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CHAMBER ACTION

<u>Senate</u>	.	<u>House</u>
Comm: RCS	.	
4/22/2008	.	
	.	
	.	

1 The Committee on Health and Human Services Appropriations (Gaetz)
2 recommended the following **amendment**:

3
4 **Senate Amendment (with title amendment)**

5 Delete everything after the enacting clause
6 and insert:

7 Section 1. Section 393.12, Florida Statutes, is amended to
8 read:

9 393.12 Capacity; appointment of guardian advocate.--

10 (1) CAPACITY.--

11 (a) ~~The issue of capacity shall be separate and distinct~~
12 ~~from a determination of the appropriateness of admission to~~
13 ~~nonresidential services or residential care for a condition of~~
14 ~~developmental disabilities. A No person with a developmental~~
15 ~~disability may not shall be presumed incapacitated solely by~~
16 ~~reason of his or her acceptance in nonresidential services or~~
17 ~~admission to residential care and may not; nor shall any such~~



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18 ~~person~~ be denied the full exercise of all legal rights guaranteed
19 to citizens of this state and of the United States.

20 (b) The determination of incapacity ~~issue of capacity~~ of a
21 person with a developmental disability and the appointment of a
22 guardian must be conducted ~~disabilities shall be determined~~ in a
23 separate proceeding according to the procedures and requirements
24 of chapter 744 and the Florida Probate Rules.

25 (2) APPOINTMENT OF A GUARDIAN ADVOCATE.--

26 (a) ~~Conditions.--~~A circuit probate court may appoint a
27 guardian advocate, without an adjudication of incapacity, for a
28 person with developmental disabilities, if the person lacks the
29 decisionmaking ability ~~capacity~~ to do some, but not all, of the
30 decisionmaking tasks necessary to care for his or her person or
31 ~~property, or estate~~ or if the person has voluntarily petitioned
32 for the appointment of a guardian advocate. Except as otherwise
33 specified, the proceeding shall be governed by the Florida Rules
34 of Probate ~~Civil~~ Procedure.

35 (b) A person who is being considered for appointment or is
36 appointed as a guardian advocate need not be represented by an
37 attorney unless required by the court or if the guardian advocate
38 is delegated any rights regarding property other than the right
39 to be the representative payee for government benefits. This
40 paragraph applies only to proceedings relating to the appointment
41 of a guardian advocate and the court's supervision of a guardian
42 advocate and is not an exercise of the Legislature's authority
43 pursuant to s. (2) (a), Art. V of the State Constitution.

44 (3) ~~(b)~~ PETITION.--A petition to appoint a guardian advocate
45 for a person with a developmental disability may be executed by
46 an adult person who is a resident of this state. The petition
47 must ~~shall~~ be verified and must ~~shall~~:



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48 (a)1. State the name, age, and present address of the
49 petitioner and his or her relationship to the person with a
50 developmental disability ~~disabilities~~;

51 (b)2. State the name, age, county of residence, and present
52 address of the person with a developmental disability
53 ~~disabilities~~;

54 (c)3. Allege that the petitioner believes that the person
55 needs a guardian advocate and specify the factual information on
56 which such belief is based;

57 (d)4. Specify the exact areas in which the person lacks the
58 decisionmaking ability ~~capacity~~ to make informed decisions about
59 his or her care and treatment services or to meet the essential
60 requirements for his or her physical health or safety;

61 (e)5. Specify the legal disabilities to which the person is
62 subject; and

63 (f)6. State the name of the proposed guardian advocate, the
64 relationship of that person to the person with a developmental
65 disability; the relationship that the proposed guardian advocate
66 had or has with a provider of health care services, residential
67 services, or other services to the person with a developmental
68 disability; ~~disabilities~~, and the reason why this person should
69 be appointed. If a willing and qualified guardian advocate cannot
70 be located, the petition shall so state.

71 (4)(e) NOTICE.--

72 (a)1. Notice of the filing of the petition must ~~shall~~ be
73 given to the person with a developmental disability, individual
74 ~~and his or her parent or parents~~. The notice shall be given both
75 verbally and in writing in the language of the person and in
76 English. Notice must ~~shall~~ also be given to the next of kin of
77 the person with a developmental disability as defined in chapter



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78 744, a health care surrogate designated to execute an advance
79 directive under chapter 765, an agent under a durable power of
80 attorney, and such other persons as the court may direct. A copy
81 of the petition to appoint a guardian advocate ~~must~~ shall be
82 served with the notice.

83 (b)2. The notice ~~must~~ shall state that a hearing will be
84 held ~~shall be set~~ to inquire into the capacity of the person with
85 a developmental ~~disability~~ disabilities to exercise the rights
86 enumerated in the petition. The notice ~~must~~ shall also state the
87 date of the hearing on the petition.

88 (c)3. The notice shall state that the person with a
89 developmental disability ~~individual with developmental~~
90 ~~disabilities~~ has the right to be represented by counsel of his or
91 her own choice and that if the person ~~individual~~ cannot afford an
92 attorney, the court shall appoint one.

93 (5) ~~(d)~~ COUNSEL.--Within 3 days after a petition has been
94 filed, the court shall appoint an attorney to represent a person
95 with a developmental disability who is the subject of a petition
96 to appoint a guardian advocate. The person with a developmental
97 disability may substitute his or her own attorney for the
98 attorney appointed by the court.

99 (a) If the court appoints the attorney:

100 1. The court shall appoint a private attorney who shall be
101 selected from the attorney registry compiled pursuant to s.
102 27.40.

103 2. The attorney must have completed a minimum of 8 hours of
104 education in guardianship. The court may waive this requirement
105 for an attorney who has served as a court-appointed attorney in
106 guardian advocate proceedings or as an attorney of record for
107 guardian advocates for at least 3 years.



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108 (b) An attorney representing a person with a developmental
109 disability may not also serve as the guardian advocate of the
110 person, as counsel for the guardian advocate, or as counsel for
111 the person petitioning for the appointment of a guardian
112 advocate.

113 ~~1. Every person with developmental disabilities who is the~~
114 ~~subject of a petition to appoint a guardian advocate shall be~~
115 ~~represented by counsel.~~

116 ~~2. Every person with developmental disabilities has the~~
117 ~~right to be represented by counsel of his or her own choice. If~~
118 ~~the person cannot afford an attorney, the court shall appoint one~~
119 ~~to represent the person. The court shall appoint counsel if no~~
120 ~~appearance has been filed within 10 working days of the hearing.~~

121 (6)(e) HEARING.--

122 (a)1. Upon the filing of the petition to appoint a guardian
123 advocate, the court shall set a date for holding a hearing on
124 ~~upon which~~ the petition shall be heard. The A hearing must on the
125 ~~petition shall~~ be held as soon as practicable after the petition
126 is filed, but reasonable delay for the purpose of investigation,
127 discovery, or procuring counsel or witnesses may shall be
128 granted.

129 (b)2. The hearing must be held shall be conducted at the
130 time and place specified in the notice of hearing and must. ~~The~~
131 ~~hearing shall~~ be conducted in a manner consistent with due
132 process.

133 (c)3. The person with a developmental disability individual
134 has the right to be present at the hearing and shall be present
135 unless good cause to exclude the individual can be shown. The
136 person individual has the right to remain silent, to present



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137 evidence, to call and cross-examine witnesses, and to have the
138 hearing open or closed, as the person may choose.

139 (d)4. At the hearing, the court shall receive and consider
140 all reports relevant to the person's disability disabilities,
141 including, but not limited to, the person's current individual
142 family or individual support plan, the individual education plan,
143 and other professional reports documenting the condition and
144 needs of the person individual.

145 (e)5. The Florida Evidence Code, chapter 90, applies shall
146 apply at the hearing. The burden of proof must shall be by clear
147 and convincing evidence.

148 (7) ADVANCE DIRECTIVES FOR HEALTH CARE AND DURABLE POWER OF
149 ATTORNEY.--In each proceeding in which a guardian advocate is
150 appointed under this section, the court shall determine whether
151 the person with a developmental disability has executed any valid
152 advance directive under chapter 765 or a durable power of
153 attorney under chapter 709.

154 (a) If the person with a developmental disability has
155 executed an advance directive or durable power of attorney, the
156 court must consider and find whether the documents will
157 sufficiently address the needs of the person with a developmental
158 disability for whom the guardian advocate is sought. A guardian
159 advocate may not be appointed if the court finds that the advance
160 directive or durable power of attorney provides an alternative to
161 the appointment of a guardian advocate which will sufficiently
162 address the needs of the person with a developmental disability.

163 (b) If an interested person seeks to contest an advance
164 directive or durable power of attorney executed by a person with
165 a developmental disability, the interested person shall file a
166 verified statement. The verified statement shall include the



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167 factual basis for the belief that the advance directive or
168 durable power of attorney is invalid or does not sufficiently
169 address the needs of the person for whom a guardian advocate is
170 sought or that the person with authority under the advance
171 directive or durable power of attorney is abusing his or her
172 power.

173 (c) If an advance directive exists, the court shall specify
174 in its order and letters of guardian advocacy what authority, if
175 any, the guardian advocate shall exercise over the person's
176 health care surrogate. Pursuant to the grounds listed in s.
177 765.105, the court, upon its own motion, may, with notice to the
178 health care surrogate and any other appropriate parties, modify
179 or revoke the authority of the health care surrogate to make
180 health care decisions for the person with a developmental
181 disability. For purposes of this section, the term "health care
182 decision" has the same meaning as in s. 765.101.

183 (d) If any durable power of attorney exists, the court
184 shall specify in its order and letters of guardian advocacy what
185 powers of the agent, if any, are suspended and granted to the
186 guardian advocate. The court, however, may not suspend any powers
187 of the agent unless the court determines the durable power of
188 attorney is invalid or there is an abuse by the agent of the
189 powers granted.

190 (8)(f)- COURT ORDER determining the appointment of a
191 guardian advocate.--If the court finds the person with a
192 developmental disability disabilities requires the appointment of
193 a guardian advocate, the court shall enter a written order
194 appointing the guardian advocate and containing determining the
195 need for a guardian advocate. The written order shall contain the
196 findings of facts and conclusions of law on which the court made



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197 its decision, including. ~~The court shall make the following~~
198 ~~findings:~~

199 (a)1. The nature and scope of the person's lack of
200 decisionmaking ability incapacity;

201 (b)2. The exact areas in which the individual lacks
202 decisionmaking ability capacity to make informed decisions about
203 care and treatment services or to meet the essential requirements
204 for his or her physical health and safety;

205 (c)3. The specific legal disabilities to which the person
206 with developmental disability disabilities is subject; ~~and~~

207 (d) The name of the person selected as guardian advocate
208 and the reasons for the court's selection; and

209 (e)4. The powers, ~~and~~ duties, and responsibilities of the
210 guardian advocate, including bonding of the guardian advocate, as
211 provided in ~~governed by~~ s. 744.351.

212 (9)(g) LEGAL RIGHTS.--A person with a developmental
213 disability disabilities for whom a guardian advocate has been
214 appointed retains all legal rights except those that ~~which~~ have
215 been specifically granted to the guardian advocate.

216 (10)(h) POWERS AND DUTIES OF GUARDIAN ADVOCATE.--A guardian
217 advocate for a person with a developmental disability
218 disabilities shall be a person or corporation qualified to act as
219 guardian, with the same powers, duties, and responsibilities
220 required of a guardian under chapter 744 or those defined by
221 court order under this section. However, a guardian advocate may
222 not be required to file an annual accounting under s. 744.3678 if
223 the court determines that the person with a developmental
224 disability disabilities receives income only from Social Security
225 benefits and the guardian advocate is the person's representative
226 payee for the benefits.



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227 (11)-(3) COURT COSTS.--In all proceedings under this
228 section, ~~no~~ court costs may not shall be charged against the
229 agency.

230 (12) SUGGESTION OF RESTORATION OF RIGHTS.--Any interested
231 person, including the person with a developmental disability, may
232 file a suggestion of restoration of rights with the court in
233 which the guardian advocacy is pending. The suggestion must state
234 that the person with a developmental disability is currently
235 capable of exercising some or all of the rights that were
236 delegated to the guardian advocate and provide evidentiary
237 support for the filing of the suggestion. Evidentiary support
238 includes, but is not limited to, a signed statement from a
239 medical, psychological, or psychiatric practitioner by whom the
240 person with a developmental disability was evaluated and which
241 supports the suggestion for the restoration. If the petitioner is
242 unable to provide evidentiary support due to the lack of access
243 to such information or reports, the petitioner may state a good
244 faith basis for the suggestion for the restoration of rights
245 without attaching evidentiary support. The court shall
246 immediately set a hearing if no evidentiary support is attached
247 to inquire of the petitioner and guardian advocate as to the
248 reason and enter such orders as are appropriate to secure the
249 required documents. The person with a disability and the person's
250 attorney shall be provided notice of the hearing.

251 (a) Within 3 days after the filing of the suggestion,
252 counsel shall be appointed for the person with a developmental
253 disability as set forth in subsection (5).

254 (b) The clerk of the court shall immediately send notice of
255 the filing of the suggestion to the person with a developmental
256 disability, the guardian advocate, the attorney for the person



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257 with a developmental disability, the attorney for the guardian
258 advocate, if any, and any other interested person designated by
259 the court. Formal notice shall be served on the guardian
260 advocate. Informal notice may be served on other persons. Notice
261 need not be served on the person who filed the suggestion.

262 (c) Any objections to the suggestion must be filed within
263 20 days after service of the notice. If an objection is timely
264 filed, or if the evidentiary support suggests that restoration of
265 rights is not appropriate, the court shall set the matter for
266 hearing. The hearing shall be conducted as set forth in s.
267 744.1095. The court, at the hearing, shall consider all reports
268 and testimony relevant to the person's decisionmaking abilities
269 at the hearing, including, but not limited to, the person's
270 current individual family plan or individual support plan, the
271 individual education plan, and other professional reports that
272 document the condition and needs of the person.

273 (d) Notice of the hearing and copies of the objections
274 shall be served upon the person with a developmental disability,
275 the attorney for the person with a developmental disability, the
276 guardian advocate, the attorney for the guardian advocate, the
277 next of kin of the person with a developmental disability, and
278 any other interested person as directed by the court.

279 (e) If no objections are filed and the court is satisfied
280 with the evidentiary support for restoration, the court shall
281 enter an order of restoration of rights which were delegated to a
282 guardian advocate and which the person with a developmental
283 disability may now exercise.

284 (f) At the conclusion of a hearing, the court shall enter
285 an order denying the suggestion or restoring all or some of the
286 rights that were delegated to the guardian advocate. If only some



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287 rights are restored to the person with a developmental
288 disability, the court shall enter amended letters of guardian
289 advocacy.

290 (g) If only some rights are restored to the person with a
291 developmental disability, the order must state which rights are
292 restored and amended letters of guardian advocacy shall be issued
293 by the court. The guardian advocate shall amend the current plan
294 as required under chapter 744 if personal rights are restored to
295 the person with a developmental disability. The guardian advocate
296 shall file a final accounting as required under chapter 744 if
297 all property rights are restored to the person with a
298 developmental disability. The guardian advocate must file the
299 amended plan or final accounting within 60 days after the order
300 restoring rights and amended letters of guardian advocacy are
301 issued. A copy of the reports shall be served upon the person
302 with a developmental disability and the attorney for the person
303 with a developmental disability.

304 Section 2. Paragraph (h) of subsection (3) of section
305 393.13, Florida Statutes, is amended to read:

306 393.13 Treatment of persons with developmental
307 disabilities.--

308 (3) RIGHTS OF ALL PERSONS WITH DEVELOPMENTAL
309 DISABILITIES.--The rights described in this subsection shall
310 apply to all persons with developmental disabilities, whether or
311 not such persons are clients of the agency.

312 (h) Persons with developmental disabilities shall have a
313 right to consent to or refuse treatment, subject to the powers of
314 a guardian advocate appointed pursuant to s. 393.12 or a guardian
315 appointed pursuant to provisions of s. 393.12(2)(a) or chapter
316 744.



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317 Section 3. This act shall take effect July 1, 2008.

318

319 ===== T I T L E A M E N D M E N T =====

320 And the title is amended as follows:

321 Delete everything before the enacting clause
322 and insert:

323 A bill to be entitled

324 An act relating to guardian advocates for persons with
325 developmental disabilities; amending s. 393.12, F.S.;
326 requiring the court to conduct determination of incapacity
327 of persons with developmental disabilities and appointment
328 of guardian advocates in separate proceedings; revising
329 conditions relating to venue for appointment of guardian
330 advocates; providing that the guardian advocate need not
331 be represented by an attorney unless required by the court
332 or the guardian advocate is delegated certain rights
333 regarding property; limiting applicability to certain
334 proceedings relating to appointment and supervision of
335 guardian advocates; requiring the petition to include the
336 relationship of the proposed guardian advocate to certain
337 providers; modifying the persons to whom a notice of the
338 filing of the petition must be given to include next of
339 kin, the health care surrogate designated to execute an
340 advance directive, and the agent under durable power of
341 attorney; establishing a timeframe for appointment of
342 counsel and modifying who may be appointed as counsel to a
343 person with a developmental disability; providing
344 conditions for the court to appoint attorneys; requiring
345 court proceedings and orders to consider advance
346 directives for health care and durable powers of attorney;



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347 | requiring the court's order to provide the name and
348 | reasons for the selection of the guardian advocate;
349 | providing a process for restoration of rights for the
350 | person with a developmental disability; providing for the
351 | petitioner to submit evidentiary support to the court;
352 | providing for a hearing if no evidentiary support is
353 | available; amending s. 393.13, F.S.; conforming a cross-
354 | reference; providing an effective date.