

## Council Substitute for House Bill No. 739

An act relating to guardian advocates for persons with developmental disabilities; amending s. 393.12, F.S.; requiring the court to conduct determination of incapacity of persons with developmental disabilities and appointment of guardian advocates in separate proceedings; revising conditions relating to venue for appointment of guardian advocates; providing that the guardian advocate need not be represented by an attorney unless required by the court or the guardian advocate is delegated certain rights regarding property; limiting applicability to certain proceedings relating to appointment and supervision of guardian advocates; requiring the petition to include the relationship of the proposed guardian advocate to certain providers; modifying the persons to whom a notice of the filing of the petition must be given to include next of kin, the health care surrogate designated to execute an advance directive, and the agent under durable power of attorney; establishing a timeframe for appointment of counsel and modifying who may be appointed as counsel to a person with a developmental disability; providing conditions for the court to appoint attorneys; requiring court proceedings and orders to consider advance directives for health care and durable powers of attorney; requiring the court's order to provide the name and reasons for the selection of the guardian advocate; providing a process for restoration of rights for the person with a developmental disability; providing for the petitioner to submit evidentiary support to the court; providing for a hearing if no evidentiary support is available; amending s. 393.13, F.S.; conforming a cross-reference; providing an effective date.

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

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

393.12 Capacity; appointment of guardian advocate.—

(1) CAPACITY.—

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

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

## (2) APPOINTMENT OF A GUARDIAN ADVOCATE.—

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

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

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

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

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

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

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

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

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

(4)(c) NOTICE.—

(a)1. Notice of the filing of the petition must shall be given to the person with a developmental disability, individual and his or her parent or parents. ~~The notice shall be given both~~ verbally and in writing in the language of the

person and in English. Notice ~~must shall~~ also be given to the next of kin of the person with a developmental disability as defined in chapter 744, a health care surrogate designated pursuant to an advance directive under chapter 765, an agent under a durable power of attorney, and such other persons as the court may direct. A copy of the petition to appoint a guardian advocate ~~must shall~~ be served with the notice.

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

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

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

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

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

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

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

(6)(e) HEARING.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(12) SUGGESTION OF RESTORATION OF RIGHTS.—Any interested person, including the person with a developmental disability, may file a

suggestion of restoration of rights with the court in which the guardian advocacy is pending. The suggestion must state that the person with a developmental disability is currently capable of exercising some or all of the rights that were delegated to the guardian advocate and provide evidentiary support for the filing of the suggestion. Evidentiary support includes, but is not limited to, a signed statement from a medical, psychological, or psychiatric practitioner by whom the person with a developmental disability was evaluated and which supports the suggestion for the restoration. If the petitioner is unable to provide evidentiary support due to the lack of access to such information or reports, the petitioner may state a good faith basis for the suggestion for the restoration of rights without attaching evidentiary support. The court shall immediately set a hearing if no evidentiary support is attached to inquire of the petitioner and guardian advocate as to the reason and enter such orders as are appropriate to secure the required documents. The person with a disability and the person's attorney shall be provided notice of the hearing.

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

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

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

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

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

(f) At the conclusion of a hearing, the court shall enter an order denying the suggestion or restoring all or some of the rights that were delegated to the guardian advocate. If only some rights are restored to the person with

a developmental disability, the court shall enter amended letters of guardian advocacy.

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

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

393.13 Treatment of persons with developmental disabilities.—

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

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

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

Approved by the Governor June 10, 2008.

Filed in Office Secretary of State June 10, 2008.