

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; removing a provision requiring the inclusion of  
20 certain information relating to the right to be  
21 represented by counsel in the notice of the filing of the  
22 petition; establishing a timeframe for appointment of  
23 counsel and modifying who may be appointed as counsel to a  
24 person with a developmental disability; providing  
25 conditions for the court to appoint attorneys; requiring  
26 court proceedings and orders to consider advance  
27 directives for health care and durable powers of attorney;  
28 requiring the court's order to provide the name and

29 reasons for the selection of the guardian advocate;  
 30 providing a process for restoration of rights for the  
 31 person with a developmental disability; providing for the  
 32 petitioner to submit evidentiary support to the court;  
 33 providing for a hearing if no evidentiary support is  
 34 available; amending s. 393.13, F.S.; conforming a cross-  
 35 reference; providing an effective date.

36

37 Be It Enacted by the Legislature of the State of Florida:

38

39 Section 1. Section 393.12, Florida Statutes, is amended to  
 40 read:

41 393.12 Capacity; appointment of guardian advocate.--

42 (1) CAPACITY.--

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

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

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

58 (a) ~~Conditions.~~ A circuit probate court may appoint a  
 59 guardian advocate, without an adjudication of incapacity, for a  
 60 person with developmental disabilities, if the person lacks the  
 61 decisionmaking ability capacity to do some, but not all, of the  
 62 decisionmaking tasks necessary to care for his or her person ~~or~~  
 63 ~~property, or estate~~ or if the person has voluntarily petitioned  
 64 for the appointment of a guardian advocate. Except as otherwise  
 65 specified, the proceeding shall be governed by the Florida Rules  
 66 of Probate Civil Procedure.

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

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

81 (a) ~~1.~~ State the name, age, and present address of the  
 82 petitioner and his or her relationship to the person with a  
 83 developmental disability ~~disabilities~~;

84 (b) ~~2.~~ State the name, age, county of residence, and

85 present address of the person with a developmental disability  
 86 ~~disabilities~~;

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

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

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

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

105 (4)(e) NOTICE.--

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

113 developmental disability pursuant to an advance directive under  
 114 chapter 765, any agent designated for the person with a  
 115 developmental disability under a durable power of attorney, and  
 116 such other persons as the court may direct. A copy of the  
 117 petition to appoint a guardian advocate ~~must~~ shall be served  
 118 with the notice.

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

124 ~~3-~~ ~~The notice shall state that the individual with~~  
 125 ~~developmental disabilities has the right to be represented by~~  
 126 ~~counsel of his or her own choice and that if the individual~~  
 127 ~~cannot afford an attorney, the court shall appoint one.~~

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

134 (a) If the court appoints the attorney:

135 1. The court shall appoint a private attorney who shall be  
 136 selected from the attorney registry compiled pursuant to s.  
 137 27.40.

138 2. The attorney must have completed a minimum of 8 hours  
 139 of education in guardianship. The court may waive this  
 140 requirement for an attorney who has served as a court-appointed

141 attorney in guardian advocate proceedings or as an attorney of  
 142 record for guardian advocates for at least 3 years.

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

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

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

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

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

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

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

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

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

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

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

197 provides an alternative to the appointment of a guardian  
198 advocate which will sufficiently address the needs of the person  
199 with a developmental disability.

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

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

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



225 power of attorney is invalid or there is an abuse by the agent  
226 of the powers granted.

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

236 ~~(a)1-~~ The nature and scope of the person's lack of  
237 decisionmaking ability incapacity;

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

242 ~~(c)3-~~ The specific legal disabilities to which the person  
243 with developmental disability disabilities is subject; and

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

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

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

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

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

267        (12) SUGGESTION OF RESTORATION OF RIGHTS.--Any interested  
 268 person, including the person with a developmental disability,  
 269 may file a suggestion of restoration of rights with the court in  
 270 which the guardian advocacy is pending. The suggestion must  
 271 state that the person with a developmental disability is  
 272 currently capable of exercising some or all of the rights that  
 273 were delegated to the guardian advocate and provide evidentiary  
 274 support for the filing of the suggestion. Evidentiary support  
 275 includes, but is not limited to, a signed statement from a  
 276 medical, psychological, or psychiatric practitioner by whom the  
 277 person with a developmental disability was evaluated and which  
 278 supports the suggestion for the restoration. If the petitioner  
 279 is unable to provide evidentiary support due to the lack of  
 280 access to such information or reports, the petitioner may state

281 a good faith basis for the suggestion for the restoration of  
282 rights without attaching evidentiary support. The court shall  
283 immediately set a hearing if no evidentiary support is attached  
284 to inquire of the petitioner and guardian advocate as to the  
285 reason and enter such orders as are appropriate to secure the  
286 required documents. The person with a disability and the  
287 person's attorney shall be provided notice of the hearing.

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

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

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

309 individual education plan, and other professional reports that  
310 document the condition and needs of the person.

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

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

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

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

337 must file the amended plan or final accounting within 60 days  
338 after the order restoring rights and amended letters of guardian  
339 advocacy are issued. A copy of the reports shall be served upon  
340 the person with a developmental disability and the attorney for  
341 the person with a developmental disability.

342 Section 2. Paragraph (h) of subsection (3) of section  
343 393.13, Florida Statutes, is amended to read:

344 393.13 Treatment of persons with developmental  
345 disabilities.--

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

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

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

356