

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB GVOPS 11-05 OGSR Court Monitors in Guardianship Proceedings

**SPONSOR(S):** Government Operations Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 568

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	13 Y, 0 N	Williamson	Williamson

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

A court monitor or an emergency court monitor may be appointed by a court upon inquiry by an interested person or upon its own motion. A monitor has the authority to investigate, seek information, examine documents, and interview the ward. The monitor must report his or her findings to the court. A monitor may receive a reasonable fee as determined by the court and paid from the property of the ward.

Current law provides public record exemptions for certain judicial records relating to court monitors in guardianship proceedings. The order of any court appointing a court monitor is confidential and exempt from public records requirements and an order appointing a court monitor on an emergency basis is exempt only. Reports of a court monitor or an emergency court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public records requirements. Such reports may be available for inspection as determined by a court or upon a showing of good cause. The public record exemptions expire if a court makes a finding of probable cause; however, information otherwise made confidential or exempt retains its status. Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts also are confidential and exempt from public records requirements. However, the court may allow access upon a showing of good cause.

The bill reenacts and reorganizes the public record exemptions, which will repeal on October 2, 2011, if this bill does not become law. The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency while retaining the exempt status of such orders. It also removes reference to "court determination relating to a finding of no probable cause" with regards to determinations and orders finding no probable cause. This reference is removed because, in practice, the probable cause determination is contained in a written order included in the guardianship file. In essence, it simplifies the exemption by clearly stating any order finding no probable cause is confidential and exempt from public records requirements.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>2</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created<sup>3</sup> then a public necessity statement and a two-thirds vote for passage are not required.

##### Court Records

Florida courts have consistently held that the judiciary is not an "agency" for purposes of the Public Records Act.<sup>4,5</sup> The Florida Supreme Court, however, has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."<sup>6</sup> Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.<sup>7</sup> The constitutional provision provides for public access to judicial records, except for those records expressly exempted by the State Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.<sup>8</sup>

##### Guardianship

The intent of the Florida Guardianship Law<sup>9</sup> is to provide the least restrictive form of guardianship necessary to provide assistance to a person who is not fully capable of taking care of his or her own needs.<sup>10</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 24(c), Art. I of the State Constitution.

<sup>3</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).

<sup>6</sup> *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).

<sup>7</sup> Section 24(a), Art. I of the State Constitution.

<sup>8</sup> Section 24(c) and (d), Art. I of the State Constitution.

<sup>9</sup> Chapter 744, F.S.

<sup>10</sup> Section 744.1012, F.S.

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated.<sup>11</sup> Within five days after a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.<sup>12</sup> If a majority of the examining committee members determine the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.<sup>13</sup> If a majority of the members determine the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If, after a hearing, the court determines a person is incapacitated, the court also must find that alternatives to guardianship were considered and that no alternatives to guardianship sufficiently address the problems of the incapacitated person and appoint a guardian.<sup>14</sup>

#### Authority of a Guardian

An order appointing a guardian must state the nature of the guardianship as either plenary<sup>15</sup> or limited.<sup>16</sup> If the nature is limited, the order must state that the guardian may exercise only those delegable rights that have been removed from the incapacitated person and specifically delegated to the guardian. Finally, the order must state the specific powers and duties of the guardian.<sup>17</sup>

The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.<sup>18</sup> A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care. Some of the powers of the guardian may be exercised only with court approval.<sup>19</sup>

#### Court Monitoring in Guardianship Cases

##### *Nonemergency Court Monitors*

A court monitor may be appointed by a court upon inquiry by an interested person or upon its own motion. A family member or any person with a personal interest in the proceedings may not serve as a court monitor. The order appointing the monitor must be served upon the guardian, the ward, and any other person determined by the court.<sup>20</sup>

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor must report his or her findings to the court.<sup>21</sup> If it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court must hold a hearing with notice and enter any order necessary to protect the ward.<sup>22</sup> A monitor may receive a reasonable fee as determined by the court and paid from the property of the ward. If the court determines that a motion to appoint a court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.<sup>23</sup>

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<sup>11</sup> Section 744.331(1), F.S.

<sup>12</sup> Section 744.331(3), F.S.

<sup>13</sup> Section 744.331(4), F.S.

<sup>14</sup> *See s.* 744.331(6)(b) and (f), F.S.

<sup>15</sup> Section 744.102(9)(b), F.S., defines "plenary guardian" to mean "a person who has been 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."

<sup>16</sup> Section 744.102(9)(a), F.S., defines "limited guardian" to mean "a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of a limited guardian."

<sup>17</sup> Section 744.344(1), F.S.

<sup>18</sup> Section 744.344(2), F.S.

<sup>19</sup> Section 744.441, F.S.

<sup>20</sup> Section 744.107(1), F.S.

<sup>21</sup> Section 744.107(2), F.S.

<sup>22</sup> Section 744.107(3), F.S.

<sup>23</sup> Section 744.107(4), F.S.

### *Emergency Court Monitors*

Upon inquiry of an interested person or upon its own motion, the court may appoint a court monitor on an emergency basis without providing notice to the guardian, the ward, or other interested parties. 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
- The ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.<sup>24</sup>

The authority of a court monitor appointed on an emergency basis expires 60 days after the date of appointment or upon a finding of no probable cause, whichever occurs first. However, the authority of such monitor may be extended for an additional 30 days upon a showing that the emergency conditions still exist.<sup>25</sup>

Within 15 days after the entry of the order appointing a court monitor on an emergency basis, such monitor must file his or her report<sup>26</sup> of findings and recommendations to the court.<sup>27</sup> The court reviews the report and determines whether there is probable cause to take further action to protect the ward or property of the ward.<sup>28</sup> If the court finds probable cause, it must issue an order to show cause to the guardian or other respondent including the specific facts constituting the conduct charged and requiring the respondent to appear before the court to address the allegations.<sup>29</sup> Following the hearing on the order to show cause, the court may impose sanctions on the respondent and take any other action necessary to protect the ward.<sup>30</sup>

An emergency court monitor may receive a reasonable fee as determined by the court and paid from the property of the ward.<sup>31</sup> If the court determines that a motion to appoint an emergency court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.<sup>32</sup>

### Public Record Exemption under Review

Current law provides public record exemptions for certain judicial records related to court monitors in guardianship proceedings.<sup>33</sup>

The order of any court appointing a court monitor is confidential and exempt<sup>34</sup> from public records requirements<sup>35</sup> while an order appointing a court monitor on an emergency basis is exempt only.<sup>36</sup> Reports of a court monitor or an emergency court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public records requirements.<sup>37</sup> Such reports may be available for inspection as determined by a court or upon a showing of good

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<sup>24</sup> Section 744.1075(1)(a), F.S.

<sup>25</sup> Section 744.1075(1)(b), F.S.

<sup>26</sup> The report must be verified and may be supported by documents or other evidence.

<sup>27</sup> Section 744.1075(2), F.S.

<sup>28</sup> Section 744.1075(3), F.S.

<sup>29</sup> Section 744.1075(4)(a), F.S.

<sup>30</sup> Section 744.1075(4)(c), F.S.

<sup>31</sup> No full-time state, county, or municipal employee or officer may be paid a fee for services as an emergency court monitor.

<sup>32</sup> Section 744.1075(5), F.S.

<sup>33</sup> Chapter 2006-129, L.O.F.; codified as s. 744.1076, F.S.

<sup>34</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See Attorney General Opinion 85-62*, August 1, 1985).

<sup>35</sup> Section 744.1076(1)(a), F.S.

<sup>36</sup> Section 744.1076(2)(a), F.S.

<sup>37</sup> Section 744.1076(1)(b) and (2)(b), F.S.

cause.<sup>38</sup> The public record exemptions expire if a court makes a finding of probable cause; however, information otherwise made confidential or exempt retains its status.<sup>39</sup>

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts also are confidential and exempt from public records requirements. However, the court may allow access upon a showing of good cause.<sup>40</sup>

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2011, unless reenacted by the Legislature.<sup>41</sup>

### **Effect of Bill**

The bill removes the repeal date, thereby reenacting the public record exemptions. It reorganizes the section to group like provisions.

The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency while retaining the exempt status of such orders. The change also allows nonemergency court monitors to share the order with others, as necessary, to aid in the monitor's investigation.

The bill removes reference to "court determination relating to a finding of no probable cause" with regards to determinations and orders finding no probable cause. This reference is removed because, in practice, the probable cause determination is contained in a written order included in the guardianship file. In essence, the bill simplifies the exemption by clearly stating any order finding no probable cause is confidential and exempt from public records requirements.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 744.1076, F.S., to reenact the public record exemptions for court records relating to court monitors in guardianship proceedings.

Section 2 provides an effective date of October 1, 2011.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

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<sup>38</sup> *Id.*

<sup>39</sup> Section 744.1076(1)(c) and (2)(c), F.S.

<sup>40</sup> Section 744.1076(3), F.S.

<sup>41</sup> Section 744.1076(4), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.