

WHITE PAPER
SUMMARY GUARDIANSHIP FOR MENTALLY ILL INDIVIDUALS
SB 1124

I. Introduction

“[I]n our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights.” *McJunkin v. McJunkin*, 896 So.2d 962 (Fla. 2d DCA 2005).

SB 1124 creates a new summary guardianship procedure for mentally ill individuals. Currently, all incapacity proceedings are governed by Chapter 744 of the Florida Statutes. Chapter 744 was created by the Study Commission on Guardianship Law in 1989 which brought sweeping changes to the determination of an individual’s capacity, ensuring that the least restrictive form of guardianship was established for persons who might be only partially capable of caring for themselves. The purpose of those reforms was to better secure the legal rights of those adjudicated and to ensure their dignity and protection. (Florida Guardianship Practice, Chapter 11, Florida CLE Fifth Edition). During the 2003 session, legislation was passed establishing the Guardianship Task Force to review the guardianship laws to ensure that the due process rights of individuals were properly protected and that the laws were being applied consistently and effectively. The final report of the Guardianship Task Force was presented in 2004 and recommended changes to Chapter 744 passed in 2006. Florida is recognized as a national leader in protecting individuals during and after a determination of incapacity.

The proposed summary guardianship proceeding for mentally ill persons seriously erodes years of careful legislative efforts to balance the rights of the individual and the need to provide incapacitated persons with protection. There appears to be a misperception that a Chapter 744 proceeding for the appointment of a guardian creates an undue burden on family members if an individual is mentally ill. Chapter 744 however, not only ensures that civil rights are not removed from a mentally ill person until they are afforded due process and equal protection but also contains provisions that allow for (i) the payment of the examining committee fees and court appointed counsel fees by the State of Florida if a mentally ill individual is indigent and (ii) the waiving of an annual accounting if the mentally ill ward receives only public benefits for which the guardian is the representative payee.

II. Current Procedures

Currently if a mentally ill individual requires a guardian, the protections of Chapter 744 are provided to the individual. Chapter 744 affords the individual with protection against the loss of property, civil, and legal rights without first providing due process and equal protection under the law. Chapter 744 ensures that the individual, if placed

under guardianship, is protected against potential abuse, exploitation, neglect, discrimination and allotted the opportunity to regain rights when they have regained capacity.

Florida law authorizes the appointment of a guardian advocate pursuant to §393.12, Florida Statutes, for developmentally disabled adults without a determination of incapacity. However, this appointment is allowed for a very specific and limited group of individuals (clearly and specifically defined by statute) whose capacity or lack thereof is static, has been present since birth or shortly thereafter and is not likely to change over the course of a lifetime. Even this procedure provides for due process and oversight of the guardian advocate to ensure that the individual is not subject to abuse, neglect, exploitation or discrimination.

III. Potential Problems. As proposed, the summary guardianship proceeding has several issues that will likely make the plight of the mentally ill individual and family members attempting to care for them harder to navigate through the legal system rather than easier.

- Overbroad and over-inclusive. The definition of mental illness is overly broad. “Mental illness” is defined as “an impairment of the mental or emotional processes that exercise conscious control of one’s actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person’s ability to meet the ordinary demands of living, regardless of etiology.” See §394.455(18). This definition would apply to most, if not all, adults who are currently subject to guardianship proceedings under Chapter 744. It would also apply to any adult with dementia, Alzheimer’s, or organic brain syndrome. Thus, as presently written, the proposed summary guardianship would subject all incapacitated individuals with dementia or Alzheimer’s or organic brain syndrome to summary proceedings without any of the protections of Chapter 744. The proposed legislation in effect nullifies Chapter 744 and the hard fought protections for alleged incapacitated persons and wards against (i) the removal of their civil and legal rights without due process and (ii) abuse, neglect, exploitation and discrimination.
- Violation of Privacy/Medical, Mental Health & Clinical Records Now Public. Under a summary guardianship, the judge receives into evidence clinical records, psychiatric evaluations, and other professional reports, which but for this action, the individual could prevent public access. The factual basis of the mental illness and need for a summary guardian are stated in the petition which is available to the public and could also include all the medical, mental health and clinical records of the mentally ill individual. This is a clear and egregious violation of an individual’s right to privacy. Moreover, the proposed legislation

appears to authorize the petitioner to have access to the mentally ill individual's medical and mental health records for presentation to the judge at a hearing to determine if a summary guardian is appropriate. Thus opening a Pandora's Box for abuse. For example, a non-family member wanting access to medical and mental health need only file for a summary guardianship to receive the records.

It leads to the inclusion of medical records in a public court record. This proceeding even mandates and allows public disclosure of the most personal and private records of an individual—including those that individuals are allowed to protect under Federal privacy laws. An individual should not lose his or her right to privacy with regard to medical, mental health and clinical records simply because someone alleges they are mentally ill (depressed, demented, lost memory, a victim of Alzheimer's or has an organic brain syndrome).

- Appointment of Counsel. Appointment of counsel for anyone who will lose rights to liberty and property, particularly the most vulnerable such as those with a mentally illness, is crucial and constitutionally required. If the alleged incapacitated person does not retain their own counsel, under the summary guardianship proceeding, before counsel is appointed for the alleged incapacitated individual the following steps are necessary:
 - a. the alleged incapacitated person has to go the Clerk's Office to complete an affidavit of indigence;
 - b. the Clerk of Court has to determine if the individual is indigent;
 - c. if the Clerk of Court determines the individual is indigent the Clerk of Court forwards the determination to the judge;
 - d. the judge then appoints either the Office of Criminal Conflict and Civil Regional Counsel or an attorney from the Circuit's registry.¹

If the individual fails to take the above steps or is not determined not to be indigent, then the judge is required to appoint counsel for the ward ten (10) days before the hearing. The Court will be required to appoint either the Office of Criminal Conflict and Civil Regional Counsel or an attorney from the Circuit's registry. This process will leave little time for the alleged incapacitated person to build a defense, object to the violations of due process or to request a qualified and appropriate summary guardian. Under Chapter 744, counsel is appointed immediately upon the filing of the petition with the Clerk of Court.

¹ This is required as §27.51, Fla. Stat. (2007), does not authorize a Public Defender to provide representation.

- No Committee Reports. No Committee Reports. Chapter 744 requires an examining committee to be appointed to advise the court as to the individual's current capacity. The committee consists of three (3) individuals that must include a psychiatrist or physician and at least one (1) member with knowledge of the alleged incapacity. Each committee member's written report must include a diagnosis, prognosis, recommended course of treatment, and opinion as to rights which should be removed or retained. Copies of the reports are provided to the attorney for the alleged incapacitated individual, thus allowing the attorney to be properly prepared to represent his or her client.
- Stale and Inappropriate Records. Under the summary guardianship proceeding, as proposed, the judge is to consider clinical records, reports, psychological reports, etc. without limitation as to time, qualification of provider or relationship to mentally ill person or petitioners. If clinical reports and evaluations are being offered into evidence they must be recent, relevant and without conflict. As written, the judge would be obligated to accept clinical records, psychiatric evaluations, and other professional reports from years ago which do not address a current situation or the current need for a summary guardian. Further, the judge is obligated to accept clinical reports from unqualified providers and providers with a conflict of interest with the mentally ill person. If the judge must accept the clinical records, psychiatric evaluations, and other professional reports there must be a limitation as to the age of the reports, the qualifications of the providers, and the conflicts of interest. The proposed summary guardianship process eliminates the carefully thought out examining committee procedure required under Chapter 744, as outlined above. It places an enormous burden on the judge to weigh this evidence with no opportunity by the proposed ward to cross examine, depose or otherwise address the relevancy or credibility of the evidence being presented.
- No Restoration of Rights. Under summary guardianship, as written, no provision for the restoration of rights delegated to the summary guardian exists. In essence, once a summary guardian is appointed, the individual will remain under summary guardianship for the remainder of his or her life, regardless of capacity or abilities. Admittedly §393.12 pertaining to developing disable individual, does not specifically provide for a restoration, however good cause exists for that limitation. Unlike a mentally ill individual, whose capacity is usually regained with proper treatment and care, a developmentally disabled individual's capacity or lack thereof remains static. No justification exists for the permanent deprivation rights to liberty and property based on the diagnosis of a mental illness or the transient crisis created by a mental illness.

- No Specific Rights Delegated. As proposed, the summary guardianship proceeding removes rights associated with the management of person and property. However, there is no specific enumeration of those rights. Are ALL rights as enumerated in Chapter 744 subject to removal in the summary proceedings? Are there additional rights that can be removed simply because of a mental illness?
- Loss of Right to Object to Experimental Treatment, Sterilization or Abortion. Is a summary guardian required to seek court approval for medical procedures as set forth at §744.3215(4)? If not, a mentally ill person can be subjected to experimental medical treatment or sterilization or an abortion without the opportunity to object or have a court hearing. Why should a mentally ill individual be afforded fewer rights than a ward governed by Chapter 744 protections.
- Inappropriate Notice. The notice provisions in the proposed summary proceedings do not adequately describe the proceeding, do not state that the individual subject to the proceeding will have a guardian appointed and does not notify them of the attorney that was appointed for them (because one has not). Further, there is no specific person/entity tasked with guaranteeing the mentally ill person has been served with the petition and notice and there is no requirement that anyone file a proof of service. Additionally, the petition assertions would not fully or accurately state the allegations necessary to allow someone to adequately defend against the breadth of rights and protections removed by the process. This leaves open the distinct and real possibility that many vulnerable, mentally ill individuals will not receive adequate and proper notice.
- No Qualified/Appropriate Guardian. It is unclear under the proposed legislation, if the summary guardian is required to undergo a criminal or credit investigation at any time. If the summary guardian is not required to undergo the same scrutiny as a guardian appointed pursuant to Chapter 744, then a mentally ill person could have a convicted felon appointed as guardian. Does a mentally ill person require less protections or a less qualified guardian than someone who has not been diagnosed with a mental illness?
- Lack of Oversight & Protection for Vulnerable Adult. As written, the summary guardianship legislation removes all oversight of the summary guardian. This, like any other proceeding in which the state is delegating an individual's rights to another for the protection of that individual is a parens patriae proceeding. However, the summary guardianship proceeding eliminates all reporting to the court of the alleged incapacitated individual's care and support. The summary guardian is acting as the alternative decision-maker and no one is looking over

his or her shoulder. The court does not receive even the most minimal report on the care of the mentally ill individual to ensure that the individual is being provided with food, shelter and clothing. The individual subject to the summary guardian's decisions has no mechanism with which to bring potential abuse, neglect or exploitation to the court's attention. The court has no mechanism with which to seek information and to rectify inadequacies. If the court does not, at a minimum receive reports as to the care, treatment and protection of the person, how can the court protect the individual? Again, why is someone as fragile as a mentally ill individual in crisis afforded fewer protections than anyone else?

- No Way to Opt for Chapter 744 Protections. An individual subjected to a petition for summary guardian has no way to object or opt out of the proceeding once a court finds he/she suffers from a mental illness and lacks some capacity. An individual is therefore, prevented from seeking the protections and oversight authorized by Chapter 744. Additionally, if an individual is found incapacitated pursuant to Chapter 744, that individual, if diagnosed with a mental illness and lacking some capacity, by legislative mandate is placed under summary guardianship and removed from the Chapter 744 process and protections.
- Procedural Rules. As drafted, the summary guardianship proceeding appears to make the process subject to the Civil Rules of Procedure, under §394.45983. The Rules of Civil Procedure place a vulnerable and possibly incapacitated person at a severe disadvantage, particularly when the individual is not appointed counsel through most of the proceeding. The Rules of Civil Procedure have default and discovery provisions operating to the detriment and potential abuse of an alleged incapacitated person. However, if the proceeding is started pursuant to a Chapter 744, the Florida Rules of Probate Procedure apply until the summary guardian is appointed. At all times in proceedings such as these, the Florida Rules of Probate Procedure should apply.
- Codified Discrimination Based Solely on Disability. Because of the lack of constitutional, due process, privacy and oversight protections in a summary guardianship proceeding, the State of Florida, will codify the deprivation of rights to liberty and property without due process, the deprivation of privacy and the removal of protections for vulnerable individuals based solely on a disability – diagnosis of mental illness.
- Interference with Advance Directives & Estate Planning. Chapter 744 provides a mechanism to determine if the guardian's authority will usurp the authority of an agent under a power of attorney or surrogate under a health care designation. The proposed summary guardianship proceeding makes no provisions, allowances or recognition of any advanced directives or powers of attorney.

Further, it is unclear if the summary guardian might be able to override advanced directives and provide informed consent when a health care surrogate, properly appointed, could and should make decisions. Thus if an individual has a power of attorney, advance directive, or other estate planning documents, the summary guardianship proceeding creates a potential for conflict as to who has the appropriate authority which might lead to litigation with financial institutions and health care providers.

- Burden on Clerks & Courts. Clerks will be forced to assist potentially incapacitated individuals through the indigence determination process. Judges and clerks will be responsible for helping family members work through this new system. Judges and clerks will be the ones blamed for any abuse, neglect, exploitation or discrimination allowed by this system and will have to find ways, without the reporting process, to oversee these proceedings.
- Public Access to Court Records. The summary guardian proceedings, if passed, should be exempt from public access, except for any Letters of Summary Guardianship. The exemption is necessary to protect the ward's right of privacy with regard to medical and mental health records.

IV. Fiscal Impact on State and Local Governments

State government will be responsible for a majority of the fiscal impact of the proposed legislation. The impact will be for funding of the Office of Criminal Conflict and Civil Regional Counsel, private court appointed counsel through the Justice Administrative Commission, judiciary, judicial support staff, and Clerks of Court.

V. Direct Impact on Private Sector

The fiscal impact on the private sector is not easily determined. It is anticipated that medical care providers, financial institutions, and summary guardians will face attorney fees and costs to litigate who has the authority to act for an individual. It is anticipated that medical and mental health care service providers will face attorneys' fees and costs associated with litigation over the protection of patient records from disclosures prohibited by federal law.

VI. Constitutional Issues

There are serious substantive and procedural due process issues in this summary procedure. The definition of mentally ill is overbroad. The right to effective notice and counsel for the alleged incapacitated person is eviscerated.

VII. Other Interested Persons

Advocacy Center for Persons with Disabilities

AARP

Alzheimer's Association

Department of Elder Affairs - Statewide Public Guardianship Office

Elder Law Section of The Florida Bar

Florida State Guardianship Association

National Guardianship Association

Florida Association of Court Clerks

Florida Bankers Association

Judicial Branch

Mental Health Groups

Medical and Mental Health Care Providers Groups