

## House Bill No. 191

An act relating to guardianship; amending s. 737.2065, F.S.; excepting the contesting of trust validity by property guardians of incapacitated settlors from a prohibition against commencing certain actions; amending s. 744.107, F.S.; revising provisions relating to court monitors; requiring orders of appointment and monitors' reports to be served upon certain persons; authorizing the court to determine which persons may inspect certain orders or reports; authorizing the court to enter any order necessary to protect a ward or ward's estate; requiring notice and hearing; authorizing a court to assess certain costs and attorney's fees under certain circumstances; creating s. 744.1075, F.S.; authorizing a court to appoint a court monitor on an emergency basis under certain circumstances; requiring the court to make certain findings; specifying a time period for a monitor's authority; providing for extending such time period; requiring the monitor to report findings and recommendations; providing duties of the court relating to probable cause for the emergency appointment; authorizing the court to determine which persons may inspect certain orders or reports; providing requirements for a court order to show cause for the emergency appointment; authorizing the court to issue certain injunctions or orders for certain purposes; requiring the court to provide copies of such injunctions or orders to all parties; authorizing the court to impose sanctions or take certain enforcement actions; providing for payment of reasonable fees to the monitor; prohibiting certain persons from receiving certain fees; authorizing a court to assess certain costs and attorney's fees under certain circumstances; amending s. 744.331, F.S.; requiring a court to determine whether acceptable alternatives to guardianship of incapacitated persons exist under certain circumstances; requiring appointment of a guardian if no alternative exists; prohibiting such appointment if an alternative exists; specifying circumstances of nonexistence of an alternative; preserving certain court authority to determine exercise of certain powers of attorney; amending s. 744.441, F.S.; requiring a court to make certain findings in a ward's best interest before authorizing a guardian to bring certain actions; requiring a court to review certain continuing needs for guardians and delegation of a ward's rights; creating s. 744.462, F.S.; requiring guardians to immediately report certain judicial determinations in certain guardianship proceedings; requiring a court to review certain continuing needs for guardians and delegation of a ward's rights under certain circumstances; providing an effective date.

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

Section 1. Section 737.2065, Florida Statutes, is amended to read:

737.2065 Trust contests.—An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except

this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 2. Section 744.107, Florida Statutes, is amended to read:

744.107 Court monitors.—

(1) The court may, upon inquiry from any interested person or upon its own motion in any proceeding over which it has jurisdiction, appoint a monitor. The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings. The order of appointment shall be served upon the guardian, the ward, and such other persons as the court may determine.

(2) The monitor may investigate, seek information, examine documents, or interview the ward and shall report to the court his or her findings. The report shall be verified and shall be served on the guardian, the ward, and such other persons as the court may determine. The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings.

(3) If it appears from the monitor's report that further action by the court to protect the interests of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward's estate, including amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(4) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 3. Section 744.1075, Florida Statutes, is created to read:

744.1075 Emergency court monitor.—

(1)(a) A court, upon inquiry from any interested person or upon its own motion, in any proceeding over which the court has jurisdiction, may appoint a court monitor on an emergency basis without notice. The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The scope of the matters to be investigated and the powers and duties of the monitor must be specifically enumerated by court order.

(b) The authority of a monitor appointed under this section expires 60 days after the date of appointment or upon a finding of no probable cause, whichever occurs first. The authority of the monitor may be extended for an additional 30 days upon a showing that the emergency conditions still exist.

(2) Within 15 days after the entry of the order of appointment, the monitor shall file his or her report of findings and recommendations to the court. The report shall be verified and may be supported by documents or other evidence.

(3) Upon review of the report, the court shall determine whether there is probable cause to take further action to protect the person or property of the ward. If the court finds no probable cause, the court shall issue an order finding no probable cause and discharging the monitor.

(4)(a) If the court finds probable cause, the court shall issue an order to show cause directed to the guardian or other respondent stating the essential facts constituting the conduct charged and requiring the respondent to appear before the court to show cause why the court should not take further action. The order shall specify the time and place of the hearing with a reasonable time to allow for the preparation of a defense after service of the order.

(b) At any time prior to the hearing on the order to show cause, the court may issue a temporary injunction, a restraining order, or an order freezing assets, may suspend the guardian or appoint a guardian ad litem, or may issue any other appropriate order to protect the physical or mental health or safety or property of the ward. A copy of all such orders or injunctions shall be transmitted by the court or under its direction to all parties at the time of entry of the order or injunction.

(c) Following a hearing on the order to show cause, the court may impose sanctions on the guardian or his or her attorney or other respondent or take any other action authorized by law, including entering a judgment of contempt, ordering an accounting, freezing assets, referring the case to local law enforcement agencies or the state attorney, filing an abuse, neglect, or exploitation complaint with the Department of Children and Family Services, or initiating proceedings to remove the guardian.

Nothing in this subsection shall be construed to preclude the mandatory reporting requirements of chapter 39.

(5) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for a court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 4. Paragraphs (b) and (f) of subsection (6) of section 744.331, Florida Statutes, are amended to read:

744.331 Procedures to determine incapacity.—

(6) ORDER DETERMINING INCAPACITY.—If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity.

A person is determined to be incapacitated only with respect to those rights specified in the order.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an alternative. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person ~~In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward.~~

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,

~~the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the attorney in fact~~ When an order is entered which determines that a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights.

Section 5. Subsection (11) of section 744.441, Florida Statutes, is amended to read:

744.441 Powers of guardian upon court approval.—After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 737.2065, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in s. 737.2065, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 6. Section 744.462, Florida Statutes, is created to read:

744.462 Determination regarding alternatives to guardianship.—Any judicial determination concerning the validity of the ward's durable power of

attorney, trust, or trust amendment shall be promptly reported in the guardianship proceeding by the guardian of the property. If the instrument has been judicially determined to be valid or if, after the appointment of a guardian, a petition is filed alleging that there is an alternative to guardianship which will sufficiently address the problems of the ward, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 7. This act shall take effect upon becoming a law.

Approved by the Governor June 6, 2006.

Filed in Office Secretary of State June 6, 2006.