

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB CFS 17-03 Ratification of a Department of Elder Affairs Rule  
**SPONSOR(S):** Children, Families & Seniors Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Children, Families & Seniors Subcommittee		Langston	Brazzell

### SUMMARY ANALYSIS

PCB CFS 17-03 ratifies an adopted rule promulgated by the Department of Elder Affairs (DOEA) – rule 58M-2.009, F.A.C., titled “Standards of Practice for Professional Guardians” – so that the adopted rule may go into effect.

In 2016, the Legislature passed CS/SB 232 following reports of abuse and inappropriate behavior by professional guardians.<sup>1</sup> The bill directed that the Statewide Public Guardianship Office be renamed the Office of Public and Professional Guardians (OPPG) and expanded the OPPG’s oversight of professional guardians, including monitoring and discipline. To implement this new law, DOEA adopted Rule 58M-2.009, F.A.C., establishing standards of practice for professional guardians.

Section 120.54(3), F.S., requires that a rule whose statement of regulatory costs estimates an adverse economic impact exceeding \$1 million over the first five years must be ratified by the Legislature before it may go into effect. The SERC that DOEA developed for the adopted rule estimates costs exceeding this threshold. This cost will be borne by wards to pay for the additional work guardians must do to meet requirements regarding fee approval and recordkeeping.

The scope of the bill is limited to this rulemaking procedure and does not adopt the substance of the rule into statute.

The bill has no fiscal impact on state or local governments.

The bill is effective upon coming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy.<sup>2</sup> Rulemaking authority is delegated by the Legislature<sup>3</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>4</sup> a rule.<sup>5</sup> To adopt a rule, an agency must have a general or specific grant of authority from the Legislature to implement a specific law through rulemaking.<sup>6</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>7</sup>

The formal rulemaking process begins by an agency giving notice of the proposed rule.<sup>8</sup> The notice is published by the Department of State in the Florida Administrative Register.<sup>9</sup> The notice of the proposed rule must include:

- An explanation of the purpose and effect;
- The specific legal authority for the rule;
- The full text of the rule;
- A summary of the agency’s statement of estimated regulatory costs (SERC), if one is prepared;
- Whether legislative ratification is required; and
- How a party may request a public hearing on the proposed rule.<sup>10</sup>

##### *Statement of Estimated Regulatory Costs (SERC)*

Agencies must prepare a SERC if the proposed rule will have a negative impact on small business or if the proposed rule is likely to directly or indirectly increase the total regulatory costs by more than \$200,000, within one year of the rule’s implementation.<sup>11</sup> The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs, including estimates of:

- The number of people and entities affected by the proposed rule;
- The cost to the governmental entities to implement and enforce the proposed rule;
- Transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and

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<sup>2</sup> S. 120.52(16), F.S.

<sup>3</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>4</sup> S. 120.52(17), F.S.

<sup>5</sup> A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency as well as certain types of forms. See s. 120.52(16), F.S., and *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>6</sup> S. 120.52(8), F.S., and s. 120.536(1), F.S.

<sup>7</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>8</sup> S. 120.54(3)(a)1, F.S..

<sup>9</sup> Ss. 120.54(3)(a)2., 120.55(1)(b)2, F.S.

<sup>10</sup> S. 120.54(3)(a)1., F.S.

<sup>11</sup> S. 120.54(1)(b), F.S.

- An analysis of the proposed rule's impact on small<sup>12</sup> businesses, counties, and cities.<sup>13</sup>

The SERC must analyze a rule's potential impact over the five year period from when the rule goes into effect. The economic analysis should show whether the rule, directly or indirectly is:

- Likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;
- Likely to have an adverse impact on business competitiveness,<sup>14</sup> productivity, or innovation; and
- Likely to increase regulatory costs, including any transactional costs.<sup>15</sup>

The law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>16</sup> A rule must be filed for adoption before it may go into effect and cannot be filed for adoption until completion of the rulemaking process.<sup>17</sup> A rule may be adopted but cannot go into effect until ratified by the Legislature if the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the five-year period.<sup>18</sup>

### Regulation of Guardians

When an individual is unable to make legal decisions regarding his or her person or property, such as due to nonage, a developmental disability, mental illness, or dementia, the court may appoint a guardian to act on his or her behalf regarding his or her person or property or both.<sup>19</sup> Guardians are subject to the requirements of ch. 744, F.S. There are three main types of guardians: family or friends of the ward, professional guardians, and public guardians. The two types of guardians overseen by the Department of Elder Affairs (DOEA) are public and professional guardians. A professional guardian is a guardian who has at any time rendered services to three or more wards as their guardian; however, a person serving as a guardian for two or more relatives is not considered a professional guardian.<sup>20</sup>

In 2016, the Legislature passed and the Governor signed CS/SB 232 following reports of abuse and inappropriate behavior by professional guardians.<sup>21</sup> The bill directed that the Statewide Public Guardianship Office be renamed the Office of Public and Professional Guardians (OPPG) and

<sup>12</sup> Section 120.541(2)(b)-(e), F.S. A small city has an unincarcerated population of 10,000 or less. A small county has an unincarcerated population of 75,000 or less. A small business employs less than 200 people, and has a net worth of \$5 million or less. See ss. 120.52(18), (19), and 288.703(6), respectively.

<sup>13</sup> Section 120.541(2)(a), F.S.

<sup>14</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>15</sup> S. 120.541(2)(a), F.S.

<sup>16</sup> S. 120.54(3)(e)6., F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>17</sup> S. 120.54(3)(e), F.S.

<sup>18</sup> S. 120.541(3), F.S.)

<sup>19</sup> S. 744.012(9), F.S.

<sup>20</sup> S. 744.012 F.S

<sup>21</sup> See, e.g., Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003, *available at* <http://flcourts.org/core/fileparse.php/260/urlt/guardianshipmonitoring.pdf> (last visited March 9, 2017) (reviewed how effectively guardians were fulfilling their duties and obligations. The committee received input from citizens that there was abuse, neglect, and misuse of ward's funds. As a result, the committee stated that, though the majority of guardians are law-abiding and are diligently fulfilling their complex responsibilities, a small percentage are not properly handling guardianship matters, and as a result, monitoring is necessary.); Department of Elder Affairs, Guardianship Task Force – 2004 Final Report, *available at* <http://elderaffairs.state.fl.us/doea/pubguard/GTF2004FinalReport.pdf> (last visited March 9, 2017) (advocated for additional oversight of professional guardians); Michael E. Miller, *Florida's Guardians Often Exploit the Vulnerable Residents They're Supposed to Protect*, MIAMI NEWTIMES, May 8, 2014, *available at* <http://www.miaminewtimes.com/2014-05-08/news/florida-guardian-elderly-fraud/full/> (last visited March 9, 2017) (provided anecdotal evidence of fraud within the guardianship system, noting that the appointed court monitor for Broward County has uncovered hundreds of thousands of dollars that guardians have misappropriated from their wards, and, over the course of two years, Palm Beach County's guardianship fraud hotline has investigated over 100 cases; and Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida*, SARASOTA HERALD-TRIBUNE, December 6, 2014, *available at* <http://guardianship.heraldtribune.com/default.aspx> (last visited March 9, 2017) (three-part series published in December 2014 details abuses occurring in guardianships based on an evaluation of guardianship court case files and interviews with wards, family and friends caught in the system against their will.).

expanded the OPPG's oversight of professional guardians, including monitoring and discipline. The bill directed DOEA to adopt rules relating to OPPG to establish standard of practice for public and professional guardians, receive and investigate complaints, establish procedures for disciplinary oversight, conduct hearings, take administrative action pursuant to ch. 120, F.S., and specify penalties for violations.

On October 18, 2016, DOEA published proposed rules including:<sup>22</sup>

- Rule 58M-2.001, F.A.C., Professional Guardian Registration;
- Rule 58M-2.009, F.A.C., Standards of Practice; and
- Rule 58M-2.011, F.A.C., Disciplinary Action and Guidelines.<sup>23</sup>

The rules were filed for adoption with the Secretary of State on February 9, 2017. Rules 58M-2.001 and 2.011, F.A.C. went into effect on March 1, 2017. However, due to the level of its projected impact, rule 58M-2.009, F.A.C., must be ratified by the Legislature before it may take effect.

#### Rule 58M-2.009, F.A.C., "Standards of Practice for Professional Guardians"

The standards of practice contained in rule 58M-2.009, F.A.C., include a variety of topics, including requirements pertaining to:

- The professional guardians' relationship with the courts, their wards, friends and family members of their wards, and other service providers;
- Decision making;
- Confidentiality;
- Record keeping;
- The professional guardians' duties and obligations to their wards; and
- The responsibilities of the professional guardian of the property.

DOEA determined that the main economic impact of rule 58M-2.009, F.A.C., was due to requirements that professional guardians receive court approval of their guardianship fees and through increased record keeping requirements that require the professional guardian to:

- Maintain written documentation of all reports from a ward's family, friends, medical service providers or other professionals relevant to a decision made on behalf of a ward (informed consent); and
- Develop a written plan setting forth short-term and long-term objectives for meeting the goals, needs, and preferences of the ward, and maintain the plan in a separate file for each ward, along with other specified documentation.<sup>24</sup>

To determine the economic impact of rule 58M-2.009, F.A.C., DOEA contacted all 506 registered professional guardians and requested their response to a survey to determine the economic impact of the proposed rule. The response rate was 21% (106 professional guardians).

#### *Increased Costs Related to Court Fees*

Rule 58M-2.009(22), F.A.C., requires all fees related to the duties of a professional guardian to be reviewed and approved by the court.

Of the 106 respondents to the survey, 97.1% indicated that receiving court approval of their guardianship fees is currently part of their standard practice and procedures.<sup>25</sup> The 2.9% of

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<sup>22</sup> Notice of Proposed Rule (on file with Children, Families & Seniors Subcommittee staff).

<sup>23</sup> Id.

<sup>24</sup> Department of Elder Affairs, Statement of Estimated Regulatory Costs

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respondents who stated that they do not seek court approval of their guardianship fees estimated an increase of one to two hours per ward annually would be necessary to meet the requirement.<sup>26</sup> Based on DOEA's assumptions,<sup>27</sup> it estimated that the requirement that professional guardians receive court approval of their guardianship fees will increase private sector costs \$15,113 to \$30,225 in the first year of implementation, and \$83,505 to \$167,011 over the first five years of implementation of the proposed rule.<sup>28</sup>

#### *Increased Costs Related to Record Keeping*

Rule 58M-2.009(6), F.A.C., requires professional guardians to make decisions on behalf of their wards based on informed consent; to that end, the professional guardian must maintain written documentation of all reports from a ward's family, friends, medical service providers, or other professionals relevant to a decision made on behalf of a ward.<sup>29</sup>

Of the respondents, 78% indicated that this requirement is consistent with their current practices.<sup>30</sup> The 22% of respondents stating they did not maintain this documentation estimated that an increase of between half an hour to eight hours per ward annually would be necessary to meet the requirement.<sup>31</sup> DOEA estimated that the requirements for informed consent will increase private sector costs \$187,785 to \$381,420 in the first year of implementation, and \$1,037,631 to \$2,107,588 over the first five years of implementation of the proposed rule.<sup>32</sup>

Rule 58M-2.009(13), F.A.C., requires professional guardians to develop a written plan setting forth short-term and long-term objectives for meeting the goals, needs, and preferences of the ward, and that the plan be maintained in a separate file for each ward, along with other enumerated documentation.

Of the respondents to the survey, 73% indicated that this requirement is consistent with their current practices.<sup>33</sup> The 27% of respondents stating they did not maintain this documentation estimated an increase of one to 15 hours per ward annually would be necessary to meet the requirement.<sup>34</sup> DOEA estimated that the initial and ongoing responsibilities imposed on the professional guardians will increase private sector costs \$274,901 to \$582,673 in the first year of implementation, and \$1,519,001 to \$3,219,637 over the first five years of implementation of the proposed rule.<sup>35</sup>

However, factors such as the difficulty of estimating the time necessary to comply with new requirements, variation in the annual rate of growth in the number of guardians, and differences in the number of wards served by new versus more experienced guardians could affect the SERC. Using different, more conservative assumptions, an alternate cost analysis resulted in a total cost of implementation of \$1.5 million, which, while substantially less, still exceeds the threshold requiring legislative ratification of the proposed rule.<sup>36</sup>

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<sup>25</sup> Id. The high response rate can be explained in part by the statutory interpretation of s. 744.108, F.S., which has led many judicial circuits around the state to decree that the judicial approval of guardianship fees is required by statute.

<sup>26</sup> Id.

<sup>27</sup> DOEA estimated the average professional guardian hourly fee to be \$65, the average caseload among professional guardians to be 15.5 wards, and projected annual increase in registered professional guardians of 5%.

<sup>28</sup> Id.

<sup>29</sup> While the proposed rule would require an expansion of reporting requirements for professional guardians, it is the responsibility of the professional guardian in statute to ensure that the ward is involved to the greatest extent possible with decision-making, including any previously executed advance directives.

<sup>30</sup> *Supra*, note 24.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> These assumptions included: an annual rate of growth in the number of new guardians of 3%; that new guardians would have only 10 wards; that the new guardians would have had a compliance rate similar to existing guardians, and that guardians would need one

## Effect of Proposed Changes

PCB CFS 17-03 ratifies Rule 58M-2.009, F.A.C., Standards of Practice for Professional Guardians, solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. This means that the provisions of this rule will become binding on professional guardians. The bill expressly limits ratification to the effectiveness of the rule. The bill directs the act shall not be codified in the Florida Statutes; it will only be noted in the historical comments to the rule by the Department of State.

The bill is effective upon becoming law.

### B. SECTION DIRECTORY:

**Section 1:** Ratifies Rule 58M-2.009, F.A.C.

**Section 2:** Provides that the act goes into effect upon becoming law.

## 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.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See, section I.A., *infra*.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill meets the final statutory requirement for DOEA to exercise its rulemaking authority concerning the standards of practice for professional guardians. No additional rulemaking authority is required.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**