

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 for appointment of guardian advocates;  
8           requiring the court to appoint guardian advocates in  
9           accordance with s. 744.312, F.S.; providing that the  
10          guardian advocate need not be represented by an attorney  
11          unless required by the court or the guardian advocate is  
12          delegated certain rights regarding property; requiring the  
13          petition to include the relationship of the proposed  
14          guardian advocate to certain providers; modifying the  
15          persons to whom a notice of the filing of the petition  
16          must be given to include next of kin, the health care  
17          surrogate designated to execute an advance directive, and  
18          the agent under durable power of attorney; establishing a  
19          timeframe for appointment of counsel and modifying who may  
20          be appointed as counsel to a person with a developmental  
21          disability; providing conditions for the court to appoint  
22          attorneys; requiring court proceedings and orders to  
23          consider advance directives for health care and durable  
24          powers of attorney; requiring the court's order to provide  
25          the name and reasons for the selection of the guardian  
26          advocate; providing a process for restoration of rights  
27          for the person with a developmental disability; amending

28 s. 393.13, F.S.; conforming a cross-reference; providing  
 29 an effective date.

30  
 31 Be It Enacted by the Legislature of the State of Florida:

32  
 33 Section 1. Section 393.12, Florida Statutes, is amended to  
 34 read:

35 393.12 Capacity; appointment of guardian advocate.--

36 (1) CAPACITY.--

37 (a) ~~The issue of capacity shall be separate and distinct~~  
 38 ~~from a determination of the appropriateness of admission to~~  
 39 ~~nonresidential services or residential care for a condition of~~  
 40 ~~developmental disabilities. A person with a developmental~~  
 41 ~~disability may not shall~~ be presumed incapacitated solely by  
 42 reason of his or her acceptance in nonresidential services or  
 43 admission to residential care and may not, ~~nor shall any such~~  
 44 ~~person~~ be denied the full exercise of all legal rights  
 45 guaranteed to citizens of this state and of the United States.

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

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

52 (a) ~~Conditions.~~—A circuit probate court may appoint a  
 53 guardian advocate, without an adjudication of incapacity, for a  
 54 person with a developmental disability ~~disabilities~~, if the  
 55 person lacks the decisionmaking ability ~~capacity~~ to do some, but

56 | not all, of the decisionmaking tasks necessary to care for his  
 57 | or her person ~~or~~, property, ~~or estate~~ or if the person has  
 58 | voluntarily petitioned for the appointment of a guardian  
 59 | advocate. The court may not appoint a guardian advocate if there  
 60 | are competing petitions for appointment of the guardian advocate  
 61 | under this section. Such petitions shall be considered under  
 62 | chapter 744. Except as otherwise specified, the proceeding shall  
 63 | be governed by the Florida Probate Rules ~~of Civil Procedure~~.

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

66 | (c) A person who is being considered for appointment or is  
 67 | appointed as a guardian advocate need not be represented by an  
 68 | attorney unless required by the court or if the guardian  
 69 | advocate is delegated any rights regarding property other than  
 70 | the right to be the representative payee for government  
 71 | benefits.

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

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

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

82 | (c) ~~3.~~ Allege that the petitioner believes that the person  
 83 | needs a guardian advocate and specify the factual information on

84 which such belief is based;

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

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

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

99 (4)(e) NOTICE.--

100 (a)1- Notice of the filing of the petition must shall be  
 101 given to the person with a developmental disability, individual  
 102 and his or her parent or parents. The notice shall be given both  
 103 verbally and in writing, in the language of the person and in  
 104 English. Notice must shall also be given to the next of kin of  
 105 the person with a developmental disability as defined in chapter  
 106 744, a health care surrogate designated to execute an advance  
 107 directive under chapter 765, an agent under a durable power of  
 108 attorney, and such other persons as the court may direct. A copy  
 109 of the petition to appoint a guardian advocate must shall be  
 110 served with the notice.

111 (b)2- The notice must shall state that a hearing will be

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

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

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

127 (a) If the court appoints the attorney:

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

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

137 (b) An attorney representing a person with a developmental  
 138 disability may not also serve as the guardian advocate of the  
 139 person, as counsel for the guardian advocate, or as counsel for

140 the person petitioning for the appointment of a guardian  
141 advocate.

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

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

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

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

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

163 (c)3. The person with a developmental disability  
164 ~~individual~~ has the right to be present at the hearing and shall  
165 be present unless good cause to exclude the individual can be  
166 shown. The person ~~individual~~ has the right to remain silent, to  
167 present evidence, to call and cross-examine witnesses, and to

168 have the hearing open or closed, as the person may choose.

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

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

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

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

194 (b) If an interested person seeks to contest an advance  
195 directive or durable power of attorney executed by a person with

196 a developmental disability, the interested person shall file a  
 197 verified statement. The verified statement shall include the  
 198 factual basis for the belief that the advance directive or  
 199 durable power of attorney is invalid or does not sufficiently  
 200 address the needs of the person for whom a guardian advocate is  
 201 sought or that the person with authority under the advance  
 202 directive or durable power of attorney is abusing his or her  
 203 power.

204 (c) If an advance directive exists, the court shall  
 205 specify in its order and letters of guardian advocacy what  
 206 authority, if any, the guardian advocate shall exercise over the  
 207 person's health care surrogate designated under chapter 765.  
 208 Pursuant to the grounds listed in s. 765.105, the court, upon  
 209 its own motion, may, with notice to the health care surrogate  
 210 and any other appropriate parties, modify or revoke the  
 211 authority of the health care surrogate to make health care  
 212 decisions for the person with a developmental disability. For  
 213 purposes of this section, the term "health care decision" has  
 214 the same meaning as in s. 765.101.

215 (d) If any durable power of attorney exists, the court  
 216 shall specify in its order and letters of guardian advocacy what  
 217 powers of the agent, if any, are suspended and granted to the  
 218 guardian advocate. The court, however, may not suspend any  
 219 powers of the agent unless the court determines the durable  
 220 power of attorney is invalid or there is an abuse by the agent  
 221 of the powers granted.

222 (8) ~~(f)~~ COURT ORDER determining the appointment of a  
 223 guardian advocate.--If the court finds the person with a



224 developmental disability ~~disabilities~~ requires the appointment  
 225 of a guardian advocate, the court shall enter a written order  
 226 appointing the guardian advocate and containing ~~determining the~~  
 227 ~~need for a guardian advocate. The written order shall contain~~  
 228 the findings of facts and conclusions of law on which the court  
 229 made its decision, including. ~~The court shall make the following~~  
 230 ~~findings:~~

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

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

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

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

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

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

248 (10)~~(h)~~ POWERS AND DUTIES OF GUARDIAN ADVOCATE.--A  
 249 guardian advocate for a person with a developmental disability  
 250 ~~disabilities~~ shall be a person or corporation qualified to act  
 251 as guardian, with the same powers, duties, and responsibilities

252 required of a guardian under chapter 744 or those defined by  
 253 court order under this section. However, a guardian advocate may  
 254 not be required to file an annual accounting under s. 744.3678  
 255 if the court determines that the person with a developmental  
 256 disability ~~disabilities~~ receives income only from social  
 257 security benefits and the guardian advocate is the person's  
 258 representative payee for the benefits.

259 (11)(3) COURT COSTS.--In all proceedings under this  
 260 section, ~~no~~ court costs may not shall be charged against the  
 261 agency.

262 (12) SUGGESTION OF RESTORATION OF RIGHTS.--Any interested  
 263 person, including the person with a developmental disability,  
 264 may file a suggestion of restoration of rights with the court in  
 265 which the guardian advocacy is pending. The suggestion must  
 266 state that the person with a developmental disability is  
 267 currently capable of exercising some or all of the rights that  
 268 were delegated to the guardian advocate.

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

272 (b) Upon the filing of the suggestion, the court shall  
 273 immediately provide for the examination of the person with a  
 274 developmental disability by a physician, psychologist,  
 275 psychiatrist, gerontologist, registered nurse, or licensed  
 276 social worker familiar with the developmental disability. The  
 277 report of the examination of the person with a developmental  
 278 disability shall be filed with the court within 20 days after  
 279 the examination is ordered.

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

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

299        (e) 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        (f) The examination reports shall be served upon the  
306 person with a developmental disability, the guardian advocate,  
307 the attorney for the person with a developmental disability, the

308 attorney for the guardian advocate, and any other interested  
309 person as directed by the court.

310 (g) If no objections are filed and the court is satisfied  
311 with the examination report, the court shall enter an order of  
312 restoration of rights which were delegated to a guardian  
313 advocate and which the person with a developmental disability  
314 may now exercise. The order must be issued within 30 days after  
315 the medical report is filed.

316 (h) At the conclusion of a hearing, the court shall enter  
317 an order either denying the suggestion or restoring all or some  
318 of the rights that were delegated to the guardian advocate. If  
319 only some rights are restored to the person with a developmental  
320 disability, the court shall enter amended letters of guardian  
321 advocacy.

322 (i) If only some rights are restored to the person with a  
323 developmental disability, the order must state which rights are  
324 restored and amended letters of guardian advocacy shall be  
325 issued by the court. The guardian advocate shall amend the  
326 current plan as required under chapter 744 if personal rights  
327 are restored to the person with a developmental disability. The  
328 guardian advocate shall file a final accounting as required  
329 under chapter 744 if all property rights are restored to the  
330 person with a developmental disability. The guardian advocate  
331 must file the amended plan or final accounting within 60 days  
332 after the order restoring rights and amended letters of guardian  
333 advocacy are issued. A copy of the reports shall be served upon  
334 the person with a developmental disability and the attorney for  
335 the person with a developmental disability.

CS/HB 739

2008

336 Section 2. Paragraph (h) of subsection (3) of section  
 337 393.13, Florida Statutes, is amended to read:

338 393.13 Treatment of persons with developmental  
 339 disabilities.--

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

344 (h) Persons with developmental disabilities shall have a  
 345 right to consent to or refuse treatment, subject to the powers  
 346 of a guardian advocate appointed pursuant to s. 393.12 or a  
 347 guardian appointed pursuant to ~~provisions of s. 393.12(2)(a) or~~  
 348 chapter 744.

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