

Committee Substitute for Senate Bill No. 268

An act relating to persons in a position of trust and confidence; amending s. 825.101, F.S.; defining the term “position of trust and confidence”; amending s. 772.11, F.S.; prescribing civil remedies for theft and other offenses in which the victim is an elderly or disabled person; providing that a violation of patient rights is not a cause of action under the act; providing for continuation of a cause of action upon the death of the elderly or disabled person; authorizing the court to advance a trial on the docket which involves a victim who is an elderly or disabled person; creating s. 744.1083, F.S.; providing guidelines for the registration of professional guardians; authorizing rulemaking; authorizing certain financial institutions to register; amending s. 744.309, F.S.; revising qualifications for trust companies that may be appointed guardians; amending s. 744.3135, F.S.; revising credit and background screening requirements for guardians; providing such requirements for employees of a professional guardian who have a fiduciary responsibility to the ward; providing applicability; amending s. 744.446, F.S.; providing for court actions to protect the ward in the event of a breach of fiduciary duty by the guardian; amending s. 744.534, F.S.; revising provisions relating to disposition of unclaimed funds; amending s. 744.703, F.S.; authorizing the establishment of public guardian offices; providing for the staffing of offices; creating s. 744.7082, F.S.; defining the term “direct-support organization”; providing for the purposes of a direct-support organization; amending s. 744.387, F.S.; increasing the amount of a claim that may be settled by a natural guardian of a minor without the necessity of appointment of a legal guardian; amending s. 744.301, F.S.; increasing the amount of a claim that may be settled by a natural guardian of a minor without the necessity of appointment of a guardian ad litem; amending s. 765.104, F.S.; authorizing a patient whose legal disability is removed to amend or revoke the recognition of a medical proxy and any uncompleted decision made by that proxy; specifying when the amendment or revocation takes effect; amending s. 765.401, F.S.; clarifying provisions relating to medical proxies for incapacitated persons; providing priority of a guardian advocate who has been authorized to consent to medical treatment for a person with a developmental disability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (11) of section 825.101, Florida Statutes, is amended to read:

825.101 Definitions.—As used in this chapter:

(11) “Position of trust and confidence” with respect to an elderly person or a disabled adult means the position of a person who:

- (a) Is a parent, spouse, adult child, or other relative by blood or marriage of the elderly person or disabled adult;
- (b) Is a joint tenant or tenant in common with the elderly person or disabled adult;
- (c) Has a legal or fiduciary relationship with the elderly person or disabled adult, including, but not limited to, a court-appointed or voluntary guardian, trustee, attorney, or conservator; or
- (d) Is a caregiver of the elderly person or disabled adult; or
- (e) Is any other person who has been entrusted with or has assumed responsibility for the use or management of the elderly person's or disabled adult's funds, assets, or property.

Section 2. Section 772.11, Florida Statutes, is amended to read:

772.11 Civil remedy for theft or exploitation.—

(1) Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of ~~the provisions of~~ ss. 812.012-812.037 or s. 825.103(1) has a cause of action for three-fold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of \$200, and reasonable attorney's fees and court costs in the trial and appellate courts. Before filing an action for damages under this section, the person claiming injury must make a written demand for \$200 or the treble damage amount of the person liable for damages under this section. If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand. Any person who has a cause of action under this section may recover the damages allowed under this section from the parents or legal guardian of any unemancipated minor who lives with his or her parents or legal guardian and who is liable for damages under this section. ~~In no event shall Punitive damages may not be awarded under this section. The defendant is shall be entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that which was without substantial fact or legal support. In awarding attorney's fees and costs under this section, the court may shall not consider the ability of the opposing party to pay such fees and costs. Nothing under This section does not limit shall be interpreted as limiting any right to recover attorney's fees or costs provided under any other provisions of law.~~

(2) For purposes of a cause of action arising under this section, the term "property" does not include the rights of a patient or a resident or a claim for a violation of such rights.

(3) This section does not impose civil liability regarding the provision of health care, residential care, long-term care, or custodial care at a licensed facility or care provided by appropriately licensed personnel in any setting in which such personnel are authorized to practice.

(4) The death of an elderly or disabled person does not cause the court to lose jurisdiction of any claim for relief for theft or exploitation when the victim of the theft or exploitation is an elderly or disabled person.

(5) In a civil action under this section in which an elderly or disabled person is a party, the elderly or disabled person may move the court to advance the trial on the docket. The presiding judge, after consideration of the age and health of the party, may advance the trial on the docket. The motion may be filed and served with the civil complaint or at any time thereafter.

Section 3. Section 744.1083, Florida Statutes, is created to read:

744.1083 Professional guardian registration.—

(1) Effective January 1, 2003, a professional guardian must register with the Statewide Public Guardianship Office established in part IX of this chapter. The Statewide Public Guardianship Office may contract with the clerk of the court in each county to perform the administrative functions associated with registering professional guardians.

(2) Annual registration shall be made on forms furnished by the Statewide Public Guardianship Office and accompanied by the applicable registration fee as determined by rule. Such fee shall not exceed \$25.

(3) Registration must include the following:

(a) If the professional guardian is a natural person, the name, address, date of birth, and employer identification or social security number of the professional guardian.

(b) If the professional guardian is a partnership or association, the name, address, and date of birth of every member, and the employer identification number of the partnership or association.

(c) If the professional guardian is a corporation, the name, address, and employer identification number of the corporation; the name, address, and date of birth of each of its directors and officers; the name of its resident agent; and the name, address, and date of birth of each person having at least a 10-percent interest in the corporation.

(d) The name, address, date of birth, and employer identification number, if applicable, of each person providing guardian-delegated financial or personal guardianship services for wards.

(e) Documentation that the bonding and educational requirements of s. 744.1085 have been met, and that background screening has been conducted pursuant to s. 744.3135.

(4) The Statewide Public Guardianship Office may adopt rules necessary to administer this section.

(5) 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 this state, may, but shall not be required to, register as a professional guardian under this section. If a trust company, state banking corporation, state savings association, national banking association, or federal savings and loan association described in this subsection elects to register as a professional guardian under this subsection, the requirements of subsection (3) shall not apply and the registration shall include only the name, address, and employer identification number of the registrant, the name and address of its registered agent, if any, and the documentation described in paragraph (3)(e).

Section 4. Subsection (4) of section 744.309, Florida Statutes, is amended to read:

744.309 Who may be appointed guardian of a resident ward.—

(4) TRUST COMPANY, STATE BANK OR SAVINGS ASSOCIATION, OR NATIONAL BANK OR FEDERAL SAVINGS AND LOAN ASSOCIATION.—~~A trust company incorporated under the laws of this state, 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 this state may act as guardian of the property of the ward.~~

Section 5. Section 744.3135, Florida Statutes, is amended to read:

744.3135 Credit and criminal investigation.—~~The court may require a nonprofessional guardian and shall require a professional or public guardian, and all employees of a professional guardian who have a fiduciary responsibility to a ward, to submit, at their his or her own expense, to an investigation of the guardian's credit history and to undergo level 2 background screening as required under s. 435.04 an investigatory check by the National Crime Information Center and the Florida Crime Information Center systems by means of fingerprint checks by the Department of Law Enforcement and the Federal Bureau of Investigation. The clerk of the court shall obtain fingerprint cards from the Federal Bureau of Investigation and make them available to guardians. Any guardian who is so required shall have his or her fingerprints taken and forward the proper fingerprint card along with the necessary fee to the Florida Department of Law Enforcement for processing. The professional guardian shall pay to the clerk of the court a fee of \$5 for handling and processing professional guardian files. The results of the fingerprint checks shall be forwarded to the clerk of court who shall maintain the results in a guardian file and shall make the results available to the court. If credit or criminal investigations are required, the court must consider the results of the investigations in appointing a guardian. Guardians and all employees of a professional guardian who have a fiduciary responsibility to a ward, so appointed, must resubmit, at their own expense, to an investigation of credit history, and undergo level 1 background screening as required under s. 435.03, every 2 years after the date of their appointment. The court must consider the results of these investigations in reappointing a guardian. This section shall not apply to a professional guardian, or to the employees of a professional guardian, that is 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 this state.

Section 6. Section 744.446, Florida Statutes, is amended to read:

744.446 Conflicts of interest; prohibited activities; court approval; breach of fiduciary duty.—

(1) It is essential to the proper conduct and management of a guardianship that the guardian be independent and impartial. The fiduciary relationship which exists 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. The guardian may not incur any obligation on behalf of the guardianship which conflicts with the proper discharge of the guardian's duties.

(2) Unless prior approval is obtained by court order, or unless such relationship existed prior to appointment of the guardian and is disclosed to the court in the petition for appointment of guardian, a guardian may not:

(a) Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;

(b) Acquire an ownership, possessory, security, or other pecuniary interest adverse to the ward;

(c) Be designated as a beneficiary on any life insurance policy, pension, or benefit plan of the ward unless such designation was validly made by the ward prior to adjudication of incapacity of the ward; and

(d) Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity of which the guardian or the guardian's spouse or any of the guardian's lineal descendants, or collateral kindred, is an officer, partner, director, shareholder, or proprietor, or has any financial interest.

(3) Any activity prohibited by this section is voidable during the term of the guardianship or by the personal representative of the ward's estate, and the guardian is subject to removal and to imposition of personal liability through a proceeding for surcharge, in addition to any other remedies otherwise available.

(4) In the event of a breach by the guardian of the guardian's fiduciary duty, the court shall take those necessary actions to protect the ward and the ward's assets.

Section 7. Paragraph (c) of subsection (2) of section 744.534, Florida Statutes, is amended to read:

744.534 Disposition of unclaimed funds held by guardian.—

(2)

(c) Within 5 ~~10~~ years from the date of deposit with the State Treasurer, on written petition to the court that directed the deposit of the funds and informal notice to the Department of Legal Affairs, and after proof of his or her right to them, any person entitled to the funds, before or after payment to the State Treasurer and deposit as provided for in paragraph (a), may obtain a court order directing the payment of the funds to him or her. All funds deposited with the State Treasurer and not claimed within 5 ~~10~~ years from the date of deposit shall escheat to the state to be deposited in the Department of Elderly Affairs Administrative Trust Fund to be used solely for the benefit of public guardianship as determined by the Statewide Public Guardianship Office established in part IX of this chapter.

Section 8. Subsection (1) of section 744.703, Florida Statutes, is amended to read:

744.703 Office of public guardian; appointment, notification.—

(1) The executive director of the Statewide Public Guardianship Office, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit, one or more offices ~~an office~~ of public guardian and if so established, shall create a list of persons best qualified to serve as the public guardian, who have been investigated and such qualifications shall include review pursuant to s. 744.3135. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a nonprofit corporate guardian under s. 744.309(5) must receive tax-exempt status from the United States Internal Revenue Service. A nonprofit corporation under s. 744.309(5) may be appointed public guardian only if:

(a) ~~It has been granted tax-exempt status from the United States Internal Revenue Service; and~~

(b) ~~It maintains a staff of professionally qualified individuals to carry out the guardianship functions, including a staff attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner.~~

Section 9. Section 744.7082, Florida Statutes, is created to read:

744.7082 Direct-support organization.—

(1) As used in this section, the term “direct-support organization” means a not-for-profit corporation incorporated under chapter 617 and organized

and operated to conduct programs and activities; initiate developmental projects; raise funds; request and receive grants, gifts, and bequests of monies; acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and make expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office or individual offices of public guardians.

(2) The purposes and objectives of the direct-support organization must be consistent with the priority issues and objectives of the Statewide Public Guardianship Office and must be in the best interest of the state.

(3) The Statewide Public Guardianship Office may permit, without charge, the appropriate use of property and facilities of the state by the direct-support organization subject to the provisions of this section. Such use must be directly in keeping with the approved purpose of the direct-support organization.

(4) The direct-support organization shall provide for an annual financial audit in accordance with s. 215.981.

Section 10. Section 744.387, Florida Statutes, is amended to read:

744.387 Settlement of claims.—

(1) When a settlement of any claim by or against the guardian, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, is proposed, but before an action to enforce it is begun, on petition by the guardian of the property stating the facts of the claim, question, or dispute and the proposed settlement, and on any evidence that is introduced, the court may enter an order authorizing the settlement if satisfied that the settlement will be for the best interest of the ward. The order shall relieve the guardian from any further responsibility in connection with the claim or dispute when the settlement has been made in accordance with the order. The order authorizing the settlement may also determine whether an additional bond is required and, if so, shall fix the amount of it.

(2) In the same manner as provided in subsection (1) or as authorized by s. 744.301, the natural guardians or guardian of a minor may settle any claim by or on behalf of a minor that does not exceed \$15,000 ~~\$5,000~~ without bond. A legal guardianship shall be required when the amount of the net settlement to the ward exceeds \$15,000 ~~\$5,000~~.

(3)(a) No settlement after an action has been commenced by or on behalf of a ward shall be effective unless approved by the court having jurisdiction of the action.

(b) In the event of settlement or judgment in favor of the ward or minor, the court may authorize the natural guardians or guardian, or a guardian of the property appointed by a court of competent jurisdiction, to collect the amount of the settlement or judgment and to execute a release or satisfaction. When the amount of net settlement to the ward or judgment exceeds \$15,000 ~~\$5,000~~ and no guardian has been appointed, the court shall require the appointment of a guardian for the property.

(4) In making a settlement under court order as provided in this section, the guardian is authorized to execute any instrument that may be necessary to effect the settlement. When executed, the instrument shall be a complete release of the person making the settlement.

Section 11. Subsections (2) and (4) of section 744.301, Florida Statutes, are amended to read:

744.301 Natural guardians.—

(2) The natural guardian or guardians are authorized, on behalf of any of their minor children, to settle and consummate a settlement of any claim or cause of action accruing to any of their minor children for damages to the person or property of any of said minor children and to collect, receive, manage, and dispose of the proceeds of any such settlement and of any other real or personal property distributed from an estate or trust or proceeds from a life insurance policy to, or otherwise accruing to the benefit of, the child during minority, when the amount involved in any instance does not exceed \$15,000 ~~\$5,000~~, without appointment, authority, or bond.

(4)(a) In any case where a minor has a claim for personal injury, property damage, or wrongful death in which the gross settlement for the claim of the minor ~~equals or exceeds~~ \$15,000 ~~\$10,000~~, the court may, prior to the approval of the settlement of the minor's claim, appoint a guardian ad litem to represent the minor's interests. In any case in which the gross settlement involving a minor equals or exceeds \$25,000, the court shall, prior to the approval of the settlement of the minor's claim, appoint a guardian ad litem to represent the minor's interests. The appointment of the guardian ad litem must be without the necessity of bond or a notice. The duty of the guardian ad litem is to protect the minor's interests. The procedure for carrying out that duty is as prescribed in the Florida Probate Rules. If a legal guardian of the minor has previously been appointed and has no potential adverse interest to the minor, the court may not appoint a guardian ad litem to represent the minor's interests, unless the court determines that the appointment is otherwise necessary.

(b) Unless waived, the court shall award reasonable fees and costs to the guardian ad litem to be paid out of the gross proceeds of the settlement.

Section 12. Subsection (4) is added to section 765.104, Florida Statutes, to read:

765.104 Amendment or revocation.—

(4) Any patient for whom a medical proxy has been recognized under s. 765.401 and for whom any previous legal disability that precluded the patient's ability to consent is removed may amend or revoke the recognition of the medical proxy and any uncompleted decision made by that proxy. The amendment or revocation takes effect when it is communicated to the proxy, the health care provider, or the health care facility in writing or, if communicated orally, in the presence of a third person.

Section 13. Subsection (1) of section 765.401, Florida Statutes, is amended to read:

765.401 The proxy.—

(1) If an incapacitated or developmentally disabled ~~the~~ patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

(a) The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability as defined in s. 393.063, who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;

(b) The patient's spouse;

(c) An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(d) A parent of the patient;

(e) The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;

(f) An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or

(g) A close friend of the patient.

Section 14. This act shall take effect upon becoming a law.

Approved by the Governor April 29, 2002.

Filed in Office Secretary of State April 29, 2002.