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2008 Legislature

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

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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

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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

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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, a health care surrogate designated pursuant to an advance
 110 directive under chapter 765, an agent under a durable power of
 111 attorney, and such other persons as the court may direct. A copy
 112 of the petition to appoint a guardian advocate must shall be

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113 served with the notice.

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

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

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

130 (a) The court shall initially appoint a private attorney
 131 who shall be selected from the attorney registry compiled
 132 pursuant to s. 27.40. Such attorney must have completed a
 133 minimum of 8 hours of education in guardianship. The court may
 134 waive this requirement for an attorney who has served as a
 135 court-appointed attorney in guardian advocate proceedings or as
 136 an attorney of record for guardian advocates for at least 3
 137 years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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 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

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

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281 required documents. The person with a disability and the
 282 person's attorney shall be provided notice of the hearing.

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

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

295 (c) Any objections to the suggestion must be filed within
 296 20 days after service of the notice. If an objection is timely
 297 filed, or if the evidentiary support suggests that restoration
 298 of rights is not appropriate, the court shall set the matter for
 299 hearing. The hearing shall be conducted as set forth in s.
 300 744.1095. The court, at the hearing, shall consider all reports
 301 and testimony relevant to the person's decisionmaking abilities
 302 at the hearing, including, but not limited to, the person's
 303 current individual family plan or individual support plan, the
 304 individual education plan, and other professional reports that
 305 document the condition and needs of the person.

306 (d) Notice of the hearing and copies of the objections
 307 shall be served upon the person with a developmental disability,
 308 the attorney for the person with a developmental disability, the

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309 guardian advocate, the attorney for the guardian advocate, the
310 next of kin of the person with a developmental disability, and
311 any other interested person as directed by the court.

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

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

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

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337 Section 2. Paragraph (h) of subsection (3) of section
338 393.13, Florida Statutes, is amended to read:

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

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

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

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