

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

This bill gives direction to the court as to who should be appointed a guardian advocate. If a healthcare surrogate currently exists, this person should be given first preference. Otherwise the following list in preferential order must be considered if the person is willing and able to perform as a guardian advocate:

- 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.
- a natural person or corporation qualified to serve as a guardian.

The courts use of the above list of people in preferential order to select the guardian advocate places primary weight on the relationship to the individual with a developmental disability as the key qualification to serve as guardian advocate. This may present a problem where one or more of these relationships are not strong or healthy.

The bill requires that the petition for a guardian advocate include the names, addresses and relationships of the individuals specified in the above list. The petition must also be delivered to the persons named in the list. The bill deletes the requirement for the name of the proposed guardian advocate to be included in the petition. The effect of this deletion is that the individual who is the subject of guardianship will not know who specifically is being considered as his or her guardian advocate until the court hearing is concluded.

The bill adds language which provides that a guardian advocate need not be represented by an attorney unless specifically required by the court. This could eliminate the cost of an attorney to the guardian advocate.

The bill provides that the court appointed attorney for a person with a developmental disability 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.

The bill prohibits attorneys from representing the guardian advocate if they are already representing the individual with a developmental disability. This would eliminate any potential conflict in legal representation.

⁵ Section 393.12(2)(d)

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

⁷ Committee Substitute for Senate Bill 1088

The bill deletes a provision in s.393.12 (2)(h),F.S. which permits the guardian advocate to not file an annual accounting of the ward's property if the person only receives social security and the guardian is the representative payee. However, the section deleted by this bill still exists in section 744.3678(5). Therefore, the requirements of the law regarding this annual accounting of the ward's property have not effectively changed.

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

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

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

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:

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 201-206 delete a provision which remains elsewhere in statute. Section 744.3678(5) contains essentially the same provision of law. It is not clear if this bill is intending to eliminate a duplicate provision in the law or to delete this provision of the statute.

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 March 4, 2008, the Committee on Healthy Families adopted one strike all amendment by the bill sponsor that does the following:

- Directs the court to not appoint a guardian advocate when there are competing petitions for appointment of a guardian advocate.
- Removes the language giving ranked preference for appointment of the guardian advocate to certain designated relationships to the person with a developmental disability.
- Requires that the selection of a guardian advocate be in accordance with s.744.312, F.S.
- Reverts to original statute language which requires the petition to include the name of the proposed guardian advocate.
- Requires the notice of the petition to be given to the person's next of kin.
- Requires the court as part of the proceeding to determine whether advance directives for health care or a durable power of attorney exists for the person who is subject of the petition. If these instruments exist, the court must specify in the order appointing a guardian advocate what authority the guardian advocate will have over the health care surrogate and attorney in fact for a durable power of attorney.
- Requires the guardian advocate to file an annual accounting of the ward's property in accordance with s.744.3678,F.S. notwithstanding the exception language in this statute.