

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;
 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
 48 guaranteed 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
 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
 67 | advocate is delegated any rights regarding property other than
 68 | the right to be the representative payee for government
 69 | benefits. This paragraph applies only to proceedings relating to
 70 | the appointment of a guardian advocate and the court's
 71 | supervision of a guardian advocate and is not an exercise of the
 72 | Legislature's authority pursuant to s. (2)(a), Art. V of the
 73 | State Constitution.

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

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

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

84 | (c)3. Allege that the petitioner believes that the person

85 needs a guardian advocate and specify the factual information on
 86 which such belief is based;

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

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

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

102 (4)(e) NOTICE.--

103 (a)1. Notice of the filing of the petition must shall be
 104 given to the person with a developmental disability, individual
 105 ~~and his or her parent or parents. The notice shall be given both~~
 106 verbally and in writing in the language of the person and in
 107 English. Notice must shall also be given to the next of kin of
 108 the person with a developmental disability as defined in chapter
 109 744, any health care surrogate designated for the person with a
 110 developmental disability pursuant to an advance directive under
 111 chapter 765, any agent designated for the person with a
 112 developmental disability under a durable power of attorney, and

113 such other persons as the court may direct. A copy of the
114 petition to appoint a guardian advocate must ~~shall~~ be served
115 with the notice.

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

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

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

132 (a) If the court appoints the attorney:

133 1. The court shall appoint a private attorney who shall be
134 selected from the attorney registry compiled pursuant to s.
135 27.40.

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

141 (b) An attorney representing a person with a developmental
142 disability 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~~
152 ~~one to represent the person. The court shall appoint counsel if~~
153 ~~no appearance has been filed within 10 working days of the~~
154 ~~hearing.~~

155 (6)(e) HEARING.--

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

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

167 (c)3. The person with a developmental disability
168 ~~individual~~ has the right to be present at the hearing and shall

169 be present unless good cause to exclude the individual can be
 170 shown. The person ~~individual~~ has the right to remain silent, to
 171 present evidence, to call and cross-examine witnesses, and to
 172 have the hearing open or closed, as the person may choose.

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

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

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

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

197 with a developmental disability.

198 (b) If an interested person seeks to contest an advance
199 directive or durable power of attorney executed by a person with
200 a developmental disability, the interested person shall file a
201 verified statement. The verified statement shall include the
202 factual basis for the belief that the advance directive or
203 durable power of attorney is invalid or does not sufficiently
204 address the needs of the person for whom a guardian advocate is
205 sought or that the person with authority under the advance
206 directive or durable power of attorney is abusing his or her
207 power.

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

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

225 (8)~~(f)~~ COURT ORDER ~~determining the appointment of a~~
 226 ~~guardian advocate.~~--If the court finds the person with a
 227 developmental disability ~~disabilities~~ requires the appointment
 228 of a guardian advocate, the court shall enter a written order
 229 appointing the guardian advocate and containing ~~determining the~~
 230 ~~need for a guardian advocate. The written order shall contain~~
 231 the findings of facts and conclusions of law on which the court
 232 made its decision, including. ~~The court shall make the following~~
 233 ~~findings:~~

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

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

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

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

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

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

251 (10)~~(h)~~ POWERS AND DUTIES OF GUARDIAN ADVOCATE.--A
 252 guardian advocate for a person with a developmental disability

253 ~~disabilities~~ shall be a person or corporation qualified to act
 254 as guardian, with the same powers, duties, and responsibilities
 255 required of a guardian under chapter 744 or those defined by
 256 court order under this section. However, a guardian advocate may
 257 not be required to file an annual accounting under s. 744.3678
 258 if the court determines that the person with a developmental
 259 disability ~~disabilities~~ receives income only from Social
 260 Security benefits and the guardian advocate is the person's
 261 representative payee for the benefits.

262 (11)-(3) COURT COSTS.--In all proceedings under this
 263 section, ~~no~~ court costs may not ~~shall~~ be charged against the
 264 agency.

265 (12) SUGGESTION OF RESTORATION OF RIGHTS.--Any interested
 266 person, including the person with a developmental disability,
 267 may file a suggestion of restoration of rights with the court in
 268 which the guardian advocacy is pending. The suggestion must
 269 state that the person with a developmental disability is
 270 currently capable of exercising some or all of the rights that
 271 were delegated to the guardian advocate and provide evidentiary
 272 support for the filing of the suggestion. Evidentiary support
 273 includes, but is not limited to, a signed statement from a
 274 medical, psychological, or psychiatric practitioner by whom the
 275 person with a developmental disability was evaluated and which
 276 supports the suggestion for the restoration. If the petitioner
 277 is unable to provide evidentiary support due to the lack of
 278 access to such information or reports, the petitioner may state
 279 a good faith basis for the suggestion for the restoration of
 280 rights without attaching evidentiary support. The court shall

281 immediately set a hearing if no evidentiary support is attached
282 to inquire of the petitioner and guardian advocate as to the
283 reason and enter such orders as are appropriate to secure the
284 required documents. The person with a disability and the
285 person's attorney shall be provided notice of the hearing.

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

289 (b) The clerk of the court shall immediately send notice
290 of the filing of the suggestion to the person with a
291 developmental disability, the guardian advocate, the attorney
292 for the person with a developmental disability, the attorney for
293 the guardian advocate, if any, and any other interested person
294 designated by the court. Formal notice shall be served on the
295 guardian advocate. Informal notice may be served on other
296 persons. Notice need not be served on the person who filed the
297 suggestion.

298 (c) Any objections to the suggestion must be filed within
299 20 days after service of the notice. If an objection is timely
300 filed, or if the evidentiary support suggests that restoration
301 of rights is not appropriate, the court shall set the matter for
302 hearing. The hearing shall be conducted as set forth in s.
303 744.1095. The court, at the hearing, shall consider all reports
304 and testimony relevant to the person's decisionmaking abilities
305 at the hearing, including, but not limited to, the person's
306 current individual family plan or individual support plan, the
307 individual education plan, and other professional reports that
308 document the condition and needs of the person.

309 (d) Notice of the hearing and copies of the objections
310 shall be served upon the person with a developmental disability,
311 the attorney for the person with a developmental disability, the
312 guardian advocate, the attorney for the guardian advocate, the
313 next of kin of the person with a developmental disability, and
314 any other interested person as directed by the court.

315 (e) If no objections are filed and the court is satisfied
316 with the evidentiary support for restoration, the court shall
317 enter an order of restoration of rights which were delegated to
318 a guardian advocate and which the person with a developmental
319 disability may now exercise.

320 (f) At the conclusion of a hearing, the court shall enter
321 an order denying the suggestion or restoring all or some of the
322 rights that were delegated to the guardian advocate. If only
323 some rights are restored to the person with a developmental
324 disability, the court shall enter amended letters of guardian
325 advocacy.

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

337 advocacy are issued. A copy of the reports shall be served upon
 338 the person with a developmental disability and the attorney for
 339 the person with a developmental disability.

340 Section 2. Paragraph (h) of subsection (3) of section
 341 393.13, Florida Statutes, is amended to read:

342 393.13 Treatment of persons with developmental
 343 disabilities.--

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

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

353 Section 3. This act shall take effect July 1, 2008.
 354