

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 739 Guardian Advocates for Persons with Developmental Disabilities
SPONSOR(S): Healthcare Council; Ambler and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 688

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Healthy Families</u>	<u>9 Y, 0 N</u>	<u>Schoolfield</u>	<u>Schoolfield</u>
2) <u>Healthcare Council</u>	<u>18 Y, 0 N, As CS</u>	<u>Schoolfield/Massengale</u>	<u>Gormley</u>
3) <u>Policy & Budget Council</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

House Bill 739 provides substantive changes to section 393.12 and 393.13, F.S., relating to the appointment of guardian advocates for persons with developmental disabilities. This analysis is written to reflect the council substitute. The bill provides that:

- The court may not appoint a guardian advocate if there are competing petitions for appointment as guardian advocate.
- The petition to the court must detail the relationship of the proposed guardian advocate to service providers.
- Guardian advocates are not required to be represented by counsel unless required by the court or if they are delegated rights to manage property.
- Court appointed attorneys for the person with a developmental disability are to come from the office of criminal conflict and civil regional counsel or private attorneys in accordance with s. 27.40, F.S.
- Court appointed attorneys must complete specified training unless waived by the court.
- Attorneys may not represent both the individual with a developmental disability and the guardian advocate or the person who files the petition.
- The court must determine if a valid advance directive or durable power of attorney exist for the person who is the subject of a petition to appoint a guardian advocate. The court must also determine the sufficiency of these instruments for the person with a developmental disability. If a guardian advocate is appointed, the court must include in the letter of appointment how the guardian advocate will affect any advance directive or durable power of attorney.
- A person may file a petition with the court for suggestion of restoration of rights for the person with a developmental disability. The bill provides the process for considering a suggestion for restoration of rights.
- The right of an individual with a developmental disability to consent to or refuse treatment is subject to the powers given to the guardian advocate or guardian.

The bill makes technical improvements in wording to the statute and provides an effective date of July 1, 2008.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empowers Families: This bill empowers families by assisting them in caring for relatives through improvements in the guardian advocacy process of probate courts.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Some individuals with developmental disabilities¹ may need assistance in handling their personal or financial affairs. A form of guardianship assistance called the guardian advocate is available to persons with developmental disabilities in accordance with section 393.12, F.S. A person for whom a guardian advocate has been appointed retains all legal rights except those which have been specifically granted to the guardian advocate.² The guardian advocate is considered by some advocates for persons with developmental disabilities to be preferable to other forms of guardianship. Some of the reasons for this preference are that this process does not require the adjudication of incapacity of the individual³ and the associated cost of the examining committee for determining capacity of the individual.⁴

Powers and Duties of the Guardian Advocate

The guardian advocate appointed under section 393.12, F.S., has the same powers and duties as a guardian appointed under chapter 744, F.S. The guardian advocate duties may be further defined by the court order. Guardian duties to the court include but are not limited to filing annual reports, guardianship plans and an annual accounting of the ward's property over which the guardian has control.

Appointment Process: The guardian advocate may be appointed by the probate (circuit) court in response to a petition for appointment by any adult resident of Florida. The petition must include specific information about the person with a developmental disability who is the subject of the petition including factual information supporting why a guardian advocate is needed. The petition must also include the exact areas a person lacks capacity to make informed decisions and the proposed person who will serve as guardian advocate. A notice of the petition must be provided to the individual who is the subject of the petition, his or her parents and others as directed by the court.

Section 393.12, F.S., states that a guardian advocate may be a person or corporation qualified to act as a guardian. Section 744.312, F.S. gives additional direction and provides a list of preferences for appointment as follows:

- Is related by blood or marriage to the ward;
- 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.

¹ Section. 393.063 (9) Developmental Disability means a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18 and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

² Section 393.12(2)(g)

³ Section 393.12(2)(a)

⁴ Planning Ahead, A Handbook for Parents, Family Members and Guardians of Individuals with Developmental Disabilities, Florida Developmental Disabilities Council, Inc.

Florida Statute requires that a person who is the subject of a petition for a guardian advocate shall have legal representation.⁵ If they cannot afford to hire an attorney then the court will appoint an attorney for them.

The Florida Probate rules require that every guardian shall be represented by an attorney.⁶ The guardian advocate must hire an attorney or seek pro bono services for legal representation.

Effect of Proposed Changes in the Bill

This bill directs the court to not appoint a guardian advocate if there are competing petitions for appointment. In this case the petitions would be heard under chapter 744, F.S., which relates to guardianship. When the court appoints a guardian advocate it must be in accordance with s.744.312, F.S.

The bill requires that the petition for a guardian advocate must include the relationship the proposed guardian advocate has or had with a provider of health care, residential or other services. The effect of this provision is to disclose all information in the petition so that it can be considered in the appointment process.

The current law requires the notice of filing a petition to be delivered to the person with a developmental disability and his or her parents. The bill deletes the reference to parents and requires the notice to be delivered to the next of kin, any surrogate resulting from an advance directive or agent under a durable power of attorney. The effect of this change will inform the closest family members and others who may have legal authority to make decisions on behalf of the person.

The bill also adds language which provides that a guardian advocate need not be represented by an attorney unless specifically required by the court or if the guardian advocate is delegated any rights regarding property other than acting as the representative payee. In some instances, this could eliminate the cost of an attorney to the guardian advocate and/or their family.

The bill provides that the court appointed attorney for the person with a developmental disability must be made within 3 days after the petition is filed with the court. The court appointed attorney shall come from the office of criminal conflict and civil regional counsel or a private attorney in accordance with section 27.511(6), F.S. This office was created by the Legislature in each of the five district courts of appeal in 2007⁷ to provide representation to persons who require court appointed counsel. The bill also requires that attorneys complete an 8 hour course in guardianship unless waived by the court for attorneys with specified experience in this area.

Current law allows the person to select their own attorney in lieu of a court appointed counsel. The bill prohibits attorneys who represent the person from serving as the guardian advocate or representing the guardian advocate or person who files the petition. This would eliminate potential conflicts of interest in legal representation.

The bill requires the court to determine if valid advance directives under chapter 765, F.S., or durable power of attorney under chapter 709, F.S., exists for the person who is the subject of the petition for guardian advocate. The court must determine if the advance directive and or power of attorney are sufficient to address the person's needs. If these instruments are sufficient, the court must not appoint a guardian advocate. The bill also provides a process for contesting an advance directive or durable power of attorney as being invalid or insufficient to meet the needs of the person with a developmental disability.

⁵ Section 393.12(2)(d)

⁶ Rule 5.030. Attorneys, Florida Probate Rules 2008 edition.

⁷ Committee Substitute for Senate Bill 1088

If the court appoints a guardian advocate and an advance directive or durable power of attorney exists then the letter of guardian advocacy must specify what authority, if any, the guardian advocate will exercise over the health care surrogate or what powers, if any, of the agent for durable power of attorney are suspended.

The bill adds a new subsection titled Suggestion of Restoration, which provides a process for the court to consider petitions which suggest restoring some or all of the rights of the person with the developmental disability that have been delegated to the guardian advocate. This subsection provides the process for petitioning the court, examination of the person, providing notice to appropriate parties, conducting the hearing and making a final determination and issuing a court order in regards to the suggestion of restoration (of rights).

This bill amends s.393.13, F.S., also known as the Bill of Rights for Persons with Developmental Disabilities. The bill provides that a person's right to consent to or refuse treatment is subject to the powers appointed to a guardian advocate or guardian. The effect of this change seems to clarify the role of the guardian advocate in decisions regarding treatment.

C. SECTION DIRECTORY:

Section 1. Amends s. 393.12, F.S., relating to appointment of guardian advocates

Section 2. Amends s. 393.13, F.S., relating to rights of persons with developmental disabilities to refuse treatment subject to powers of guardian advocates.

Section 3. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The elimination of the requirement for attorney representation to the guardian advocate would eliminate attorney fees of approximately \$2,000 or more in uncontested guardianship proceedings.⁸

D. FISCAL COMMENTS:

None

⁸ Phone conversation with Twila Sketchley, Guardianship and Elder Law Attorney

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

D. STATEMENT OF THE SPONSOR

The issues addressed herein will be addressed in the amendment being offered at the Committee on Healthy Families hearing.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 1, 2008, the Healthcare Council adopted a substitute strike all amendment by the bill sponsor. This analysis is written to incorporate the strike all amendment. See the Effect of Proposed Changes for detail of the strike all amendment.