

By the Committee on Judiciary; and Senators Crist, Gaetz and Lynn

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1 A bill to be entitled

2 An act relating to guardian advocates for persons with  
3 developmental disabilities; amending s. 393.12, F.S.;  
4 authorizing a court in dependency proceedings to appoint a  
5 guardian advocate for a child; providing that the person  
6 being considered for or appointed as guardian advocate  
7 need not be represented by an attorney unless required by  
8 the court; revising the requirements for the petition  
9 seeking the appointment of a guardian advocate; providing  
10 for consideration of any advance directive or a  
11 designation of a durable power of attorney in guardian  
12 advocacy proceedings; modifying the persons to whom a  
13 notice of the filing of the petition must be given to  
14 include next of kin, a health care surrogate, and an  
15 attorney in fact, and, if a dependent child, the  
16 Department of Children and Family Services and the child's  
17 guardian ad litem or attorney; modifying who may be  
18 appointed counsel to a person with developmental  
19 disabilities and providing a timeframe for appointment of  
20 counsel, including the office of criminal conflict and  
21 civil regional counsel; requiring the court's order to  
22 name the guardian advocate and the reasons why the  
23 advocate was selected; revising the powers and duties of  
24 the guardian advocate with respect to financial accounting  
25 requirements; providing for the restoration of the rights  
26 of a person for whom a guardian advocate has been  
27 appointed; providing for the petition, evidentiary  
28 support, notice, objections to the petition; providing for  
29 the partial restoration of rights and the amendment of the

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30 letters of guardianship advocacy; amending s. 393.13,  
31 F.S.; conforming a cross-reference; providing an effective  
32 date.

33  
34 Be It Enacted by the Legislature of the State of Florida:

35  
36 Section 1. Section 393.12, Florida Statutes, is amended to  
37 read:

38 393.12 Capacity; appointment of guardian advocate.--

39 (1) CAPACITY.--

40 (a) ~~The issue of capacity shall be separate and distinct~~  
41 ~~from a determination of the appropriateness of admission to~~  
42 ~~nonresidential services or residential care for a condition of~~  
43 ~~developmental disabilities. A No person with a developmental~~  
44 ~~disability may not shall~~ be presumed incapacitated solely by  
45 reason of his or her acceptance in nonresidential services or  
46 admission to residential care and may not; ~~nor shall any such~~  
47 ~~person~~ be denied the full exercise of all legal rights guaranteed  
48 to citizens of this state and of the United States.

49 (b) The determination of incapacity ~~issue of capacity~~ of a  
50 person with developmental disabilities and the appointment of a  
51 guardian must shall be conducted determined in a separate  
52 proceeding according to the procedures and requirements of  
53 chapter 744 and the Florida Probate Rules.

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

55 (a) ~~Conditions.--~~A circuit probate court may appoint a  
56 guardian advocate, without an adjudication of incapacity, for a  
57 person with developmental disabilities, if the person lacks the  
58 decisionmaking ability capacity to do some, but not all, of the

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59 decisionmaking tasks necessary to care for his or her person,  
60 property, or estate or if the person has voluntarily petitioned  
61 for the appointment of a guardian advocate. A court having  
62 jurisdiction in a dependency proceeding may appoint a guardian  
63 advocate for a child who has been adjudicated dependent. Except  
64 as otherwise specified, the proceeding shall be governed by the  
65 Florida Rules of Probate Civil Procedure.

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

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

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

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

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

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

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

87 (e)5. Specify the legal disabilities to which the person is

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88 | subject; and

89 |        ~~(f)6.~~ State the name of the proposed guardian advocate, the  
90 | relationship of that person to the person with developmental  
91 | disabilities, the relationship of the proposed guardian advocate  
92 | with the providers of health care services, residential services,  
93 | or other services to the person with development disabilities,  
94 | and the reason why this person should be appointed. If a willing  
95 | and qualified guardian advocate cannot be located, the petition  
96 | shall so state.

97 |        (4) ADVANCE DIRECTIVES FOR HEALTH CARE AND DURABLE POWER OF  
98 | ATTORNEY.--In a proceeding seeking the appointment of a guardian  
99 | advocate under this section, the court shall determine whether  
100 | the person with a developmental disability has executed an  
101 | advance directive under chapter 765 or a durable power of  
102 | attorney under chapter 709.

103 |        (a) If the person has executed an advance directive or  
104 | durable power of attorney, the court shall determine whether the  
105 | documents sufficiently address the needs of the person. The court  
106 | may not appoint a guardian advocate if the court finds that the  
107 | advance directive or durable power of attorney provides an  
108 | alternative to the appointment of a guardian advocate which  
109 | sufficiently addresses the needs of the person with a  
110 | developmental disability.

111 |        (b) If an advance directive exists and the court determines  
112 | that the appointment of a guardian advocate is necessary, the  
113 | court shall specify in its order and letters of guardian advocacy  
114 | what authority, if any, the guardian advocate shall exercise over  
115 | the health care surrogate. Pursuant to the grounds listed in s.  
116 | 765.105, the court, upon its own motion, may, with notice to the

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117 health care surrogate and any other appropriate parties, modify  
118 or revoke the authority of the health care surrogate to make  
119 health care decisions for the person with a developmental  
120 disability. For purposes of this section, the term "health care  
121 decision" has the same meaning as in s. 765.101.

122 (c) If a durable power of attorney exists, the court shall  
123 specify in its order and letters of guardian advocacy what powers  
124 of the attorney in fact, if any, are suspended and granted to the  
125 guardian advocate. However, the court may not suspend the powers  
126 of the attorney in fact unless the court determines that the  
127 durable power of attorney is invalid or there is an abuse of  
128 power by the attorney in fact.

129 (5) ~~(e)~~ NOTICE.--

130 (a) ~~1.~~ Notice of the filing of the petition must ~~shall~~ be  
131 given to the person with developmental disabilities, individual  
132 and ~~his or her parent or parents~~. The notice shall be given both  
133 verbally and in writing, in the language of the person and in  
134 English. Notice must ~~shall~~ also be given to the person with a  
135 developmental disability's next of kin as defined in chapter 744,  
136 to a health care surrogate appointed under chapter 765, to an  
137 attorney in fact designated in a durable power of attorney, and  
138 to such other persons as the court may direct. If the petition  
139 seeks a guardian advocate for a dependent child, notice must be  
140 given to the Department of Children and Family Services and to  
141 the child's guardian ad litem or attorney. A copy of the petition  
142 to appoint a guardian advocate must ~~shall~~ be served with the  
143 notice.

144 (b) ~~2.~~ The notice must ~~shall~~ state that a hearing will be  
145 held ~~shall be set~~ to inquire into the capacity of the person with

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146 developmental disabilities to exercise the rights enumerated in  
147 the petition. The notice must ~~shall~~ also state the date of the  
148 hearing on the petition.

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

154 (6)(d) COUNSEL.--Within 3 days after a petition has been  
155 filed, the court shall appoint an attorney to represent a person  
156 with developmental disabilities who is the subject of a petition  
157 to appoint a guardian advocate. The person with developmental  
158 disabilities may substitute his or her own attorney for the  
159 attorney appointed by the court.

160 (a) If the court appoints the attorney:

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

165 2. The attorney must have completed a minimum of 8 hours of  
166 education in guardianship. The court may waive this requirement  
167 for an attorney who has served as a court-appointed attorney in  
168 guardian advocate proceedings or as an attorney of record for  
169 guardian advocates for at least 3 years.

170 (b) An attorney representing a person with developmental  
171 disabilities may not also serve as the guardian advocate of the  
172 person, as counsel for the guardian advocate, or as counsel for  
173 the person petitioning for the appointment of a guardian  
174 advocate.

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

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

183           (7)(e) HEARING.--

184           (a)1. Upon the filing of the petition to appoint a guardian  
185 advocate, the court shall set a date for holding a hearing on  
186 ~~upon which~~ the petition shall be heard. The A hearing must on the  
187 ~~petition shall~~ be held as soon as practicable after the petition  
188 is filed, but a reasonable delay for the purpose of  
189 investigation, discovery, or procuring counsel or witnesses may  
190 ~~shall~~ be granted.

191           (b)2. The hearing must be held ~~shall be conducted~~ at the  
192 time and place specified in the notice of hearing and must. ~~The~~  
193 ~~hearing shall~~ be conducted in a manner consistent with due  
194 process.

195           (c)3. The person with developmental disabilities individual  
196 has the right to be present at the hearing and shall be present  
197 unless good cause to exclude the individual can be shown. The  
198 person individual has the right to remain silent, to present  
199 evidence, to call and cross-examine witnesses, and to have the  
200 hearing open or closed, as the person may choose.

201           (d)4. At the hearing, the court shall receive and consider  
202 all reports relevant to the person's disabilities, including, but  
203 not limited to, the person's current individual family or

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204 individual support plan, the individual education plan, and other  
205 professional reports documenting the condition and needs of the  
206 person individual.

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

210 (8)(f) COURT ORDER ~~determining the appointment of a~~  
211 ~~guardian advocate.--~~If the court finds the person with  
212 developmental disabilities requires the appointment of a guardian  
213 advocate, the court shall enter a written order appointing the  
214 guardian advocate and containing ~~determining the need for a~~  
215 ~~guardian advocate.~~ The written order shall contain the findings  
216 of facts and conclusions of law on which the court made its  
217 decision, including. ~~The court shall make the following findings:~~

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

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

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

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

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

231 (9)(g) LEGAL RIGHTS.--A person with developmental  
232 disabilities for whom a guardian advocate has been appointed



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233 retains all legal rights except those that ~~which~~ have been  
234 specifically granted to the guardian advocate.

235 (10)(h) ~~POWERS AND DUTIES of guardian advocate.~~--A guardian  
236 advocate for a person with developmental disabilities has ~~shall~~  
237 ~~be a person or corporation qualified to act as guardian, with the~~  
238 ~~same powers, duties, and responsibilities required of a guardian~~  
239 ~~under chapter 744 or those defined by court order~~ issued under  
240 this section. If the court waives the filing of annual  
241 accounting, the court shall require the guardian advocate to  
242 notify the court of any changes in the person's financial  
243 circumstances. However, a guardian advocate may not be required  
244 to file an annual accounting under s. 744.3678 if the court  
245 determines that the person with developmental disabilities  
246 receives income only from social security benefits and the  
247 guardian advocate is the person's representative payee for the  
248 benefits.

249 (11)(3) ~~COURT COSTS.~~--In all proceedings under this  
250 section, ~~no~~ court costs may not ~~shall~~ be charged against the  
251 agency.

252 (12) ~~RESTORATION OF RIGHTS.~~--Any interested person,  
253 including the person for whom a guardian advocate has been  
254 appointed, may file a petition with the court from which the  
255 appointment of a guardian advocacy was issued seeking the  
256 restoration of the person's rights. The petition must include  
257 evidentiary support such as a signed statement from a medical,  
258 psychological, or psychiatric practitioner who has evaluated the  
259 person with developmental disabilities and which supports the  
260 suggestion that restoration is feasible and would not pose a  
261 detriment to the health or welfare of the ward. The petition must

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262 state that the person with a developmental disability is capable  
263 of exercising some or all of the rights that were granted to the  
264 guardian advocate.

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

268 (b) Upon the appointment of counsel, the petitioner shall  
269 immediately send notice of the filing of the petition to the  
270 person for whom a guardian advocate was appointed, the person's  
271 guardian advocate, the person's attorney, and any other  
272 interested person as directed by the court. Formal notice shall  
273 be served on the guardian advocate. Informal notice may be served  
274 on the other persons. Notice need not be served on the  
275 petitioner.

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

281 1. Notice of the hearing and copies of the objections shall  
282 be served upon the person with the developmental disability, the  
283 person's attorney, the person's guardian advocate, and any other  
284 interested persons as directed by the court.

285 2. The hearing shall be conducted as set forth in s.  
286 744.1085. The court, at the hearing, shall consider all reports  
287 and testimony relevant to the person's decisionmaking capacities,  
288 including, but not limited to, the evidentiary support, the  
289 person's current individual family or individual support plan,  
290 the individual education plan, and any other professional reports

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291 documenting the condition and needs of the person.

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

295 1. If only some rights are restored to the person with a  
296 developmental disability, the order must state which rights are  
297 restored and amend the letters of guardianship advocacy issued by  
298 the court accordingly.

299 2. Within 60 days after the order restoring rights and  
300 amended letters of guardian advocacy are issued, the guardian  
301 advocate shall amend the current plan required by chapter 744 if  
302 personal rights are restored to the person with a developmental  
303 disability, and shall file a final accounting as required by  
304 chapter 744 if all property rights are restored to the person  
305 with a developmental disability. A copy of the amended plan and  
306 accounting shall be served upon the person with a developmental  
307 disability and the person's attorney.

308 (e) If no objections are filed and the court is satisfied  
309 with the evidentiary support that the person has sufficient  
310 decisionmaking ability, the court shall enter an order for the  
311 restoration of the person's rights that had been granted to a  
312 guardian advocate and that the person with a developmental  
313 disability may now exercise. The order must be issued within 30  
314 days after the petition is filed.

315 Section 2. Paragraph (h) of subsection (3) of section  
316 393.13, Florida Statutes, is amended to read:

317 393.13 Treatment of persons with developmental  
318 disabilities.--

319 (3) RIGHTS OF ALL PERSONS WITH DEVELOPMENTAL

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320 DISABILITIES.--The rights described in this subsection shall  
321 apply to all persons with developmental disabilities, whether or  
322 not such persons are clients of the agency.

323 (h) Persons with developmental disabilities shall have a  
324 right to consent to or refuse treatment, subject to the powers of  
325 a guardian advocate appointed pursuant to s. 393.12 or a guardian  
326 appointed pursuant to ~~provisions of s. 393.12(2)(a) or~~ chapter  
327 744.

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