

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

BILL: SB 688

INTRODUCER: Senator Crist

SUBJECT: Guardian Advocates for Persons with Developmental Disabilities

DATE: February 15, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ray	Jameson	CF	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	HA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 688 significantly amends ss. 393.12 and 13, F.S., relating to guardian advocates. The bill provides that:

- An individual being considered for selection as a guardian advocate need not be represented by an attorney unless required by the court;
- The court must give appointment preference to a health care surrogate, if available, and must otherwise choose a guardian advocate from a list of specified individuals;
- Notice of the petition must be provided to every potential guardian advocate;
- If an attorney must be appointed by the court, then the appointed attorney must meet certain specified requirements; and
- The circuit court is required to name the appointed guardian advocate in the order.

The bill also revises current petition and notice requirements related to the appointment of a guardian advocate.

II. This bill substantially amends, ss. 393.12 and 393.13, F.S. Present Situation:

Many individuals with developmental disabilities are able to manage their own personal and financial affairs without the intervention of a guardian. Many of those individuals with developmental disabilities who may need assistance have informal decision-making support from family and friends.¹

¹ Florida Developmental Disabilities Council Website: <http://fddc.org/PPA/IB%20Guardianship.asp>.

Appointment of a Guardian Advocate

For those individuals who require the assistance of a guardian but are not incapacitated, s. 393.12, F.S., provides for the appointment of a guardian advocate. A guardian advocate may be appointed by a probate court for an individual with developmental disabilities without a court finding that the person lacks legal capacity.² A person with a developmental disability retains all legal rights except for those rights that have been granted to the guardian advocate.³ It is unclear whether or how an individual's rights are handled if the guardian advocate dies or becomes unable to serve.

A petition to appoint a guardian advocate can be executed by any adult resident of Florida. Each petition contains information on the petitioner, the developmentally disabled person who is the subject of the petition, the proposed guardian advocate, and the need for a guardian advocate.⁴ Notice of a petition to appoint a guardian advocate is currently provided to the person with the developmental disability, his or her parent(s) and anyone else upon the direction of the court.⁵

Every person with a developmental disability, who is the subject of a petition to appoint a guardian advocate, must have legal representation. If the person cannot afford an attorney, the court is required to appoint one.⁶ According to the Agency for Person with Disabilities (APD), the developmentally disabled person may currently elect to receive representation from the same attorney who represents the guardian advocate, or may choose separate representation.

The Florida Probate Rules of Court require guardians to have legal representation.⁷ It is not clear whether or not guardian advocates are required by court rule to be represented by counsel. In some jurisdictions, an attorney is only required to represent the guardian advocate during the appointment process and is not required thereafter. In other jurisdictions, the courts require representation of the guardian advocate throughout the guardianship. However, ch. 393, F.S., is silent regarding legal counsel for the guardian advocate.

Section 393.12, F.S., does not specify who a court must name as a guardian advocate. According to s. 744.312, F.S., the court may appoint any qualified person to act as a guardian. Preference is shown to anyone who:⁸

- Is related by blood or marriage;
- Has educational, professional, or business experience relevant to the nature of the services sought to be provided;
- Has the capacity to manage the financial resources involved; or
- Has the ability to meet the requirements of the law and the unique needs of the individual case.

² Section 393.12(2)(a), F.S.

³ Section 393.12(2)(f), F.S.

⁴ Section 393.12(2)(g), F.S.

⁵ Section 393.12(2)(c), F.S.

⁶ Section 393.12(2)(d), F.S.

⁷ Rule 5.030.(a), Florida Probate Rules

⁸ Section 744.312(2), F.S.

The court is also required to consider the wishes expressed by an incapacitated person as to who shall be appointed guardian.⁹

Powers and Duties of a Guardian Advocate

Section 393.12(2)(h), F.S., provides that the powers, duties, and responsibilities are the same as the powers and duties for guardians under ch. 744, F.S., or those defined by court order under s. 393.12, F.S. Among the enumerated responsibilities is the guardian's responsibility to file annual accountings with the court. The annual accounting requirements include a full and correct account of the receipts and disbursements of all of the developmentally disabled individual's property controlled by the guardian and a statement of the disabled individual's property on hand at the end of the accounting period and a copy of the year-end statement of all of the disabled individual's cash accounts.¹⁰ It appears that the court could waive the accounting requirements for guardian advocates under s. 393.12, F.S.

Section 393.12(2)(h), F.S., allows the court to waive the annual financial reporting requirement if the developmentally disabled person's only income is made up of governmental benefits and the guardian advocate is the representative payee.¹¹ This provision is duplicated in ch. 744, F.S.

III. Effect of Proposed Changes:

Legal Representation

The bill provides that a guardian advocate is not required to have legal representation. Florida Probate Rule 5.030(a) requires that every guardian to be represented by an attorney admitted to practice in Florida. This provision will make it clear that a guardian advocate is not the same as a guardian at least as it relates to the requirements for legal representation.

According to Article V, Section 2(a) of the Florida Constitution, it is the responsibility of the Supreme Court to adopt rules for practice and procedure in all courts. The Legislature is permitted to repeal these rules with a two-thirds vote of each chamber of the Legislature. While this bill does not repeal a court rule, the bill does differentiate guardian advocates from guardians thereby clearly taking guardian advocates out of the requirement for legal representation that may currently be assumed to apply to guardian advocates under the Probate Rule.

Article II, Section 3, of the State Constitution provides that no person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided.¹²

Currently law provides that every person with a developmental disability who is subject of a petition to appoint a guardian advocate must be represented by counsel.¹³ The bill modifies this provision to specify that if the court appoints the attorney, rather than the person choosing their own counsel, then the court must appoint the office of criminal conflict and civil regional counsel or a private attorney. The appointed attorney must have completed a minimum of eight

⁹ Section 744.312(3), F.S.

¹⁰ Section 744.3678, F.S.

¹¹ The term "representative payee" as defined in s. 402.33(1)(e), F.S., means an individual or entity which acts on behalf of a client as the receiver of any or all benefits owing to the client.

¹² See *In re Commitment: John R. Cartwright*, 870 So.2d 152, (Fla. 2d DCA 2004)

¹³ Section 393.12(2)(d), F.S.

hours of education in guardianship. The education requirement may be waived for an attorney who as served as a court-appointed attorney in guardian advocate proceedings or as an attorney of record for guardian advocates for at least three years.

The bill prohibits an attorney representing a person with a developmental disability from also serving as the guardian advocate or the counsel for the person petitioning for the appointment of a guardian advocate.

Appointment of a Guardian Advocate

The bill requires that the court give preference to a health care surrogate when selecting a guardian advocate, if one has been designated by the developmentally disabled person who is the subject of the petition. If a health care surrogate has not been designated, then the court must select a guardian advocate from a specified list of individuals and entities. This list includes:

- The person's spouse;
- An adult child of the person;
- A parent of the person;
- An adult sibling of the person;
- A grandparent of the person;
- An adult next of kin of the person, who has an active relationship with the person;
- An adult friend of the person; or
- A person or corporation qualified to serve as a guardian.

The bill requires that the name, relationship, and address of each person listed by the court as potential guardian advocates be included within the petition.

The bill requires that notice of the filing of the petition be given to the person with a developmental disability and each person listed by the court as a potential guardian advocate.

Powers and Duties of a Guardian Advocate

Section 393.12(2)(h), F.S., allows the court to waive the annual financial reporting requirement if the developmentally disabled person's only income is made up of governmental benefits and the guardian advocate is the representative payee. The bill removes this provision, however, this exception is specified in ch. 744, F.S. which is cross-referenced in s. 393.12(2)(h), F.S.

Therefore, this should not change current law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

C. Government Sector Impact:

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.