HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 191 CS Guardianship
SPONSOR(S): Bogdanoff; Goodlette; Seiler
TIED BILLS: HB 193 **IDEN./SIM. BILLS:** SB 356

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Judiciary Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Guardianship is a process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions. Individuals in need of guardianship may have medical conditions such as dementia or Alzheimer's disease, a developmental disability, chronic mental illness, or other condition that may cause functional limitations. A guardian is appointed by a court to manage some or all the legal affairs of a ward. A ward is a person who is unable to manage some or all of his or her legal affairs. This bill amends guardianship law, and related trust law, to:

- Provide that a guardianship court may appoint a court monitor on an emergency basis with no notice to the guardian.
- Provide that a guardian for an incompetent trust settlor may sue to modify a trust before the trust becomes irrevocable.
- Require that a court consider all possible alternatives to guardianship, such as use of an existing trust or existing durable power of attorney, prior to imposing a guardianship on an incapacitated person.

This bill does not appear to have a financial impact on state or local government or in the private sector.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- The bill has the potential to increase the number of cases in which a monitor is appointed and, therefore, increase the need for a greater number of individuals available to serve as monitors and increase the workload of the court.

Empower families -- This bill affects family relationships by allowing the court or other concerned parties to intervene when a guardian may be taking advantage of a ward.

B. EFFECT OF PROPOSED CHANGES:

Current law

Trusts

A trust is generally defined as:

> [A] fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.[1]

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."[2] "Trustee" refers to "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[3]

Trust Contests

Section 737.2065, F.S., expressly prohibits the bringing of any action to contest the validity of any or all parts of a trust until the trust becomes irrevocable. This section was enacted in 1992, along with similar legislation forbidding the commencement of will contests before the death of the testator.[4]

Generally, revocable trusts are correctly treated as will substitutes, although they serve an additional function that is not contemplated by a will: a revocable trust can serve as the framework for the investment, management, expenditure, and distribution of the grantor's assets during his or her life.[5] It is because of the similarity between a will and a revocable trust that the Legislature, in 1992, enacted statutes forbidding challenges to either instrument prior to the death of the testator for a will or prior to the trust becoming irrevocable, which typically occurs upon the death of the trust's settlor.[6] However, because a trust can operate during the settlor's lifetime, and because the settlor may become

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[1] 55A Fla. Jur. 2d Trusts s.1.
[2] S. 731.201(17), F.S.
[3] *Id.* at (35).
[4] Wm. Fletcher Belcher, *Proposed Exception to Existing Prohibition Against Contesting Revocable Trusts*, Vol. XXV ActionLine No. 2, 11 (2003). ActionLine is a publication of the Florida Bar's Real Property, Probate and Trust Law Section.
[5] *Id.*
[6] *See Id.*

incapacitated, there is also a potential guardianship aspect to a trust which, again, is not present in a will. An invalid revocable trust, which administers the grantor's assets during his or her lifetime, has the potential to cause great harm to the grantor.[7] "Unlike probate, serving as a guardian is a responsibility that may change over time, last for many years, and include excruciatingly complex decisions about medical treatment, placement, and trade-offs between autonomy and beneficence."[8]

Guardianship

The Legislature has stated the general purpose of the guardianship chapter as follows:

> [I]t is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.[9]

As noted elsewhere, the Legislature's intent in section 744.344, F.S., indicates that a "guardian should be granted no more authority over the ward and his or her property than is necessary for the guardian to address the needs created by the specific incapacities of the ward, so that the substitute decision-making of the guardian leaves the ward with as much personal autonomy as is feasible."[10]

Some of the relevant definitions of terms used in guardianship include: "ward," a person for whom a guardian has been appointed;[11] "guardian," a person who has been appointed by the court to act on behalf of a ward's person, property, or both;[12] and "court monitor," a person appointed by the court pursuant to s. 744.107, F.S., to provide the court with information concerning a ward.[13]

Determining Incapacity

Section 744.331, F.S., sets forth the procedures for determining that a person is incapacitated. The notice of filing of a petition to determine incapacity and the petition for appointment of a guardian must be read to the alleged incapacitated person, the person must be provided with an attorney, who cannot serve as the guardian or counsel for the guardian, and within five days of filing a petition for determination of incapacity, the court must appoint an examining committee which must include a psychiatrist/physician, and a psychologist, a nurse, social worker, gerontologist, or other qualified persons with sufficient knowledge, skill, experience, or training.[14] Each committee member must examine the person and then issue a joint report evaluating the person's mental health, functional ability, and physical health.[15] If the committee determines that the person is not incapacitated in any respect, the court must dismiss the petition.[16] Pursuant to s. 744.331(6), F.S., if the court finds by clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the person's incapacity, although such incapacity shall extend only to the rights specified in

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[7] Belcher, *Prohibition Against Contesting Revocable Trusts*, at 11.
[8] Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 926-27 (2002).
[9] S. 744.1012, F.S.
[10] *In re Guardianship of Fuqua*, 646 So. 2d 795, 796 (Fla. 1st DCA 1994).
[11] S. 744.102(20), F.S.
[12] *Id.* at (8).
[13] *Id.* at (5).
[14] S. 744.333(1)-(3)(a), F.S.
[15] *Id.* at (3)(b)-(c).
[16] *Id.* at (4).

the order. Section 744.331(6)(b), F.S., provides that the "court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward." Section 744.331(6)(f), F.S., provides that "[w]hen an order is entered which determines a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights."

Powers of Guardian Upon Court Approval

Section 744.441(11), F.S., provides that a plenary or limited guardian of the property may "[p]rosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in performance of his or her duties."[17] Other powers given under s. 744.441, F.S., and which a guardian may only exercise with court approval, include executing, exercising, or releasing any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised if not incapacitated, if the execution, exercise, or release would be in the best interest of the ward.[18] Additionally, a guardian may "[c]reate revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning."[19] Thus, it appears that a guardian may exercise powers over a revocable trust, which might include the power to revoke the trust.

Court-Appointed Guardianship Monitors

The "front end" of adult guardianship is the determination of incapacity and appointment of a guardian, and the "back end" is accountability of the guardian and court monitoring.[20] Court monitoring of guardianship is vital to the protection of the ward, to provide the court with a way to verify the financial accounts the guardian provides to the court.[21] Verifying information in personal-status reports requires more personal involvement by the court, and is best accomplished by someone who can visit the ward to ascertain the suitability of the ward's living arrangements, the frequency of guardian visits, and the implementation of the care plan.[22]

Court Monitors

Section 744.107, F.S., allows the court to appoint a monitor "upon inquiry from any interested person" or on its own motion. The monitor has authority to "investigate, seek information, examine documents, or interview the ward," and to present a report of such findings to the court.[23] A family member or any other person with an interest in the proceedings may not serve as a monitor.[24] A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee may be paid a fee for serving as a monitor.[25]

This section gives the trial court broad authority to appoint a monitor in guardianship cases, but the statute has been criticized for its lack of guidelines regarding how the court-appointed monitor should perform his or her duties.[26] In 2003, the Florida Supreme Court's Commission on Fairness, Committee on Court Monitoring, issued a report and recommendations finding that greater oversight of court

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[17] S. 744.411(11), F.S.
[18] *Id.* at (2).
[19] *Id.* at (19).
[20] Hurme, *Guardian Accountability*, 31 STETSON L. REV. at 867.
[21] *Id.* at 907.
[22] *Id.* at 907-08.
[23] S. 744.107, F.S.
[24] *Id.*
[25] *Id.*
[26] The Florida Bar, Real Property, Probate, and Trust Law Section, White Paper on PROPOSED AMENDMENTS TO CHAPTERS 737 & 744, F.S.

monitors was warranted and recommending an overhaul and expansion of the court monitoring statute.[27]

Effect of the Bill

Trusts

This bill amends s. 737.2065, F.S. to create an exception to the prohibition on filing an action against a trust prior to that trust becoming irrevocable. Under this bill, a challenge to the trust could only be brought by a court-appointed guardian of the person of the incompetent ward/settlor of the trust, and the court would have to make a finding that the challenge to the trust was in the ward's best interests during his or her probable lifetime. This bill creates a requirement that, if the court denied the guardian's request, the court must review whether the ward was still in need of a guardian and whether the current delegation of rights was appropriate to serve the ward's needs. Unless there is a court-appointed guardian of the property of an incapacitated settlor, there cannot be any contest challenging the trust before it becomes irrevocable because, presumably, a competent trust settlor can personally revoke or amend the trust as necessary during the settlor's lifetime.[28]

Guardianship

This bill amends s. 744.331, F.S. to require that when a court finds by clear and convincing evidence that a person is incapacitated, the court must enter a written order determining such incapacity, but that the incapacity may only extend to the rights specified in the order. When entering an order of incapacity, the court must consider and determine whether or not there is an alternative to guardianship that will sufficiently meet the needs of the incapacitated person. Unless the court finds that there is a suitable alternative that will sufficiently address the problems of the incapacitated person, a guardian must be appointed. Additionally, this bill amends s 744.331, F.S. to provide that when an interested person files a verified statement asserting a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid, and a reasonable factual basis for the belief is given, the existence of such an instrument is not considered an alternative to the appointment of a guardian. However, the appointment of a guardian does not preclude the court from determining that specific authority established by a durable power of attorney may still be exercised by the attorney in fact.

This bill amends s. 744.107, F.S. to provide for service of the order of appointment and the monitor's report upon the guardian, the ward, the respective attorneys and other persons, as determined by the court. The bill also authorizes, if necessary, further action by the court to protect the interests of the ward. If further action is warranted upon receipt of the monitor's report, the trial court must conduct a noticed hearing and then take whatever action is necessary to protect the assets of the ward's estate, including suspending a guardian or taking steps to remove a guardian.

This bill amends s. 744.441(11), F.S. to provide that before a guardian may bring an action pursuant to s. 737.2065, F.S., contesting the validity of a trust, the court must first find that the action appears to be in the ward's best interest during the ward's probable lifetime. Furthermore, if the court denies the guardian's request to bring an action under s. 737.2065, F.S., the court must review the ward's continued need for a guardian and the extent of that need, if any.

The bill creates a new section, s. 744.462, F.S., which provides a framework, after a guardian has been appointed, through which the court may respond to new developments or information which may affect the guardianship proceeding. This section authorizes the court to review the extent of the ward's continued need for a guardian or whether a guardian is needed, in the event of any new developments such as a judicial determination of the existence of a valid durable power of attorney or a valid trust amendment.

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[27] *Id.*
[28] *Id.*

Emergency Court Monitors

The bill also creates s. 744.1075, F.S., entitled "emergency court monitor," to provide that a court may, upon inquiry from any interested person or upon its own motion, appoint a court monitor on an emergency basis without notice. The limitation on this authority is that 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.[29]

The court order must specifically name the powers and duties of the monitor and the matters to be investigated. Fifteen days after entering the order of appointment, the monitor must file a verified report of findings and recommendations to the court, along with supporting documents or evidence. After reviewing the monitor's report, the court shall determine whether there is probable cause to take further action on behalf of the ward's person or property. If there is no probable cause, the court shall issue an order so stating and discharge the monitor.

However, if probable cause exists, the court must issue a show cause order directing the guardian or other respondent to state the essential facts constituting the charge and directing the respondent to appear and show cause as to why the court should not take further action. The order shall name a time and place for a hearing and provide "a reasonable time to allow for the preparation of a defense after service of the order." The authority of an emergency monitor is limited to sixty days or until an order showing no cause is issued, whichever occurs first. However, the monitor's authority may be extended by thirty days if there is a showing that emergency conditions still exist. Prior to the hearing on the order to show cause, the court may take action to protect the ward's physical or mental health, safety, or assets, including issuing a temporary injunction, restraining order, or an order freezing assets. The court shall give a copy of such order to all parties. After the hearing on the show cause order, the court may impose sanctions on the guardian, his or her attorney, or any other respondent. The court may also take any other action authorized by law, including entering a judgment of contempt, ordering an accounting, freezing assets, referring the case for criminal charges, filing a complaint with the Department of Children and Families Services ("DCFS"), or initiating proceedings to remove a guardian.

Finally, a monitor may be paid a reasonable fee, as determined by the court, which shall be paid from the ward's property. An employee of the state, county, or municipality may not be compensated for conducting an investigation and providing such a report. If the court finds that the motion for a court monitor was filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

C. SECTION DIRECTORY:

Section 1. Amends s. 737.2065, F.S., to state that the guardian of the property for an incapacitated grantor may initiate a trust contest prior to the trust becoming irrevocable.

Section 2. Amends s. 744.107, F.S., to establish certain restrictions upon whom the court may name as a monitor, listing certain individuals who have a right to receive the monitor's report, and granting the court power to conduct a hearing should the monitor's report warrant action on behalf of the ward.

Section 3. Creates s. 744.1075, F.S., entitled "emergency court monitor," establishing guidelines whereby a court may sua sponte appoint a court monitor on an emergency basis without notice.

Section 4. Amends s. 744.331(6)(b) and (f), F.S., regarding procedures to determine incapacity, setting forth procedures for the court to follow when entering an order of incapacity, and establishing requirements for an interested person who wishes to challenge the validity of an incapacitated person's trust, trust amendment, or durable power of attorney.

[29] S. 744.1075(1), F.S.

Section 5. Amends s. 744.441(11), F.S., to require a finding by the court that an action to be commenced by the guardian appears to be in the ward's best interests, and stating that if the court denies the guardian's request, the court shall review the ward's continued need for a guardian.

Section 6. Creates s. 744.462, F.S., to require that any judicial determination concerning the validity of an instrument concerning the ward's property must be promptly recorded in the guardianship proceeding and stating that, under certain circumstances, the court shall review the ward's continued need for a guardian.

Section 7. Provides that this bill shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   According to the Office of the State Courts Administrator (OSCA), this bill may result in minimal workload and fiscal impact on the judiciary due to a potential increase in the number of guardianship issues. However, OSCA did not provide an estimate of those costs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill recognizes that a person with functional limitations may not be able to make a reasonable decision which has lifetime implications such as creating an irrevocable trust. Accordingly, the bill creates an exception to the general rule by allowing a guardian for an incompetent trust settlor to sue to modify a trust before the trust becomes irrevocable. If such a suit is successful, persons with functional limitations will be provided more safeguards to protect the wards property. Further, by providing the courts with authorization to appoint an emergency monitors, it appears that the wards property will be provided greater protection.

D. FISCAL COMMENTS:

The bill provides that the fee for a monitor, as determined by the court, may be paid from the assets of the ward. In the case of an indigent ward with no funds to pay monitor costs**,** it is unclear whether that makes the ward ineligible for the services of a monitor or, if not, how the monitor will be paid.

Last year the following fiscal comments were provided regarding a substantially similar bill, HB 457: The bill has the potential to have a fiscal impact on state government. By expanding current provisions related to the appointment of court monitors and creating a new section of law related to the appointment of emergency court monitors, more court monitors could be appointed. While full-time employees of the state, county, and municipal governments are not allowed to receive compensation for serving as court monitors, more government employee time may be spent acting as court monitors

because of the expanded authority granted to courts to oversee the relationship between guardians and wards. OSCA believes there would be a fiscal impact on the court as a result of an increase in judicial workloads on guardianship issues. OSCA did not provide an estimate of those costs to committee staff.

The bill provides that court monitors may be allowed a reasonable fee as determined by the court which may be paid from the assets of the ward. While this may result in a financial consequence to the ward, that fiscal impact may be offset by a savings to the ward if his or her assets are being mismanaged by a guardian.

The Department of Elder Affairs, the Statewide Public Guardianship Office, and the Agency for Persons With Disabilities all reported that there would be no fiscal impact on the agency or office. The Department of Children and Family Services, which has responsibility for Adult Protective Services and the Abuse Hotline, declined to provide an analysis of the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   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 counties and municipalities have to raise revenue.

2. Other:

   The bill provides that the court may, under certain circumstances, appoint a court monitor on an emergency basis without notice, which could raise due process concerns. Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may take advantage of that right, they must be notified. Issues associated with such due process concerns were raised and discussed as the Supreme Court's Commission on Fairness, Committee on Guardianship Monitoring explored guardianship monitoring in Florida. The Committee concluded:

> Attorneys and professional guardians who appeared before the committee repeatedly expressed concern about due process issues associated with confidential communications between the court and the guardianship monitor. The committee thoroughly explored and debated the matter. While the committee is sensitive to the fact that attorneys and guardians may perceive there is a potential ex parte communication issue, the committee believes that in reality there is no impropriety as long as proper court procedures are established, published, and followed. Because the guardianship monitor is an arm of the court and works at the direction of the judge, it is permissible for communication between the court and monitor to be confidential (see, for example, rule 2.051(c)(3)(b), Florida Rules of Judicial Administration). Nevertheless, the committee recommends that insofar as possible, the monitoring process should be transparent and open, and all communications between the monitor and the judge should be in writing, becomes part of the confidential portion of the court file, and copies provided to counsel and other interested persons as prescribed by Florida law.[30]

B. RULE-MAKING AUTHORITY:

None.

[30] Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards. Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003 [hereinafter Guardianship Monitoring in Florida].

C. DRAFTING ISSUES OR OTHER COMMENTS:

Guardianship Monitoring

A guardian is essentially a surrogate decision-maker for an adult with disabilities who has been adjudicated incapacitated or for a minor without parents.[31] "When the court removes an adult's rights to order his or her own affairs, there is an accompanying duty to protect the individual."[32] While guardianship proceedings are initiated by an adversarial hearing, once incapacity has been determined, there are typically no "adversaries" to raise issues before the court. Hence, the courts must be proactive to detect and respond to disputes. Guardianship monitoring is a mechanism Florida courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected.[33]

In 1999, former Chief Justice Major B. Harding directed the Supreme Court Commission on Fairness to investigate and report on various models for guardianship monitoring.[34] The Commission established the Guardianship Monitoring Committee ("Committee") with a membership that included probate judges, chief judges, court staff, representatives of the Statewide Public Guardianship Office, attorneys with experience in guardianship matters, academics, and professionals in the field of social work, all with considerable direct experience. The Committee reviewed available literature on the subject, visited Florida courts that are experimenting with innovative guardianship monitoring methods, and conducted public hearings around the state to receive input from guardians, clerks of court, attorneys, advocates, and other interested persons. The Committee found that while most guardians and attorneys do an admirable job, more active oversight is necessary in guardianship cases.[35]

As a result of its work, the Committee adopted a number of findings, including the following:

- An ideal guardianship monitoring program encompasses four major service areas: (1) initial and on going screening and reviewing of guardians; (2) reporting on the well-being of the ward; (3) reporting on the protection of the ward's assets; and (4) case administration.

- Minimum requirements for guardianship monitoring should be established and the monitoring process should be well defined.

- Insofar as possible, the monitoring process should be transparent and open, and communication between the monitor and the judge should be in writing and become part of the official court record.

- It is sound public policy for guardianship monitoring to be available in every judicial circuit.

- Monitoring will require additional resources in order to adequately oversee guardianship cases. The cost of monitoring can be mitigated through the effective use of technology.

- Existing guardianship monitoring programs that utilize well-trained and experienced professional staff are working well.

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[31] Guardianship Monitoring in Florida provides a more thorough definition. It provides that a guardian is a "surrogate decision-maker appointed by the court to make personal and/or financial decisions either (1) for an adult with mental or physical disabilities who has been adjudicated incapacitated; or (2) for a minor in circumstances where the parents die or become incapacitated or if a child receives an inheritance, proceeds of a lawsuit, or insurance policy exceeding the amount allowed by state statute." Guardianship Monitoring in Florida, *supra* at 3

[32] *Id.*

[33] Guardianship Monitoring in Florida, *supra* at 5.

[34] *Id.*

[35] Guardianship Monitoring in Florida, *supra* at 6.

- Monitoring programs that rely entirely upon volunteers are not always efficient and effective. Although well intentioned, volunteers often lack knowledge and experience with the complex medical, legal, and financial issues involved in adult guardianship cases.

- There is a need to recruit highly qualified, motivated, and trained professionals into the guardianship field; both as guardians and attorneys.[36]

The bill expands the provisions for the appointment of court monitors without incorporating provisions reflective of the findings of the Committee.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2005, the Civil Justice Committee adopted two amendments to the bill. The amendments were technical in nature and were intended to conform the bill to HB 425. The bill was then reported favorably with a committee substitute.

[36] Guardianship Monitoring in Florida, *supra* at 4.