

By the Committees on Health and Human Services Appropriations;
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 requiring the court to conduct determination of incapacity
5 of persons with developmental disabilities and appointment
6 of guardian advocates in separate proceedings; revising
7 conditions relating to venue for appointment of guardian
8 advocates; providing that the guardian advocate need not
9 be represented by an attorney unless required by the court
10 or the guardian advocate is delegated certain rights
11 regarding property; limiting applicability to certain
12 proceedings relating to appointment and supervision of
13 guardian advocates; requiring the petition to include the
14 relationship of the proposed guardian advocate to certain
15 providers; modifying the persons to whom a notice of the
16 filing of the petition must be given to include next of
17 kin, the health care surrogate designated to execute an
18 advance directive, and the agent under durable power of
19 attorney; establishing a timeframe for appointment of
20 counsel and modifying who may be appointed as counsel to a
21 person with a developmental disability; providing
22 conditions for the court to appoint attorneys; requiring
23 court proceedings and orders to consider advance
24 directives for health care and durable powers of attorney;
25 requiring the court's order to provide the name and
26 reasons for the selection of the guardian advocate;
27 providing a process for restoration of rights for the
28 person with a developmental disability; providing for the
29 petitioner to submit evidentiary support to the court;

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30 providing for a hearing if no evidentiary support is
31 available; amending s. 393.13, F.S.; conforming a cross-
32 reference; providing an effective 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 a developmental disability and the appointment of a
51 guardian must be conducted ~~disabilities shall be determined~~ in a
52 separate proceeding according to the procedures and requirements
53 of 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 ~~or~~
60 ~~property, or estate~~ or if the person has voluntarily petitioned
61 for the appointment of a guardian advocate. Except as otherwise
62 specified, the proceeding shall be governed by the Florida Rules
63 of Probate Civil Procedure.

64 (b) A person who is being considered for appointment or is
65 appointed as a guardian advocate need not be represented by an
66 attorney unless required by the court or if the guardian advocate
67 is delegated any rights regarding property other than the right
68 to be the representative payee for government benefits. This
69 paragraph applies only to proceedings relating to the appointment
70 of a guardian advocate and the court's supervision of a guardian
71 advocate and is not an exercise of the Legislature's authority
72 pursuant to s. (2) (a), Art. V of the State Constitution.

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

77 (a) 1- State the name, age, and present address of the
78 petitioner and his or her relationship to the person with a
79 developmental disability disabilities;

80 (b) 2- State the name, age, county of residence, and present
81 address of the person with a developmental disability
82 disabilities;

83 (c) 3- Allege that the petitioner believes that the person
84 needs a guardian advocate and specify the factual information on
85 which such belief is based;

86 (d) 4- Specify the exact areas in which the person lacks the
87 decisionmaking ability capacity to make informed decisions about

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88 his or her care and treatment services or to meet the essential
89 requirements for his or her physical health or safety;

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

92 (f)6. State the name of the proposed guardian advocate, the
93 relationship of that person to the person with a developmental
94 disability; the relationship that the proposed guardian advocate
95 had or has with a provider of health care services, residential
96 services, or other services to the person with a developmental
97 disability; disabilities, and the reason why this person should
98 be appointed. If a willing and qualified guardian advocate cannot
99 be located, the petition shall so state.

100 (4)(e) NOTICE.--

101 (a)1. Notice of the filing of the petition must ~~shall~~ be
102 given to the person with a developmental disability, 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 next of kin of
106 the person with a developmental disability as defined in chapter
107 744, a health care surrogate designated to execute an advance
108 directive under chapter 765, an agent under a durable power of
109 attorney, and such other persons as the court may direct. A copy
110 of the petition to appoint a guardian advocate must ~~shall~~ be
111 served with the notice.

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

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

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

128 (a) If the court appoints the attorney, the attorney must
129 have completed a minimum of 8 hours of education in guardianship.
130 The court may waive this requirement for an attorney who has
131 served as a court-appointed attorney in guardian advocate
132 proceedings or as an attorney of record for guardian advocates
133 for at least 3 years.

134 (b) An attorney representing a person with a developmental
135 disability may not also serve as the guardian advocate of the
136 person, as counsel for the guardian advocate, or as counsel for
137 the person petitioning for the appointment of a guardian
138 advocate.

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

142 ~~2. Every person with developmental disabilities has the~~
143 ~~right to be represented by counsel of his or her own choice. If~~
144 ~~the person cannot afford an attorney, the court shall appoint one~~
145 ~~to represent the person. The court shall appoint counsel if no~~

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146 ~~appearance has been filed within 10 working days of the hearing.~~

147 ~~(6)(e)~~ HEARING.--

148 (a)1. Upon the filing of the petition to appoint a guardian
149 advocate, the court shall set a date for holding a hearing on
150 ~~upon which the petition shall be heard. The A hearing must on the~~
151 ~~petition shall~~ be held as soon as practicable after the petition
152 is filed, but reasonable delay for the purpose of investigation,
153 discovery, or procuring counsel or witnesses may shall be
154 granted.

155 (b)2. The hearing must be held ~~shall be conducted~~ at the
156 time and place specified in the notice of hearing and must. ~~The~~
157 ~~hearing shall~~ be conducted in a manner consistent with due
158 process.

159 (c)3. The person with a developmental disability individual
160 has the right to be present at the hearing and shall be present
161 unless good cause to exclude the individual can be shown. The
162 person individual has the right to remain silent, to present
163 evidence, to call and cross-examine witnesses, and to have the
164 hearing open or closed, as the person may choose.

165 (d)4. At the hearing, the court shall receive and consider
166 all reports relevant to the person's disability disabilities,
167 including, but not limited to, the person's current individual
168 family or individual support plan, the individual education plan,
169 and other professional reports documenting the condition and
170 needs of the person individual.

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

174 (7) ADVANCE DIRECTIVES FOR HEALTH CARE AND DURABLE POWER OF

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175 ATTORNEY.--In each proceeding in which a guardian advocate is
176 appointed under this section, the court shall determine whether
177 the person with a developmental disability has executed any valid
178 advance directive under chapter 765 or a durable power of
179 attorney under chapter 709.

180 (a) If the person with a developmental disability has
181 executed an advance directive or durable power of attorney, the
182 court must consider and find whether the documents will
183 sufficiently address the needs of the person with a developmental
184 disability for whom the guardian advocate is sought. A guardian
185 advocate may not be appointed if the court finds that the advance
186 directive or durable power of attorney provides an alternative to
187 the appointment of a guardian advocate which will sufficiently
188 address the needs of the person with a developmental disability.

189 (b) If an interested person seeks to contest an advance
190 directive or durable power of attorney executed by a person with
191 a developmental disability, the interested person shall file a
192 verified statement. The verified statement shall include the
193 factual basis for the belief that the advance directive or
194 durable power of attorney is invalid or does not sufficiently
195 address the needs of the person for whom a guardian advocate is
196 sought or that the person with authority under the advance
197 directive or durable power of attorney is abusing his or her
198 power.

199 (c) If an advance directive exists, the court shall specify
200 in its order and letters of guardian advocacy what authority, if
201 any, the guardian advocate shall exercise over the person's
202 health care surrogate. Pursuant to the grounds listed in s.
203 765.105, the court, upon its own motion, may, with notice to the

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204 health care surrogate and any other appropriate parties, modify
205 or revoke the authority of the health care surrogate to make
206 health care decisions for the person with a developmental
207 disability. For purposes of this section, the term "health care
208 decision" has the same meaning as in s. 765.101.

209 (d) If any durable power of attorney exists, the court
210 shall specify in its order and letters of guardian advocacy what
211 powers of the agent, if any, are suspended and granted to the
212 guardian advocate. The court, however, may not suspend any powers
213 of the agent unless the court determines the durable power of
214 attorney is invalid or there is an abuse by the agent of the
215 powers granted.

216 (8) ~~(f)~~ COURT ORDER determining the appointment of a
217 guardian advocate.--If the court finds the person with a
218 developmental disability ~~disabilities~~ requires the appointment of
219 a guardian advocate, the court shall enter a written order
220 appointing the guardian advocate and containing ~~determining the~~
221 need for a guardian advocate. The written order shall contain the
222 findings of facts and conclusions of law on which the court made
223 its decision, including. ~~The court shall make the following~~
224 findings:

225 (a) ~~1.~~ The nature and scope of the person's lack of
226 decisionmaking ability ~~incapacity~~;

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

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

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

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

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

242 (10)(h) POWERS AND DUTIES OF GUARDIAN ADVOCATE.--A guardian
243 advocate for a person with a developmental disability
244 ~~disabilities~~ shall be a person or corporation qualified to act as
245 guardian, with the same powers, duties, and responsibilities
246 required of a guardian under chapter 744 or those defined by
247 court order under this section. However, a guardian advocate may
248 not be required to file an annual accounting under s. 744.3678 if
249 the court determines that the person with a developmental
250 disability ~~disabilities~~ receives income only from Social Security
251 benefits and the guardian advocate is the person's representative
252 payee for the benefits.

253 (11)(3) COURT COSTS.--In all proceedings under this
254 section, ~~no~~ court costs may not ~~shall~~ be charged against the
255 agency.

256 (12) SUGGESTION OF RESTORATION OF RIGHTS.--Any interested
257 person, including the person with a developmental disability, may
258 file a suggestion of restoration of rights with the court in
259 which the guardian advocacy is pending. The suggestion must state
260 that the person with a developmental disability is currently
261 capable of exercising some or all of the rights that were

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262 delegated to the guardian advocate and provide evidentiary
263 support for the filing of the suggestion. Evidentiary support
264 includes, but is not limited to, a signed statement from a
265 medical, psychological, or psychiatric practitioner by whom the
266 person with a developmental disability was evaluated and which
267 supports the suggestion for the restoration. If the petitioner is
268 unable to provide evidentiary support due to the lack of access
269 to such information or reports, the petitioner may state a good
270 faith basis for the suggestion for the restoration of rights
271 without attaching evidentiary support. The court shall
272 immediately set a hearing if no evidentiary support is attached
273 to inquire of the petitioner and guardian advocate as to the
274 reason and enter such orders as are appropriate to secure the
275 required documents. The person with a disability and the person's
276 attorney shall be provided notice of the hearing.

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

280 (b) The clerk of the court shall immediately send notice of
281 the filing of the suggestion to the person with a developmental
282 disability, the guardian advocate, the attorney for the person
283 with a developmental disability, the attorney for the guardian
284 advocate, if any, and any other interested person designated by
285 the court. Formal notice shall be served on the guardian
286 advocate. Informal notice may be served on other persons. Notice
287 need not be served on the person who filed the suggestion.

288 (c) Any objections to the suggestion must be filed within
289 20 days after service of the notice. If an objection is timely
290 filed, or if the evidentiary support suggests that restoration of

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291 rights is not appropriate, the court shall set the matter for
292 hearing. The hearing shall be conducted as set forth in s.
293 744.1095. The court, at the hearing, shall consider all reports
294 and testimony relevant to the person's decisionmaking abilities
295 at the hearing, including, but not limited to, the person's
296 current individual family plan or individual support plan, the
297 individual education plan, and other professional reports that
298 document the condition and needs of the person.

299 (d) Notice of the hearing and copies of the objections
300 shall be served upon the person with a developmental disability,
301 the attorney for the person with a developmental disability, the
302 guardian advocate, the attorney for the guardian advocate, the
303 next of kin of the person with a developmental disability, and
304 any other interested person as directed by the court.

305 (e) If no objections are filed and the court is satisfied
306 with the evidentiary support for restoration, the court shall
307 enter an order of restoration of rights which were delegated to a
308 guardian advocate and which the person with a developmental
309 disability may now exercise.

310 (f) At the conclusion of a hearing, the court shall enter
311 an order denying the suggestion or restoring all or some of the
312 rights that were delegated to the guardian advocate. If only some
313 rights are restored to the person with a developmental
314 disability, the court shall enter amended letters of guardian
315 advocacy.

316 (g) If only some rights are restored to the person with a
317 developmental disability, the order must state which rights are
318 restored and amended letters of guardian advocacy shall be issued
319 by the court. The guardian advocate shall amend the current plan

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320 as required under chapter 744 if personal rights are restored to
321 the person with a developmental disability. The guardian advocate
322 shall file a final accounting as required under chapter 744 if
323 all property rights are restored to the person with a
324 developmental disability. The guardian advocate must file the
325 amended plan or final accounting within 60 days after the order
326 restoring rights and amended letters of guardian advocacy are
327 issued. A copy of the reports shall be served upon the person
328 with a developmental disability and the attorney for the person
329 with a developmental disability.

330 Section 2. Paragraph (h) of subsection (3) of section
331 393.13, Florida Statutes, is amended to read:

332 393.13 Treatment of persons with developmental
333 disabilities.--

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

338 (h) Persons with developmental disabilities shall have a
339 right to consent to or refuse treatment, subject to the powers of
340 a guardian advocate appointed pursuant to s. 393.12 or a guardian
341 appointed pursuant to provisions of s. 393.12(2)(a) or chapter
342 744.

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