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CHAMBER ACTION

<u>Senate</u>	.	<u>House</u>
Comm: RCS	.	
3/25/2008	.	
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1 The Committee on Judiciary (Joyner) recommended the following  
 2 **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 developmental disabilities and the appointment of a  
22 guardian must ~~shall~~ be conducted ~~determined~~ in a separate  
23 proceeding according to the procedures and requirements of  
24 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,  
31 property, or estate or if the person has voluntarily petitioned  
32 for the appointment of a guardian advocate. A court having  
33 jurisdiction in a dependency proceeding may appoint a guardian  
34 advocate for a child who has been adjudicated dependent. Except  
35 as otherwise specified, the proceeding shall be governed by the  
36 Florida Rules of Probate ~~Civil~~ Procedure.

37 (b) The appointment of a guardian advocate shall be made by  
38 the court in accordance with s. 744.312.

39 (c) The person being considered for or appointed as the  
40 guardian advocate need not be represented by an attorney unless  
41 required by the court.

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



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

49        (b)2. State the name, age, county of residence, and present  
50 address of the person with developmental disabilities;

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

54        (d)4. Specify the exact areas in which the person lacks the  
55 decision-making ability capacity to make informed decisions about  
56 his or her care and treatment services or to meet the essential  
57 requirements for his or her physical health or safety;

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

60        (f)6. State the name of the proposed guardian advocate, the  
61 relationship of that person to the person with developmental  
62 disabilities, the relationship of the proposed guardian advocate  
63 with the providers of health care services, residential services,  
64 or other services to the person with development disabilities,  
65 and the reason why this person should be appointed. If a willing  
66 and qualified guardian advocate cannot be located, the petition  
67 shall so state.

68        (4) ADVANCE DIRECTIVES FOR HEALTH CARE AND DURABLE POWER OF  
69 ATTORNEY.--In a proceeding seeking the appointment of a guardian  
70 advocate under this section, the court shall determine whether  
71 the person with a developmental disability has executed an  
72 advance directive under chapter 765 or a durable power of  
73 attorney under chapter 709.

74        (a) If the person has executed an advance directive or  
75 durable power of attorney, the court shall determine whether the



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76 documents sufficiently address the needs of the person. The court  
77 may not appoint a guardian advocate if the court finds that the  
78 advance directive or durable power of attorney provides an  
79 alternative to the appointment of a guardian advocate which  
80 sufficiently addresses the needs of the person with a  
81 developmental disability.

82 (b) If an advance directive exists and the court determines  
83 that the appointment of a guardian advocate is necessary, the  
84 court shall specify in its order and letters of guardian advocacy  
85 what authority, if any, the guardian advocate shall exercise over  
86 the health care surrogate. Pursuant to the grounds listed in s.  
87 765.105, the court, upon its own motion, may, with notice to the  
88 health care surrogate and any other appropriate parties, modify  
89 or revoke the authority of the health care surrogate to make  
90 health care decisions for the person with a developmental  
91 disability. For purposes of this section, the term "health care  
92 decision" has the same meaning as in s. 765.101.

93 (c) If a durable power of attorney exists, the court shall  
94 specify in its order and letters of guardian advocacy what powers  
95 of the attorney in fact, if any, are suspended and granted to the  
96 guardian advocate. However, the court may not suspend the powers  
97 of the attorney in fact unless the court determines that the  
98 durable power of attorney is invalid or there is an abuse of  
99 power by the attorney in fact.

100 (5)(e) NOTICE.--

101 (a)1. Notice of the filing of the petition ~~must shall~~ be  
102 given to the person with developmental disabilities, individual  
103 ~~and his or her parent or parents. The notice shall be given both~~  
104 verbally and in writing, in the language of the person and in  
105 English. Notice must shall also be given to the person with a



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106 developmental disability's next of kin as defined in chapter 744,  
107 to a health care surrogate appointed under chapter 765, to an  
108 attorney in fact designated in a durable power of attorney, and  
109 to such other persons as the court may direct. If the petition  
110 seeks a guardian advocate for a dependent child, notice must be  
111 given to the Department of Children and Family Services and to  
112 the child's guardian ad litem or attorney. A copy of the petition  
113 to appoint a guardian advocate ~~must~~ ~~shall~~ be served with the  
114 notice.

115 (b)2. The notice must ~~shall~~ state that a hearing will be  
116 held ~~shall be set~~ to inquire into the capacity of the person with  
117 developmental disabilities to exercise the rights enumerated in  
118 the petition. The notice must ~~shall~~ also state the date of the  
119 hearing on the petition.

120 (c)3. The notice must ~~shall~~ state that the person  
121 ~~individual~~ with developmental disabilities has the right to be  
122 represented by counsel of his or her own choice and that if the  
123 person ~~individual~~ cannot afford an attorney, the court shall  
124 appoint one.

125 (6)(d) COUNSEL.--Within 3 days after a petition has been  
126 filed, the court shall appoint an attorney to represent a person  
127 with developmental disabilities who is the subject of a petition  
128 to appoint a guardian advocate. The person with developmental  
129 disabilities may substitute his or her own attorney for the  
130 attorney appointed by the court.

131 (a) If the court appoints the attorney:

132 1. The court shall appoint the office of criminal conflict  
133 and civil regional counsel or a private attorney as prescribed in  
134 s. 27.511(6). A private attorney shall be selected from the  
135 attorney registry compiled pursuant to s. 27.40.



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136        2. The attorney must have completed a minimum of 8 hours of  
137 education in guardianship. The court may waive this requirement  
138 for an attorney who has served as a court-appointed attorney in  
139 guardian advocate proceedings or as an attorney of record for  
140 guardian advocates for at least 3 years.

141        (b) An attorney representing a person with developmental  
142 disabilities may not also serve as the guardian advocate of the  
143 person, as counsel for the guardian advocate, or as counsel for  
144 the person petitioning for the appointment of a guardian  
145 advocate.

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

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

154        (7)(e) HEARING.--

155        (a)1. Upon the filing of the petition to appoint a guardian  
156 advocate, the court shall set a date for holding a hearing on  
157 upon which the petition shall be heard. The A hearing must on the  
158 petition shall be held as soon as practicable after the petition  
159 is filed, but a reasonable delay for the purpose of  
160 investigation, discovery, or procuring counsel or witnesses may  
161 shall be granted.

162        (b)2. The hearing must be held shall be conducted at the  
163 time and place specified in the notice of hearing and must. The  
164 hearing shall be conducted in a manner consistent with due  
165 process.



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166        ~~(c)3.~~ The person with developmental disabilities individual  
167 has the right to be present at the hearing and shall be present  
168 unless good cause to exclude the individual can be shown. The  
169 person individual has the right to remain silent, to present  
170 evidence, to call and cross-examine witnesses, and to have the  
171 hearing open or closed, as the person may choose.

172        ~~(d)4.~~ At the hearing, the court shall receive and consider  
173 all reports relevant to the person's disabilities, including, but  
174 not limited to, the person's current individual family or  
175 individual support plan, the individual education plan, and other  
176 professional reports documenting the condition and needs of the  
177 person individual.

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

181        ~~(8)(f)~~ COURT ORDER ~~determining the appointment of a~~  
182 ~~guardian advocate.--~~If the court finds the person with  
183 developmental disabilities requires the appointment of a guardian  
184 advocate, the court shall enter a written order appointing the  
185 guardian advocate and containing ~~determining the need for a~~  
186 ~~guardian advocate. The written order shall contain~~ the findings  
187 of facts and conclusions of law on which the court made its  
188 decision, including. ~~The court shall make the following findings:~~

189        ~~(a)1.~~ The nature and scope of the person's inability to  
190 make decisions incapacity;

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



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

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

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

202 (9)(g) LEGAL RIGHTS.--A person with developmental  
203 disabilities for whom a guardian advocate has been appointed  
204 retains all legal rights except those that ~~which~~ have been  
205 specifically granted to the guardian advocate.

206 (10)(h) POWERS AND DUTIES ~~of guardian advocate~~.--A guardian  
207 advocate for a person with developmental disabilities has ~~shall~~  
208 ~~be a person or corporation qualified to act as guardian, with the~~  
209 same powers, duties, and responsibilities required of a guardian  
210 under chapter 744 or those defined by court order issued under  
211 this section. If the court waives the filing of annual  
212 accounting, the court shall require the guardian advocate to  
213 notify the court of any changes in the person's financial  
214 circumstances. ~~However, a guardian advocate may not be required~~  
215 ~~to file an annual accounting under s. 744.3678 if the court~~  
216 ~~determines that the person with developmental disabilities~~  
217 ~~receives income only from social security benefits and the~~  
218 ~~guardian advocate is the person's representative payee for the~~  
219 ~~benefits.~~

220 (11)(3) COURT COSTS.--In all proceedings under this  
221 section, ~~no~~ court costs may not ~~shall~~ be charged against the  
222 agency.

223 (12) RESTORATION OF RIGHTS.--Any interested person,  
224 including the person for whom a guardian advocate has been





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225 appointed, may file a petition with the court from which the  
226 appointment of a guardian advocacy was issued seeking the  
227 restoration of the person's rights. The petition must include  
228 evidentiary support such as a signed statement from a medical,  
229 psychological, or psychiatric practitioner who has evaluated the  
230 person with developmental disabilities and which supports the  
231 suggestion that restoration is feasible and would not pose a  
232 detriment to the health or welfare of the ward. The petition must  
233 state that the person with a developmental disability is capable  
234 of exercising some or all of the rights that were granted to the  
235 guardian advocate.

236 (a) Within 3 days after filing the petition, counsel shall  
237 be appointed for the person for whom a guardian advocate has been  
238 appointed as set forth in subsection (6).

239 (b) Upon the appointment of counsel, the petitioner shall  
240 immediately send notice of the filing of the petition to the  
241 person for whom a guardian advocate was appointed, the person's  
242 guardian advocate, the person's attorney, and any other  
243 interested person as directed by the court. Formal notice shall  
244 be served on the guardian advocate. Informal notice may be served  
245 on the other persons. Notice need not be served on the  
246 petitioner.

247 (c) Any objections to the petition must be filed within 20  
248 days after service of the notice of the petition. If an objection  
249 is timely filed, or if the examination suggests that a  
250 restoration of rights is not appropriate, the court shall set the  
251 matter for hearing.

252 1. Notice of the hearing and copies of the objections shall  
253 be served upon the person with the developmental disability, the



254 person's attorney, the person's guardian advocate, and any other  
255 interested persons as directed by the court.

256 2. The hearing shall be conducted as set forth in s.  
257 744.1085. The court, at the hearing, shall consider all reports  
258 and testimony relevant to the person's decisionmaking capacities,  
259 including, but not limited to, the evidentiary support, the  
260 person's current individual family or individual support plan,  
261 the individual education plan, and any other professional reports  
262 documenting the condition and needs of the person.

263 (d) At the conclusion of a hearing, the court shall enter  
264 an order denying the petition or restoring all or some of the  
265 rights that were granted to the guardian advocate.

266 1. If only some rights are restored to the person with a  
267 developmental disability, the order must state which rights are  
268 restored and amend the letters of guardianship advocacy issued by  
269 the court accordingly.

270 2. Within 60 days after the order restoring rights and  
271 amended letters of guardian advocacy are issued, the guardian  
272 advocate shall amend the current plan required by chapter 744 if  
273 personal rights are restored to the person with a developmental  
274 disability, and shall file a final accounting as required by  
275 chapter 744 if all property rights are restored to the person  
276 with a developmental disability. A copy of the amended plan and  
277 accounting shall be served upon the person with a developmental  
278 disability and the person's attorney.

279 (e) If no objections are filed and the court is satisfied  
280 with the evidentiary support that the person has sufficient  
281 decisionmaking ability, the court shall enter an order for the  
282 restoration of the person's rights that had been granted to a  
283 guardian advocate and that the person with a developmental



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284 disability may now exercise. The order must be issued within 30  
285 days after the petition is filed.

286 Section 2. Paragraph (h) of subsection (3) of section  
287 393.13, Florida Statutes, is amended to read:

288 393.13 Treatment of persons with developmental  
289 disabilities.--

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

294 (h) Persons with developmental disabilities shall have a  
295 right to consent to or refuse treatment, subject to the powers of  
296 a guardian advocate appointed pursuant to s. 393.12 or a guardian  
297 appointed pursuant to provisions of s. 393.12(2)(a) or chapter  
298 744.

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

300  
301 ===== T I T L E A M E N D M E N T =====

302 And the title is amended as follows:

303 Delete everything before the enacting clause  
304 and insert:

305 A bill to be entitled  
306 An act relating to guardian advocates for persons with  
307 developmental disabilities; amending s. 393.12, F.S.;  
308 authorizing a court in dependency proceedings to appoint a  
309 guardian advocate for a child; providing that the person  
310 being considered for or appointed as guardian advocate  
311 need not be represented by an attorney unless required by  
312 the court; revising the requirements for the petition  
313 seeking the appointment of a guardian advocate; providing



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314 | for consideration of any advance directive or a  
315 | designation of a durable power of attorney in guardian  
316 | advocacy proceedings; modifying the persons to whom a  
317 | notice of the filing of the petition must be given to  
318 | include next of kin, a health care surrogate, and an  
319 | attorney in fact, and, if a dependent child, the  
320 | Department of Children and Family Services and the child's  
321 | guardian ad litem or attorney; modifying who may be  
322 | appointed counsel to a person with developmental  
323 | disabilities and providing a timeframe for appointment of  
324 | counsel, including the office of criminal conflict and  
325 | civil regional counsel; requiring the court's order to  
326 | name the guardian advocate and the reasons why the  
327 | advocate was selected; revising the powers and duties of  
328 | the guardian advocate with respect to financial accounting  
329 | requirements; providing for the restoration of the rights  
330 | of a person for whom a guardian advocate has been  
331 | appointed; providing for the petition, evidentiary  
332 | support, notice, objections to the petition; providing for  
333 | the partial restoration of rights and the amendment of the  
334 | letters of guardianship advocacy; amending s. 393.13,  
335 | F.S.; conforming a cross-reference; providing an effective  
336 | date.