HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1119 Withholding or Withdrawal of Life-prolonging Procedures
SPONSOR(S): Health & Human Services Committee and Children, Families & Seniors Subcommittee, Berfield and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1098

FINAL HOUSE FLOOR ACTION: 112 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 1119 passed the House on April 26, 2023, and subsequently passed the Senate on May 2, 2023.

When an individual is unable to make legal decisions regarding his or her person or property, a court may adjudicate that individual incapacitated and appoint a guardian to oversee that individual's person or property or both. The individual is thereafter referred to as a ward.

Competent adults may formulate, in advance, preferences regarding health care treatment in the event of future impairment or loss of decision-making capacity, known as an advance directive. Advance directives may include designation of a health care surrogate, a person chosen to make health care decisions should the principal become unable to do so. One form of advance directive is a "do-not-resuscitate order" (DNRO), which indicates that if a person experiences cardiac or pulmonary arrest, then medical professionals are not to provide resuscitative treatments. These orders are most often used by those experiencing a terminal or end-stage condition, or in a persistent vegetative state. Since 2020, Florida law has required guardians obtain court approval prior to signing a DNRO for a ward in all instances.

CS/CS/HB 1119 creates s. 744.4431, F.S., relating to guardianship power regarding life-prolonging procedures. This section requires a professional guardian to petition the court for the authority to withhold or withdraw life-prolonging procedures prior to making such decisions, with certain exceptions. The bill outlines the contents of the petition, when a court hearing is required, and the timeframes for such hearings. The bill specifies circumstances in which a professional guardian may sign a DNRO for a ward without prior court approval.

The bill requires a guardian to file a ward's advance directive with the court upon discovery and information on any advanced directives or DNROs in the initial and annual guardianship plans, including the dates such directives and orders were signed. At the time of discovery, the court must determine whether the advance directive is an alternative to guardianship and the appropriate delegation of decision-making authority between the guardian and any health care surrogate.

The bill allows health care surrogates and agents under a durable power of attorney who retain authority to make health care decisions for a ward to exercise such authority, including withholding or withdrawal of life-prolonging procedures, without additional approval by the court. Additionally, the bill allows professional guardians to make decisions consistent with an advance directive or power of attorney without additional court approval when such decision-making authority has been expressly delegated to the guardian by the court.

The bill has an indeterminate, insignificant negative fiscal impact on the state courts. The bill has no fiscal impact on local governments.

The bill was approved by the Governor on June 23, 2023, ch. 2023-287, L.O.F., and will become effective on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Guardianship

When an individual is unable to make legal decisions regarding his or her person or property, a court may adjudicate that individual incapacitated and appoint a guardian to oversee that individual's person or property or both. The individual is thereafter referred to as a ward.[1]

Through the guardian's appointment, the court transfers a ward's civil and/or legal rights to the guardian so that the guardian may make decisions on the ward's behalf.[2] Guardianship is considered the most restrictive form of protection and supervision as it inherently entails the removal of a person's rights.[3] The specific rights that are transferred to the guardian are determined by the court and are highly dependent on the facts of each specific situation with the goal of preserving a person's rights whenever possible. In recognizing the highly restrictive nature of guardianship, the Legislature has specified its intent that the courts utilize the least restrictive form of guardianship appropriate for incapacitated persons and that alternatives to guardianship and less restrictive means of assistance be explored before appointing a guardian.[4]

The process of determining an individual's incapacity and the subsequent appointment of a guardian begins with a verified petition detailing the factual information supporting the reasons the petitioner believes the individual to be incapacitated, including the rights the alleged incapacitated person is incapable of exercising.[5] The alleged incapacitated person is then appointed an attorney and examined by a committee of three medical experts.[6] The committee members each report to the court regarding whether the individual lacks the capacity to exercise rights, the extent of the incapacity, and the factual basis for the determination of incapacity, and an evaluation of the person's ability to retain specific rights.[7] The court makes the final determination of incapacity.

Once a person has been adjudicated incapacitated, the court appoints a guardian[8] and issues the letters of guardianship which define the terms of the guardianship.[9] The order appointing a guardian must be consistent with the ward's welfare and safety, be the least restrictive option that is appropriate, and reserve to the ward the right to make decisions in all matters commensurate with the ward's ability to do so.[10]

Appointment of a Guardian

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[1] S. 744.102(9), F.S.
[2] Guardianship Improvement Task Force. *Final Report: January 2022*. Available at https://www.guardianshipimprovementtaskforce.com/report/ (last visited May 11, 2023).
[3] *Id*.
[4] S. 744.1012(2), F.S.
[5] S. 744.3201, F.S.
[6] S. 744.331, F.S. The committee is appointed by the court. One member of the committee must be a psychiatrist or other physician. The remaining committee members must be either a psychologist, gerontologist, psychiatrist, physician, advanced practice registered nurse, registered nurse, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or any other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.
[7] S. 744.331(3)(g), F.S.
[8] S. 744.2005, F.S
[9] S. 744.345, F.S.
[10] S. 744.2005(3), F.S.

In Florida, the circuit court appoints a guardian to a ward. The court may appoint any of the following persons as a guardian:[11]

- Any resident of Florida who is 18 years of age or older and has full legal rights and capacity;
- A nonresident if he or she is related to the ward by blood, marriage, or adoption;
- A trust company, a state banking corporation, or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in Florida;
- A nonprofit corporation organized for religious or charitable purposes and existing under the laws of Florida;
- A judge who is related to the ward by blood, marriage, or adoption, or has a close relationship with the ward or the ward's family, and serves without compensation;
- A provider of health care services to the ward, whether direct or indirect, when the court specifically finds that there is no conflict of interest with the ward's best interests; or
- A for-profit corporation that meets certain qualifications, including being wholly owned by the person who is the circuit's public guardian in the circuit where the corporate guardian is appointed.

Professional and Public Guardians

A professional guardian is any guardian who has, at any time, rendered services as a guardian to three or more wards to whom the guardian is not related.[12] Public guardians are a category of professional guardians who are appointed to serve individuals of limited financial means if there is no family member, friend, or other entity willing and qualified to serve as guardian.[13] The Office of Public and Professional Guardians (OPPG), within the Department of Elderly Affairs (DOEA), regulates and oversees all professional guardians, including public guardians.[14] A professional guardian must register with OPPG to be appointed as a guardian by the court.[15]

Courts must use a rotational system to appoint professional guardians; if not, the court must make specific findings of fact stating why the person was selected outside the rotation.[16] The court must consider, and the findings must reference, the following factors:[17]

- Whether the guardian is related by blood or marriage to the ward;
- Whether the guardian has educational, professional, or business experience relevant to the nature of the services sought to be provided;
- Whether the guardian has the capacity to manage the financial resources involved;
- Whether the guardian has the ability to meet the requirements of the law and the unique needs of the individual case;
- The wishes expressed by an incapacitated person as to whom shall be appointed guardian;
- The preference of a minor who is age 14 or over as to whom should be appointed guardian;
- Any person designated as guardian in any will in which the ward is a beneficiary; and
- The wishes of the ward's next of kin, when the ward cannot express a preference.

Additionally, current law prohibits the court from giving preference to the appointment of a person based solely on the fact that such person was appointed by the court to serve as an emergency

[11] S. 744.309, F.S.
[12] S. 744.102(17), F.S.
[13] S. 744.2007, F.S.
[14] S. 744.2001, F.S.
[15] S. 744.2003(9), F.S.
[16] S. 744.312(4)(a), F.S.
[17] *See* s. 744.312(2)-(3), F.S.

temporary guardian.[18] When a professional guardian is appointed as an emergency temporary guardian, that professional guardian may not be appointed as the permanent guardian of a ward unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian.[19] However, the court may waive this limitation if the special requirements of the guardianship demand that the court appoint a guardian because of that guardian's special talent or specific prior experience.[20]

Persons disqualified from being appointed as a guardian include persons:[21]

- Convicted of a felony;
- Incapable of discharging the duties of a guardian due to incapacity or illness, or who is otherwise unsuitable to perform the duties of a guardian;
- Judicially determined to have committed abuse, abandonment, or neglect against a child;
- Found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under s. 435.04, F.S.;
- Providing substantial services to the proposed ward in a professional or business capacity, or a creditor of the proposed ward, if such guardian retains that previous professional or business relationship (with exceptions);
- In the employ of any person, agency, government, or corporation that provides service to the proposed ward in a professional or business capacity, unless that person is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that the potential conflict of interest is insubstantial and that the appointment would clearly be in the proposed ward's best interest; or
- For whom serving as guardian would constitute a conflict of interest.

Relationship Between Guardian and Ward

The relationship between a guardian and ward is a fiduciary one.[22] A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.[23] The guardian, as fiduciary, must:[24]

- Act within the scope of the authority granted by the court and as provided by law;
- Act in good faith;
- Not act in a manner contrary to the ward's best interests; and
- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.

The fiduciary relationship between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law.[25] Should a guardian breach his or her fiduciary duty to the ward, the court is obligated to intervene to protect the ward and the ward's interests.[26]

A guardian's decision-making authority is either "limited" or "plenary" in nature.[27] A limited guardian is appointed to exercise the specific legal rights and powers designated by the court after the ward has been found to lack the capacity to do some, but not all, of the tasks necessary to care for person or

[18] S. 744.312(5), F.S. See also, s. 744.3031, F.S., an emergency temporary guardian may be appointed if prior to the formal appointment of a guardian, there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.
[19] S. 744.312(4)(b), F.S.
[20] *Id.*
[21] S. 744.309(3), F.S.
[22] *Lawrence v. Norris,* 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.
[23] *Doe v. Evans,* 814 So. 2d 370, 374 (Fla. 2002).
[24] S. 744.361, F.S.
[25] S. 744.446, F.S.
[26] S. 744.446(5), F.S.
[27] S. 744.102(9)(a), F.S.

property, or after the person has voluntarily petitioned for appointment of a limited guardian.[28] A person for whom a limited guardian has been appointed retains all legal rights except those the court has specifically granted to the guardian.[29] A plenary guardian is 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.[30]

Powers and Duties of the Guardian

Florida law outlines the rights which a ward retains after the appointment of a guardian,[31] and those rights which may be removed from the ward and delegated to the guardian by the court.[32] Rights that may be removed from a ward and delegated to the guardian include the right to travel, contract, determine his or her residence, and consent to medical and mental health treatment.[33] A guardian may only exercise the rights which have been removed the ward and delegated to the guardian.[34]

The guardian has a significant amount of decision-making authority in regards to the management of a ward's estate. Additional court approval is required before certain powers may be exercised by a guardian.

Examples of Powers That May Be Exercised By a Guardian[35]	
With Court Approval	**Without Court Approval**
• Enter into contracts that are appropriate for, and in the best interest of, the ward. • Perform, compromise, or refuse performance of a ward's existing contracts. • Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein. • Borrow money to be repaid from the property of the ward or the ward's estate. • Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward. • Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate. • Make gifts of the ward's property to members of the ward's family in estate and income tax planning. • Pay reasonable funeral, interment, and grave marker expenses for the ward.	• Retain assets owned by the ward. • Receive assets from fiduciaries or other sources. • Insure the assets of the estate against damage, loss, and liability. • Pay taxes and assessments on the ward's property. • Pay reasonable living expenses for the ward, taking into consideration the ward's current finances. • Pay incidental expenses in the administration of the estate. • Prudently invest liquid assets belonging to the ward. • Consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise of the ward. • Employ, pay, or reimburse persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties.

Initial and Annual Guardianship Plans

State law imposes specific responsibilities on guardians consistent with the basic duties of a fiduciary. This includes filing initial and annual guardianship reports[36] and an annual accounting of the ward's property.[37] These statutory obligations ensure a base level of judicial oversight and engagement with

[28] *Id.*
[29] S. 744.2005(7), F.S.
[30] S. 744.102(9)(b), F.S.
[31] *See* 744.3215(1), F.S. Such rights retained by a ward include the right to counsel, the right to receive visitors and communicate with others, and the right to privacy, among others.
[32] S. 744.3215, F.S.
[33] *Id.*
[34] S. 744.361(1), F.S.
[35] S. 744.441, F.S.
[36] S. 744.367, F.S.
[37] S. 744.3678, F.S.

the courts to protect and preserve the property of the ward as well as the ward's overall physical and social health.[38]

Within 60 days of appointment, a guardian must file an initial guardianship report with the court.[39] The required contents of the initial guardianship report depend upon the specific powers that have been delegated to the guardian. A guardian of the property must include a verified inventory, while a guardian of the person must include an initial guardianship plan.[40] Initial guardianship plans must contain information specified in statute including information regarding the provision of medical, mental health, or personal care services for the welfare of the ward; the kind of residential setting best suited for the needs of the ward; the provision of social and personal services for the welfare of the ward; and a list of any preexisting orders not to resuscitate or advance directives.[41]

Guardians must also file an annual guardianship report with the court. The annual guardianship report must be filed within 90 days following the last day of the anniversary month of appointment.[42] The annual plan must cover the coming fiscal year, ending on the last day in the anniversary month.[43] Similar to the initial guardianship report, the annual guardianship report for a guardian of the person must include an annual guardianship plan[44] updating information regarding the medical and mental health conditions, treatment, and rehabilitation needs of the ward; the residence of the ward; the social condition of the ward; and a list of any preexisting orders not to resuscitate or advance directives.[45]

End of Life Health Care Decisions

Competent adults may formulate, in advance, preferences regarding health care treatment in the event that injury or illness causes severe impairment or loss of decision-making capacity, known as an advance directive. An advance directive is a witnessed, oral statement or written instruction that expresses a person's desires about any aspect of his or her future health care, including the designation of a health care surrogate, a living will, or an anatomical gift.[46] The designation of a health care surrogate, a living will, or an anatomical gift each serve different purposes and have their own unique requirements and specifications under the law.[47]

Living Wills

A living will is an advance directive that indicates a person's preferences for the provision, withholding, or withdrawal of life-prolonging procedures in the event that such person has a terminal condition, end-stage condition, or is in a persistent vegetative state.[48] Life-prolonging procedures are defined as any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include administration of medication or performance of medical procedures to provide comfort care or to alleviate pain.[49] The terms of a living will are entered into by a competent adult and indicate their personal treatment preferences and goals should they be unable to make medical decisions for themselves.

Health Care Surrogates and Proxies

[38] S. 744.362, F.S.
[39] S. 744.362, F.S.
[40] *Id*.
[41] S. 744.363, F.S.
[42] S. 744.367(1), F.S.
[43] *Id.*
[44] S. 744.367(1) and (3)(a), F.S.
[45] S. 744.3675, F.S.
[46] S. 765.101, F.S.
[47] *Id.*
[48] S. 765.302(1), F.S.
[49] S. 765.101(12), F.S.

A health care surrogate is a competent adult who has been expressly designated by a principal via an advance directive to make health care decisions on the behalf of the principal upon the principal's incapacity or at another point in time as determined by the principal.[50] A health care surrogate's authority to make health care decisions includes all of the following:

- Provide informed consent for health care;
- Refuse or withdraw consent for any health care, including life prolonging procedures and mental health treatment unless otherwise stated in the advance directives;
- Apply for private, public, government, or veterans' benefits to defray the cost of health care;
- Access to all records of the principal reasonably necessary to make health care decisions and apply for benefits; and
- Make an anatomical gift pursuant to part V of Ch. 765, F.S.

If a person fails to designate a surrogate or a designated surrogate is unwilling or unable to perform his or her duties, a health care facility appoint a proxy to make health care decisions on behalf of such person should that person become incapacitated.[51] Current law directs health care facilities to appoint proxies according to a prioritized list based on the relationship to the patient. The following persons may serve as proxy to an incapacitated patient, in order of priority:[52]

- A court-appointed guardian with health care decision-making authority;
- The patient's spouse;
- An adult child of the patient;
- A parent of the patient;
- An adult sibling of the patient;
- An adult relative of the patient having shown special care and concern for the patient;
- A close friend of the patient; or
- A clinical social worker, under special circumstances.

A surrogate appointed by the principal or by proxy may, subject to any limitations and instructions provided by the principal, take the following actions:[53]

- Make all health care decisions for the principal during the principal's incapacity;
- Consult expeditiously with appropriate health care providers to provide informed consent, including written consent where required, provided that such consent reflects the principal's wishes or the principal's best interests;
- Have access to the appropriate medical records of the principal;
- Apply for public benefits for the principal and have access to information regarding the principal's income, assets, and financial records to the extent required to make such application;
- Authorize the release of information and medical records to appropriate persons to ensure continuity of the principal's health care; and
- Authorize the admission, discharge, or transfer of the principal to or from a health care facility.

Physicians should recognize the patient's proxy or surrogate as an extension of the patient and is entitled to the same respect as the competent patient.[54]

Power of Attorney

[50] S. 765.202, F.S.
[51] S. 765.401(1), F.S.
[52] S. 765.401(1), F.S.
[53] S. 765.205, F.S.
[54] American Medical Association. *Code of Ethics. Opinion 2.1.2: Decisions for Adult Patients Who Lack Capacity*. Available at https://code-medical-ethics.ama-assn.org/ethics-opinions/decisions-adult-patients-who-lack-capacity (last visited May 10, 2023).

A power of attorney is a document granting authority to an agent to act in the place of the principal.[55] A "durable" power of attorney is a kind of power of attorney that cannot be terminated by the principal's incapacity.[56] Among many other things, a durable power of attorney may be used to allow another person to make health care decisions on behalf of an incapacitated principal.[57]

Do-Not-Resuscitate Orders

One type of advance directive, a "do-not-resuscitate order" (DNRO), results in cardiopulmonary resuscitation (CPR) and all other resuscitative treatment being withheld in the event of cardiac or pulmonary arrest. A DNRO is a physician order, consented to by the patient, to withhold resuscitation if a patient experiences cardiac or pulmonary arrest. While a living will may result in withholding life-prolonging care under pre-considered circumstances, a DNRO is a directive to health care providers not to administer resuscitation in the immediate circumstance.[58]

DNROs are typically used by individuals experiencing a terminal or end-stage condition, or in a persistent vegetative state, but in some circumstances may also be used by healthy individuals. The DNRO indicates that resuscitative measures are not to be initiated; however, comfort care measures, such as oxygen administration, hemorrhage control and pain management, may still be used.[59] DNROs are honored in most health care settings including hospices,[60] adult family care homes,[61] assisted living facilities,[62] emergency departments,[63] nursing homes,[64] home health agencies,[65] and hospitals.[66] DNROs are also honored by emergency medical responders outside of a health care setting provided that the form is prominently displayed or the patient identification device, a miniature version of the form, accompanies the patient.[67]

For a DNRO to be valid, it must be on the form adopted by the Department of Health, printed on yellow paper, and signed by the patient's physician or physician assistant and the patient.[68] If the patient is incapacitated, then the form must be signed by the patient's health care surrogate or proxy, court-appointed guardian, or attorney-in-fact under a durable power of attorney.[69] A DNRO does not expire;[70] however, it may be revoked by the patient or the patient's representative who signed the original form, at any time, either in writing, by physical destruction of the form or by orally expressing contrary intent.[71]

End of Life Decisions by Guardians

Existing Advance Directives

Under current law, a ward's preexisting advance directives must be considered by the court in the process of delegating authorities to a guardian.[72] A list of preexisting DNROs and advance directives

[55] S. 709.2102(9), F.S.
[56] S. 709.2102(4), F.S.
[57] The Florida Bar. *Consumer Pamphlet: Florida Power of Attorney, About the Power of Attorney*. Available at https://www.floridabar.org/public/consumer/pamphlet13/#about (last visited May 10, 2023).
[58] Florida Department of Health. *Do Not Resuscitate Frequently Asked Questions*. Available at https://www.floridahealth.gov/about/patient-rights-and-safety/do-not-resuscitate/faq-page.html#difference (last visited May 10, 2023).
[59] *Id.*
[60] S. 400.6095, F.S.
[61] S. 429.73, F.S.
[62] S. 429.255, F.S.
[63] S. 395.1041, F.S.
[64] S. 400.142, F.S.
[65] S. 400.487, F.S.
[66] S. 395.1041, F.S.
[67] Rule 64J-2.018, F.A.C.
[68] S. 401.45(3), F.S.
[69] *Id.*
[70] *Supra*, note 67.
[71] *Id.*
[72] S. 744.345, F.S.

must be included in the initial and annual guardianship plans,[73] and where appropriate, an advance directive may be considered an alternative to guardianship.[74] If an advance directive exists, the court must determine what health care decision-making authority will be delegated to the guardian or remain with the health care surrogate.[75] The court has the authority to modify or revoke the advance directive upon specific findings of fact. If the court provides that the guardian is responsible for making health care decisions in accordance with a ward's existing advance directive, then the guardian assumes the responsibilities of health care surrogate.[76]

Do-Not-Resuscitate Orders

Since 2020, Florida law has required guardians to obtain court approval prior to signing a DNRO for a ward.[77] Under current law, a guardian must petition the court and obtain court approval prior to signing a DNRO. If a ward is in exigent circumstances, the court must hold a preliminary hearing within 72 hours after the filing of the petition and either make a ruling immediately after the preliminary hearing, or conduct an evidentiary hearing within four days after the preliminary hearing and make a ruling immediately after the evidentiary hearing.[78]

The impetus for this change in law was a high-profile case in which Steven Stryker, a ward to whom professional guardian Rebecca Fierle had been appointed, died in a Tampa hospital after choking on food. Hospital staff could not perform potentially lifesaving measures on him due to a DNRO executed by Fierle, despite Stryker and his daughter requesting the order be removed.[79] It was later discovered that the same professional guardian had consented to many DNROs, for wards without significant health problems, or for non-terminal or end-stage wards, without consent or sufficient oversight.[80] The event led to a series of changes to the state's guardianship statute[81] relating to the appointment of guardians, conflicts of interest, and the powers and duties of guardians.[82]

Guardianship Improvement Task Force

The Florida Court Clerks & Comptrollers Association convened the Guardianship Improvement Task Force (Task Force) in 2021 to study the current status of guardianships in Florida with the goal of making recommendations to improve the protection of wards throughout the state.[83] The Task Force included members representing stakeholders with direct involvement in Florida's guardianship system, ranging from wards and ward advocates, to public guardians, and probate judges.[84]

The Task Force held information gathering meetings, received presentations by experts, and took public comment over the course of three months.[85] In January 2022, the Task Force published its final report which detailed 10 focus areas that should be addressed to improve Florida's guardianship system. The report also included possible methods for implementing recommended policies,

[73] Ss. 744.363 and 744.3675, F.S.
[74] S. 744.334, F.S.
[75] S. 744.3115, F.S.
[76] *Id*. See also, 765.205, F.S.
[77] S. 744.441(2), F.S.
[78] S. 744.441(2), F.S.
[79] Adrianna Iwasinski, *Orange commissioners approve new position to help monitor guardianship cases,* Click Orlando (Oct. 22, 2019). Available at https://www.clickorlando.com/news/2019/10/23/orange-commissioners-approve-new-position-to-help-monitor-guardianship-cases/ (last visited May 10, 2023).
[80] Fierle pleaded no contest to a charge of neglect of an elderly person, a third-degree felony punishable by up to five years in prison. Fierle is currently awaiting sentencing. See, Cann, C. (2023). *Criminal Case Against Former Guardian Rebecca Fierle Ends in Plea*. Orlando Sentinel. Available at https://www.orlandosentinel.com/2023/02/23/criminal-case-against-former-orlando-guardian-rebecca-fierle-ends-in-plea/ (last visited May 19, 2023).
[81] *See* Ch. 744, F.S.
[82] Greg Angel, Spectrum News 13, *DeSantis Signs Florida Guardianship Bill Into Law, Expanding Oversight of Program* (June 19, 2020). Available at https://www.mynews13.com/fl/orlando/news/2020/06/19/desantis-signs-florida-guardianship-bill-into-law (last visited May 11, 2023).
[83] *Supra*, note 2, p. 5.
[84] *Id*.
[85] *Supra*, note 2, at p. 10.

suggestions for future consideration, and an extensive review of public comments received by the Task Force. The use of DNROs for wards and the treatment of advance directives by the courts were among the subjects reviewed by the Task Force.

The Florida Public Guardian Coalition submitted concerns to the Task Force regarding the unintended consequences of requiring court approval before a guardian may sign a DNRO for a ward. These consequences include physicians' refusal to provide comfort care to wards and resuscitations that led to injuries and undue suffering of wards. Public guardians reported barriers to obtaining necessary DNROs such as delays in filing petitions associated with gathering materials for the petitions and physician's refusal to sign forms or appear before the court. Additionally, some circuit courts did not adjust their operations to accommodate the law's timelines for making decisions in these cases, which resulted in delays harmful to the wards.[86]

Among the recommendations made by the Task Force were several suggestions relating to the treatment of ward's advance directives by the courts. The Task Force reported numerous public comments asserting that advance directives are routinely being ignored or unlawfully removed by judges.[87] The Task Force suggested that judges be required to produce specific written findings of fact in any instance in which an advance directive is not honored.[88] The Task Force also acknowledged that legal documents such as advance directives are often stored somewhere safe, secure, and private, which may result in the document not being available or able to be disclosed when needed.[89] To address this, the Task Force suggested the state consider implementing a statewide health care surrogate/proxy database to ensure that this information is available when it is needed.[90]

Effect of Proposed Changes

End of Life Decisions by Guardians

Existing Advance Directives

CS/CS/HB 1119 outlines the responsibilities of a guardian if a ward's advance directive is discovered after the guardian has been appointed. The bill requires that a guardian file the advance directive with the courts no later than the due date of the initial guardianship report, annual guardianship plan, or the filing of a petition for the authority to withhold or withdraw life-prolonging procedures. This provision obligates a guardian to file the advance directive at the time of their next interaction with the court on the ward's case. At the time of filing, the court must determine whether the advance directive is an alternative to guardianship and what authority the guardian will continue to exercise over health care decisions for the ward.

The bill expands upon the required contents of initial and annual guardianship plans regarding a ward's preexisting DNROs and advance directives. Specifically, in addition to listing any such orders and directives, the plans must also include the date that such orders and directives were signed and whether they were revoked, modified, or suspended by the court.

Health Care Surrogates

Under the bill, the court may modify or revoke the authority of a health care surrogate under an advance directive, but a hearing must be held on the motion before the court may do so. The court is required to make specific written findings of fact after such hearing regarding the authority retained by a

[86] Guardianship Improvement Task Force, *Appendix M: Public Guardian DNR Legislation Unintended Consequences Examples* (January 2022). Available at https://guardianshiptf.wpengine.com/wp-content/uploads/2022/01/GITFReportAppendix-Jan2022-Reduced.pdf (last visited May 10, 2023).
[87] *Supra*, note 2, at p. 83
[88] *Supra*, note 2, at p. 61
[89] *Supra*, note 2, at p. 139
[90] *Id.*

health care surrogate and delegated to a guardian. The bill further specifies that a health care surrogate or agent under a durable power of attorney who retains health care decision-making authority may exercise such authority, including the withdrawal or withholding of life-prolonging procedures, without obtaining additional court approval. The court may grant a professional guardian the authority to carry out the instructions in or take actions consistent with the ward's advance directive if the court finds that the health care surrogate is unwilling or unable to act.

These provisions give the court and professional guardians additional guidance for managing advance directives, and ensure that a surrogate or agent chosen by the ward prior to being adjudicated incapacitated may exercise the authority delegated to them by the ward without additional contact with the court. This prioritizes the ward's expressed wishes pre-dating their incapacity, over the fiduciary authority of the guardian.

Withdrawal or Withholding of Life-prolonging Procedures

Guardian Decision-making Authority

The bill revises the right that may be delegated to a guardian to make health care decisions on behalf of a ward. The change aligns the guardianship statute with Ch. 765, F.S., the chapter of Florida law governing advance directives, and more accurately reflects the authority being delegated to a guardian as applied practically. The bill specifies that when this right is delegated to a guardian, that the guardian must obtain court approval prior to withdrawing life-prolonging procedures pursuant to s. 744.4431, F.S.

Court Approval Requirement

The bill creates s. 744.4431, F.S., which details the parameters of a guardian's power regarding life-prolonging procedures. The bill requires a professional guardian to petition the court for approval prior to withdrawing or withholding life-prolonging procedures or executing a DNRO for a ward, except under specified circumstances (see below). The bill also deletes existing law requiring a guardian obtain court approval prior to signing a DNRO[91] which would be redundant upon the implementation of s. 744.4431, F.S.

Court Approval Process

The bill outlines the required contents of the petition, including a description of the proposed action and documentation of the guardian's existing authority to make health care decisions for the ward, any known objections to the proposed action, a description of the ward's known wishes or why the relief sought is in the best interest of the ward, any exigent circumstances which necessitate immediate relief, and a description of the circumstances and evidence supporting the proposed action. The guardian is required to serve notice of the petition and of any hearing upon the ward's known next of kin and interested persons. The bill requires the guardian show clear and convincing evidence that the proposed action or decision being requested would have been the decision of the ward if they had the capacity to do so, or if there is no indication of what the ward would have chosen, that the proposed action is in the best interest of the ward.

The bill requires that a hearing be held on the petition only if the court has been notified of an objection or conflict, a hearing is requested by the guardian, ward, or ward's attorney, or the court has insufficient information to make a determination. If a hearing is required and a ward is facing exigent circumstances, the court must hold a preliminary hearing within 72 hours of the filing of the petition and either make a ruling immediately following the hearing, or conduct an evidentiary hearing within four days of the preliminary hearing, at which time the court must immediately make a ruling.

[91] S. 744.441(2), F.S.

Court Approval Exceptions

Court approval is not required for a professional guardian to make the following decisions:

- To withdraw or withhold life-prolonging procedures consistent with the ward's advance directive, when a guardian has authority to do so, as long as there are no known objections.
- To execute a DNRO, when the court delegates health care decision-making authority to the guardian, if the ward is in the hospital and the following conditions are met:
  - The ward's primary treating physician and at least one consulting physician document in the ward's medical record that:
    - There is no reasonable medical probability for recovery from or a cure of the ward's underlying medical condition;
    - The ward is in an end-stage condition, a terminal condition, or a persistent vegetative state and the ward's death is imminent; and
    - Resuscitation will cause the ward physical harm or additional pain.
  - The guardian has notified the ward's known next of kin, and interested persons as directed by the court, and the decision is not contrary to the ward's expressed wishes and there are no known objections.
  - A guardian must notify the court within two business days of executing a DNRO for a ward under this provision.

The bill allows a professional guardian to take actions consistent with a ward's advance directive without additional court approval; this ensures that a ward's wishes established prior to incapacity are honored at the end of their lives. The bill authorizes a professional guardian to execute a DNRO for a ward without additional court approval under a narrow set of circumstances tailored to minimize undue suffering when a ward is actively dying and there is no positive outcome that can be achieved with continued efforts to resuscitate. The narrow circumstances in which a professional guardian may execute a DNRO under the bill establish safeguards with the intention of preventing the abuse of a guardian's power, and the requirement that the guardian notify the court ensures that the decisions are not being made without some degree of oversight.

Subject to the Governor's veto powers, the bill is effective July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill has an indeterminate, insignificant negative fiscal impact on the state courts. This is due to an anticipated increase judicial workload associated with the new judicial processes and hearing requirements established in the bill.[92]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

[92] Office of the State Courts Administrator, 2023 Judicial Impact Statement: HB 1119, p. 3. On file with the Children, Families, and Seniors Subcommittee.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.