objection may never be asserted.¹⁴

Effect of the Bill

The bill specifies with whom the examining committee members file their reports on and who must serve the report on the petitioner and his or her attorney. It provides each member of the examining committee will file their report with the clerk of the court within 15 days after appointment. Then, the clerk of the court must serve the report, either through electronic mail or U.S. mail, on the petitioner and the attorney for the alleged incapacitated person within three days of receipt. Accordingly, upon service, the clerk must file a certificate of service in the incapacity proceeding. Both the petitioner and the attorney for the alleged incapacitated person must be served with all reports at least 10 days before the hearing on the petition. If such service is not effectuated, either party may move for a continuance of the hearing. The bill provides that the parties may waive the 10 day requirement and consent to the consideration of the report by the court at the adjudicatory hearing. The bill requires a party objecting to the introduction of the examining committee members' reports to provide notice of the objection prior to the hearing.

The bill provides an examining committee report is admissible at an adjudicatory hearing on incapacity unless one of the parties objects. The bill provides a process for objections to the introduction of the examining committee members' reports by filing and serving a written objection on the other party no later than five days before the hearing. The objection can be to all or any portion of the examining committee members' reports and must state the basis upon which the challenge to admissibility is made. The bill provides that if an objection is timely filed and served, the court must apply the rules of evidence in determining the reports' admissibility. If no objection is made, then the examining committee members' reports are admissible into evidence without further proof.

The bill also extends the deadline for the adjudicatory hearing from two weeks after the filing of the examining committee reports to no earlier than 10 days after the examining committee report is filed and no more than 30 days after the filing of the last filed report. The bill provides the 10 day waiting period following the filing of the last examining committee report may be waived.

⁹ s. 90.801(1)(c), F.S., defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

¹⁰ *Shen v. Parkes*, 100 So. 3d 1189, 1189 (Fla. 4th DCA 2012).

¹¹ *Id.* at 1190.

¹² Blacks Law Dictionary, "hearsay rule" (8th Edition).

¹³ Florida Probate Rule 5.170 provides "In proceedings under the Florida Probate Code and the Florida Guardianship Law the rules of evidence in civil actions are applicable unless specifically changed by the Florida Probate Code, the Florida Guardianship Law, or these rules."

¹⁴ The Florida Bar, Real Property, Probate, and Trust Law Section, White Paper on Proposed Amendment on F.S. Section 744.331 in Light of *Shen v. Parkes*, (on file with the Civil Justice & Claims Subcommittee).

Filing of Annual Guardianship Report

Current Situation

Following appointment by the court, the guardian files an annual guardianship plan with the court.¹⁵ The court may require the report to be filed either on a calendar-year basis or annual basis. If on an annual basis, the guardian must file the annual guardianship plan at least 60 days but no more than 90 days before the last day of the anniversary month that the letters of guardianship were signed¹⁶. The plan must cover the coming fiscal year. If the court requires a calendar-year guardianship plan be filed, the plan must be filed after September 1 but no later than December 1 of the current year.¹⁷

Effect of the Bill

The bill changes the time that a guardian has to file an annual guardianship plan with the court. A guardian is required to file the plan within 90 days after the last day of the anniversary month that the letters of guardianship were signed unless the court requires a calendar-year filing. If the court requires a calendar-year filing, the guardianship plan must be filed on or before April 1 of each year. The latest guardianship plan filed with the court will remain in effect until the court approves the subsequent plan. This aligns the filing of the annual guardianship plan with the filing of the annual accounting report under s. 744.367(2), F.S.

Divorce of Ward

Current Situation

Once a person has been deemed incapacitated and a guardian appointed, the guardian is delegated certain rights of the incapacitated person. For example, once appointed, the guardian is delegated the authority to enter into contracts, sue and defend lawsuits, and to apply for government benefits on behalf of the ward.¹⁸ However, certain rights are not granted to a guardian without court approval. A guardian may not initiate a petition for dissolution of marriage for the ward without receiving court approval.¹⁹

In order for a guardian to initiate a dissolution of a marriage, a court must be persuaded by clear and convincing evidence that the divorce is in the best interests of the incapacitated person and that the ward's spouse has consented to the divorce. In order for the court to grant the guardian's request on behalf of the ward, the court must:

- Appoint an independent attorney to act on behalf of the incapacitated person,
- Receive as evidence independent medical, psychological, and social evaluations of the ward;
- Personally meet with the ward to obtain its own impression of the person's capacity; and
- Find by clear and convincing evidence that the person lacks the capacity to make a decision about the divorce before the court and that the ward's capacity is not likely to change in the foreseeable future.²⁰

A guardian may do all of these steps before the court and, if the ward's spouse does not consent to the divorce, then the guardian is remediless. Often, a guardian is seeking a divorce on behalf of the ward to

¹⁵ s. 744.367(1), F.S.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ s. 744.3215(3), F.S.

¹⁹ s. 744.3215(4)(c), F.S.

²⁰ s. 744.3725(1)-(4), F.S.

stop or thwart abuse by the ward's spouse.²¹ By allowing a divorce to be contingent upon the approval of the ward's spouse, current law may allow a spouse's abuse to continue unchecked.

Effect of the Bill

The bill removes the requirement for a ward's spouse's consent when a court reviews a guardian's request to begin dissolution of marriage. However, other statutory requirements remain for a guardian seeking a divorce on behalf of the ward.

Funeral Expenses

Current Situation

The guardian must file a petition for the court's authorization to perform certain duties, including but not limited to paying reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to a maximum of \$6,000.²² This cap of \$6,000 was set in 1997.

Effect of the Bill

The bill removes the statutory cap of \$6,000 for funeral, interment, and grave marker expenses from the ward's estate. The reasonable amount for funeral costs of the ward will be determined by the court on a case-by-case basis.

B. SECTION DIRECTORY:

Section 1 amends s. 744.331, F.S., relating to procedures to determine incapacity.

Section 2 amends s. 744.367, F.S., relating to duty to file annual guardianship report.

Section 3 amends s. 744.3725, F.S., relating to procedure for extraordinary authority.

Section 4 amends s. 744.441, F.S., relating to powers of guardian upon court approval.

Section 5 reenacts s. 744.3215, F.S., relating to rights of person determined incapacitated.

Section 6 provides an effective date of July 1, 2017.

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.

²¹ Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian Initiated Divorces*, NAELA JOURNAL, vol. 10, No. 2, p. 220.

²² s. 744.441(16), F.S.

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:

Examining committee members are paid a reasonable fee for their work and testimony.²³ The examining committee members' fees are paid by the guardianship or, if the guardianship is indigent, by the state.²⁴ Requiring examining committee members to attend every adjudicatory hearing, even when there are no objections to an examining committee member's report, may be an expensive burden on a guardianship or the state. To the extent that this bill will give notice to when an examining committee member needs to testify, the bill may provide a financial savings to either the party petitioning for a guardianship or the state.

Additionally, the bill may provide increased revenues for funeral homes by removing the \$6,000 cap placed on payments for a ward's funeral costs.

D. FISCAL COMMENTS:

None.

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:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 23, 2017, the Civil Justice & Claims Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Changed the reference of "petitioner's counsel" to "petitioner" to reflect pro se filings;
- Allowed for the waiver of the 10 day period between serving the examining committee report and the adjudicatory hearing;

²³ s. 744.331(7)(a), F.S.

²⁴ s. 744.331(7)(b), F.S.

- Removed the requirement that only the petitioner and the attorney for the incapacitated person may object to the examining committee report; and
- Added changes to the time for the submission of the annual guardianship report.

This analysis is drafted to the committee substitute as passed by the Civil Justice & Claims Subcommittee.