HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 73 Supported Decisionmaking Authority
SPONSOR(S): Tant and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 446

FINAL HOUSE FLOOR ACTION: 117 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

HB 73 passed the House on February 15, 2024, and subsequently passed the Senate on March 4, 2024.

Developmental disabilities such as autism or an intellectual disability can affect an individual's ability to make decisions, which then can put the individual at risk. However, these same individuals with developmental disabilities, with support, can often live independently, make decisions, or engage in person-centered planning.

HB 73 establishes a supportive decisionmaking (SDM) agreement as a type of power of attorney. The agreement authorizes a supporter to assist with communication and decisionmaking, but the agreement cannot bind the individual with disabilities to any action of the supporter. The bill also adds the agreement to the list of authorized documents which may be used for parental involvement in educational decisionmaking.

HB 73 requires a circuit court to consider the specific needs and abilities of an individual with disabilities when determining whether to approve a request for a guardian advocate. When issuing a guardian advocate order, the court must identify the alternatives considered and articulate why those other alternatives were deemed not sufficient.

For a petition to determine incapacity, the bill requires the court to address whether an alleged incapacitated individual needs assistance to exercise rights, and if so, what level of assistance the individual requires. An examining committee on incapacity must allow another person to help an alleged incapacitated individual communicate when requested by that individual's court-appointed counsel.

HB 73 has no have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 14, 2024, ch. 2024-242. L.O.F., and will become effective on July 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Developmental Disabilities

Florida law defines a developmental disability as a disorder or syndrome that is attributable to an intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, 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.[1] Nationally, about one in six children have one or more developmental disabilities or other developmental delays.[2]

Developmental disabilities such as autism and intellectual disability can affect an individual's ability to make decisions to the extent that he or she is unable to conduct personal business or will otherwise put himself or herself at risk. However, many individuals with developmental disabilities, with support, can live independently, make decisions, and engage in person-centered planning.[3] Each situation of an individual with developmental disabilities is unique, as each individual's abilities and the resources available to support the individual in the community are different.

The range of decisionmaking supports available for individuals with developmental disabilities is similarly broad, from minimal supports to plenary guardianship. Guardianship once was considered the only option to assist those individuals who were able to make at least some informed choices for their own welfare. State law now provides individuals with limitations on decisionmaking capabilities a variety of alternatives based on individual circumstances and abilities, as described below.[4]

Guardianship

When an individual is unable to make legal decisions regarding his or her person or property, a court may adjudicate that individual incapacitated and appoint a guardian to oversee that individual's person, property, or both.

Through the guardian's appointment, the court transfers a ward's civil and/or legal rights to the guardian so that the guardian may make decisions on the ward's behalf.[5] Guardianship is considered the most restrictive form of protection and supervision as it inherently entails the removal of a person's rights.[6] The specific rights that are transferred to the guardian are determined by the court and are highly dependent on the facts of each specific situation with the goal of preserving a person's rights whenever possible.

Removal or the restriction of an individual's rights may occur because of a concern for an individual's safety and well-being; an inability of the individual to communicate his or her needs successfully to a caregiver, health care provider, or other service provider; an inability to manage his or her money or property; or an inability to understand the supports necessary to successfully live independently.[7]

---

[1] S. 393.063(9), F.S.
[2] Centers for Disease Control, *Developmental Disabilities,* available at https://www.cdc.gov/ncbddd/developmentaldisabilities/index.html (last visited March 14, 2024).
[3] Florida Developmental Disabilities Council, Inc., *Developing Abilities and Restoring Rights: A Legal Manual for Legal Professional,* (2016), available at https://supportingchoices.org/wp-content/uploads/2017/07/OPG-1up-Manuals.pdf (last visited March 18, 2024).
[4] *See* generally Part V, Ch. 744, F.S.
[5] *Guardianship Improvement Task Force. Final Report: January 2022,* available at https://www.guardianshipimprovementtaskforce.com/report/ (last visited March 25, 2024).
[6] *Id.*
[7] Disability Rights Florida and Florida Center for Inclusive Communities, *Exploring my Decision-Making Options*, pp. 28-29, available at https://www.stetson.edu/law/wings/media/decision-making-options-toolkit.pdf (last visited March 18, 2024).

The guardianship process is a legal action which occurs in Florida's circuit court system under ch. 744, F.S. Following a statutory process which includes the review of a petition for guardianship or a petition to determine an individual's incapacity and an examination, the court may appoint a natural person or an entity to exercise the legal rights of another individual who does not have the ability to manage those rights and responsibilities; meet his or her own basic health, safety and self-care needs; or make informed decisions.

For Fiscal Year 2022-2023, circuit courts received 9,398 guardianship filings statewide. Of those filed, the court disposed of or acted upon 8,673. The majority of the petitions were disposed without a hearing (6,445), followed by disposed with a hearing (1,157), and then disposed by either a non-jury (879) or other means (192). An additional 87,778 guardianship cases were also re-opened[8] during this time period.[9] The state's circuit courts received 6,364 filings listed as "other social" of which 6,078 were disposed of, the majority of the cases by a judge without a hearing (4,716).[10]

Determination of Incapacity

Under Florida law, an individual deemed to be "incapacitated" means an individual who has been judicially determined to lack the capacity or ability to manage at least some of his or her property or to meet his or her own essential health and safety requirements.[11] To begin the determination process, an adult must file a petition with the appropriate circuit court. The petition must be properly noticed and served to the attorney of the alleged incapacitated individual and any next of kin listed in the petition.

The court must appoint an attorney for each alleged incapacitated individual in the petition, but each alleged incapacitated individual has the right to substitute his or her own counsel. Only attorneys specially trained in guardianship may serve in this capacity. The court shall also appoint an examining committee within five days after receipt of the petition. State law establishes the committee's membership and the training requirements. Each committee member must examine the alleged incapacitated individual, including conducting a physical and mental health examination and a functional assessment and making a written report to the committee.[12] The committee must serve the finished reports within three days to the petitioner and to the alleged incapacitated individual and the individual's attorney.

If a majority of the examining committee concludes the individual is not incapacitated in any respect, the court must dismiss the petition. Otherwise, an adjudicatory hearing must be held within 10 days after receipt of the last examining committee report, but not longer than 30 days.[13]

After the hearing, the court's findings of fact must be based on the legal standing of "clear and convincing evidence."[14] The court must consider the individual's unique needs and abilities and may only remove and delegate to a guardian those particular rights the court finds the individual does not have the capacity to exercise.[15] As part of its order, the court must also consider whether there is an alternative, less restrictive means to guardianship that will address the individual's situation. If there is not, the court may be required to appoint a guardian to protect the individual and to exercise the

[8] A re-opened case is a case that had been previously reported as disposed, but is resubmitted to the court. *See* Florida Office of the State Courts Administrator, *Glossary,* available at https://www.flcourts.gov/content/download/1334603/file/2022-23-srg-chapter-10-glossary-20231219.pdf (last visited March 21, 2024).
[9] Office of the State Courts Administrator, Summary Reporting System, *Probate Filing Report (generated for the period of July 1, 2023 – June 30, 2023 on March 21, 2024)* reporting tool available at: https://trialstats.flcourts.org/ (last visited March 21, 2024).
[10] *Id.*
[11] S.744.102(12), F.S.
[12] S.744.331(3)(a) – (g), F.S.
[13] An adjudicatory hearing is a proceeding or final action before an administrative or state agency in which the rights and duties of particular persons are determined after the parties have been given notice and an opportunity to share facts and be heard. *See Black's Law Dictionary, West Group, 6th Edition, 1990, Bryan A. Garner, ed.*
[14] "Clear and convincing" is a standard which is that proof which results in reasonable certainty of the truth of the ultimate fact in controversy. It is also that level of proof which requires more than a preponderance of the evidence but less than preponderance of doubt. *See Black's Law Dictionary, definition of "Clear and convincing", West Group, 6th edition;1990, Bryan A. Garner, ed*.
[15] S. 744.331(6), F.S.

individual's rights.[16] The individual retains all rights not delegated to the guardian.[17] Once a guardian has been designated, the individual becomes known as a ward.

Types of Guardianship

Based on the unique needs and abilities of an incapacitated individual, the court may order different types of guardianships, which can be categorized by the subject of decisions (person or property) and the scope of authority (partial or full) delegated to the guardian.

Limited or Partial Guardianship

A limited or partial guardianship[18] is established when the court deems a ward incapable of making decisions in only specific areas of life, and the court has assigned a guardian authority to decide for the ward in those specific areas only. The court order must identify the legal authority granted to a guardian and any authority remaining with the ward.

Full or Plenary Guardianship

A full or plenary guardianship[19] full or plenary guardianship occurs when the court has found that a ward lacks capacity to make any legal decisions and authorizes the guardian to make all decisions for the ward.[20]

Guardian Over the Person

A guardian granted authority over the ward's "person" must consider the ward's unique needs and abilities and the expressed desires when making decisions that affect the ward. The guardian of a person can only exercise the personal rights that have been removed from the ward by the court and delegated to the guardian.[21]

[16] *Id.*
[17] S. 744.331(6)(b)(e), F.S.
[18] *See* S. 744.102(9)(a), F.S.: A "limited guardian" is a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of a limited guardian.
[19] *See* S. 744.102(9)(b), F.S.; "Plenary guardian" means a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property.
[20] Blanck, P, and Martinis, J, *"The right to make choices": The National Resource Center for Supported Decisionmaking*, Inclusion, 3, pgs. 24-33 (2015), available at; The Right to Make Choices: The National Resource Center for Supported Decision-Making | National Resource Center (supporteddecisionmaking.org) (last visited December 2, 2023).
[21] State of Florida, 12th Judicial Circuit Court, *About the Court, Probate and Guardianship, Guardianship Basics,* available at https://www.jud12.flcourts.org/About/Divisions/Probate-Guardianship/Guardianship-Basics (last visited March 21, 2024).

Specifically, the guardian must:

- Allow the ward contact with the ward's family and friends, unless the guardian believes the contact to be harmful;
- Not restrict the ward's physical liberty more than reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease;
- Assist the ward in developing or regaining capacity, when medically possible;
- Notify the court if the guardian believes the ward has regained capacity and that one or more rights that had been removed should be restored;
- Make provisions for medical, mental, rehabilitative, or personal care services, to the extent practicable;
- Acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making health care decisions for the ward;
- Evaluate the ward's medical and health care options, financial resources, and desires when making residential decisions that are best suited for the ward's current needs; and
- Advocate on the ward's behalf in institutional and other residential settings and regarding access to home and community based services.[22]

A professional guardian or a member of the guardian's staff must personally visit the ward at least once per calendar quarter to assess the ward's appearance and condition, living situation, the need for any additional services, and to communicate with the ward's family and friends.[23]

A guardian of the person is required to file an initial plan and an annual plan with the court. The initial plan and annual plans must be based on recommendations from the examining committee and the ward's physician and include:

- Description of how the guardian will ensure the ward's medical, mental, and personal care services in the upcoming year;
- Identification of the ward's services providers for the upcoming year,
- Recommendation for a residential setting best suited for the ward;
- Identification of any unmet treatment needs;
- Attestation the ward has been consulted and to furthest extent possible his or her wishes have been honored;
- Attestation the plan does not restrict the ward's physical liberty, unless reasonably necessary for physical or mental health reasons.[24]

The initial plan must be filed within 60 days after the letters of guardianship have been issued.[25]

Guardian Over Property

A guardian who has authority over a ward's property has specific responsibilities to protect and preserve the property and to invest it prudently.[26] The guardian must maintain accurate records of the administration of the property and follow the prudent person standard[27] in any dealings relating to the property.[28]

If authorized by the courts, the guardian may take possession of any of the ward's property, and the associated rents, income, issues, and profits and the payment of debts, taxes, claims, charges and

[22] S. 744.361(13), F.S.
[23] S. 744.361(14), F.S.
[24] S. 744.361(7), F.S., and *Supra,* note 22.
[25] S. 744.361(6), F.S., and *Supra,* note 22.
[26] S. 744.361(10), F.S.
[27] The "prudent person standard" is also known as the prudent investor rule holds that a fiduciary may only invest in securities that a reasonable person would purchase as evaluated from the perspective of probable income and probable safety, under the precedent set in *Harvard College & Massachusetts General Hospital v. Armory, 26 Mass. 446 (1830).*
[28] S. 744.361(11), F.S.

expenses related to that property.[29] A guardian of the property may not sell, transfer, mortgage, or donate any of the ward's property without the court's prior approval.[30]

A guardian of property must submit an initial inventory within 60 days after the court issues the letters of guardianship. The initial inventory report must include a list of the ward's known assets and property, the location of those assets and property, and any sources of income.[31] The guardian of property must also file an annual accounting report, which must include an accurate listing of all disbursements from the ward's accounts and properties from the previous year and a year-end statement from each of the ward's accounts where assets are held.[32] The guardian must maintain a receipt or canceled check or other proof of payment for each disbursement from the ward's accounts and maintain them for at least three years after the guardian's discharge.[33]

An annual auditing fee must be paid to the court when the annual report is filed. The amount of the auditing fee is established in statute and is based upon the value of the estate.[34]
The following chart details some of the guardian's powers and whether court approval is needed to exercise them:

Examples of Powers That May Be Exercised by a Guardian	
Upon Court Approval[35]	**Without Court Approval[36]**
• Enter into contracts that are appropriate for, and in the best interest of, the ward. • Perform, compromise, or refuse performance of a ward's existing contracts. • Alter the ward's property ownership interests, including selling, mortgaging, or leasing any real property (including the homestead), personal property, or any interest therein. • Borrow money to be repaid from the property of the ward or the ward's estate. • Renegotiate, extend, renew, or modify the terms of any obligation owing to the ward. • Prosecute or defend claims or proceedings in any jurisdiction for the protection of the ward's estate. • Exercise any option contained in any policy of insurance payable to the ward. • Make gifts of the ward's property to members of the ward's family in estate and income tax planning. • Pay reasonable funeral, interment, and grave marker expenses for the ward.	• Retain assets owned by the ward. • Receive assets from fiduciaries or other sources. • Insure the assets of the ward's estate against damage, loss, and liability. • Pay taxes and assessments on the ward's property. • Pay reasonable living expenses for the ward, taking into consideration the ward's current finances. • Pay incidental expenses in the administration of the ward's estate. • Prudently invest liquid assets belonging to the ward. • Sell or exercise stock subscription or conversion rights belonging to the ward. • Consent to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise of the ward. • Employ, pay, or reimburse persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties. • Consent on behalf of the ward to a sterilization or abortion procedure on the ward.[37]

Guardian Advocates

[29] S. 744.366(12), F.S.
[30] S. 744.441, F.S., and *Supra,* note 21.
[31] S. 744.362, F.S.
[32] S. 744.3678, F.S.
[33] S.744.3678(3), F.S.
[34] S.744.3678(4), F.S.
[35] S. 744.441, F.S.
[36] S. 744.444, F.S.
[37] S. 744.3215, F.S.

The court can appoint a guardian advocate to assist individuals with developmental disabilities with accessing services or making decisions in areas where the court may have restricted the individual's decisionmaking authority through a determination of incapacity or a separate determination that the individual was not able to manage a particular decision or activity in the individual's life without a finding of incapacity. The court may appoint a guardian advocate for an individual without an adjudication of incapacity if the individual lacks the decisionmaking ability to do some, but not all, tasks necessary for his or her person or property. An individual with developmental disabilities may also voluntarily request a guardian advocate and petition the court for an appointment.[38]

A guardian advocate has the same powers, duties, and responsibilities as a guardian, except for certain accounting requirements, for persons with developmental disabilities.[39]

[38] S. 393.12(2)(a), F.S.
[39] S. 393.12, F.S.

The appointment of a guardian advocate begins with a petition that:

- States the petitioner's name, age, present address, and relationship to the individual with a developmental disability;
- States the name, age, county of residence, and present address of the individual with a developmental disability;
- Includes reasons why the petitioner believes that the individual needs a guardian advocate and specifies the factual information on which such belief is based;
- Specifies the exact areas in which the individual lacks the ability 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;
- Specifies the legal disabilities to which he or she is subject;
- Describes, if appropriate, if authority is sought over any property of the individual, a description of that property and the reason why management or control of that property should be placed with a guardian advocate;
- States the name of the proposed guardian advocate, the relationship of the proposed guardian advocate to the individual with a developmental disability, the relationship of the proposed guardian advocate with the providers of health care services, residential services, or other services to the individual with developmental disabilities, and the reason why the proposed guardian advocate should be appointed;
- Identifies whether a willing and qualified guardian advocate cannot be located; and,
- States whether the petitioner has knowledge, information, or belief that the individual with a developmental disability has executed an advance directive or a durable power of attorney.[40]

Notice of a guardian advocate petition filing must be provided to the individual with the developmental disability, both verbally and in writing, in the individual's language choice and in English, to the individual with a disability's next of kin, and to any designated health care surrogate, attorney-in-fact, designated power of attorney or anyone else as the court may direct.[41] The notice must include the date of hearing and state that the purpose of the hearing is to inquire into the individual's capacity to exercise the rights enumerated in the petition.[42] Within three days after filing, the court must appoint an attorney to represent the individual with the developmental disability; however, substitution of a personal attorney is permitted.[43]

If the court finds the individual with a developmental disability requires the appointment of a guardian advocate, the order appointing the guardian advocate must contain findings of facts and conclusions of law:

- The nature and scope of the individual's inability to make decisions;
- The exact areas in which the individual lacks ability to make informed decisions about care and treatment services or to meet the essential requirements for the individual's physical health and safety;
- If any property of the individual is to be placed under the management or control of the guardian advocate, a description of that property, any limitations as to the extent of such management or control, and the reason why management or control by the guardian advocate of that property is in the best interest of the individual with disabilities;
- If the person has executed an advanced directive or durable power of attorney, a determination as to whether the documents sufficiently address the needs of the individual with disabilities and a finding that the advanced directive or durable power of attorney does not provide an alternative to the appointment of a guardian advocate that sufficiently addresses the needs of the individual with a developmental disability;
- If a durable power of attorney exists, the powers of the attorney-in-fact, if any, that are suspended and granted to the guardian advocate;

[40] S. 393.12(3)(a)-(f), F.S.
[41] S. 393.12(4)(a), F.S.
[42] S. 393.12(4)(b), F.S.
[43] S. 393.12(5), F.S.

- If an advance directive exists and the court determines that the appointment of a guardian advocate is necessary, the authority, if any, the guardian advocate shall exercise over the health care surrogate;
- The specific legal disabilities to which the individual with a developmental disability is subject;
- The name of the person selected as guardian advocate; and
- The powers, duties, and responsibilities of the guardian advocate, including bonding of the guardian advocate as provided by law.[44]

Guardian as a Fiduciary

A guardian has a legal and fiduciary relationship with the ward.[45] A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of the another upon matters within the scope of that relationship.[46] The guardian, as a fiduciary, must:

- Act within the scope of the authority granted by the court and as provided by law;
- Act in good faith;
- Act in a manner in the ward's best interests under the circumstances; and
- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.[47]

Additionally, the fiduciary relationship between the guardian and the ward may not be used for the guardian's private gain, other than the remuneration for fees and expenses provided by law.[48] Should a guardian breach his or her fiduciary duty to the ward, the court is authorized to intervene.[49]

Ending a Guardianship or Restoring Rights

Every individual who has lost his or her rights under a guardianship has the right to seek restoration of those rights. Any interested person, including the ward, has the ability to start the process through either filing a suggestion of capacity petition for an individual under a guardianship or a restoration of rights petition for an individual under a guardian advocate. The petition asks the court to restore some or all of the capacity of an individual with a disability and individual rights which have been delegated to a guardian or a guardian advocate.

The suggestion of capacity or restoration of rights petition states why the petitioner believes the incapacitated individual has regained the ability to exercise all or some the rights which were delegated or lost and a good faith reason for that belief.[50] Once a petition is filed, an attorney is appointed to represent the incapacitated individual in the proceedings if the individual does not already have an attorney.

Restoration of Rights after a Determination of Incapacity

When a suggestion of capacity petition is filed, the court notifies the guardian about the petition. The Guardian has the opportunity to object or disagree with the petition. Upon the filing of the petition, the court appoints a physician to examine the ward. The physician's report must be filed within 20 days after appointment. If no objections are filed and the medical exam establishes by the preponderance of the evidence that restoration of some or all the right or rights is appropriate, the court shall enter an order restoring some or all of the individual's rights. If only some of the individual's rights are restored, the court order must state which rights are restored and the guardian must prepare a new report which address only those remaining rights delegated to the guardian.

[44] S. 393.12(8), F.S.
[45] Lawrence v. Norris, 563 So. 2d 195, 197 (Fla. 1st DCA 1990); s. 744.361(1), F.S.
[46] Doe v. Evans, 814 So. 2d 370, 374 (Fla. 2002).
[47] S. 744.361(1), F.S.
[48] S. 744.446, F.S.
[49] S. 744.446(4), F.S.
[50] *Supra,* note 4.

If an objection is timely filed, or the medical examination suggests that full restoration is not appropriate, the court must set a hearing. Following the hearing, the court must make specific findings of fact, based on the preponderance of the evidence, and either enter an order denying the suggestion of capacity, or restoring some or all of the individual's rights.[51]

Restoration of Rights after Guardian Advocacy

When appointing a guardian advocate, the court does not make a determination that an individual with a developmental disability is incapacitated but rather that the individual lacks decisionmaking abilities to manage some or all of the necessary tasks of daily life. Any interested person, including the individual with a developmental disability who is the subject of the guardian advocacy, may file a suggestion of restoration with the court. That petition must specify a good faith basis for seeking the removal of the guardian advocate and should include evidentiary support that the individual with a developmental disability no longer needs a guardian advocate. The petition must include a signed statement from a doctor who has evaluated the individual and supports the restoration of rights petition.

Within three days of receipt of a petition for restoration of rights, the court must appoint an attorney for the individual with a developmental disability, if that individual does not already have an attorney. The guardian advocate, the guardian advocate's attorney, and the individual with a developmental disability's attorney must receive formal notice of the petition filing, and any objections to the petition must be filed within 20 days after service of the notice. If no objections are filed and the court is satisfied by the evidence submitted with the petition, the court shall submit an order of restoration of rights. If objections are filed, the court must set a hearing, consider all reports and testimony, and enter an order either denying the petition or restoring some of the rights to the individual with a developmental disability. If some rights are restored, the court must state which rights are restored and issue amended letters of guardian advocacy. The guardian advocate must amend any existing guardianship plans to align with the revised letters of guardian advocacy within 60 days after the order is issued.

Less Restrictive Alternatives to Guardianship

Florida law recognizes several alternatives to guardianships which cover all areas of decisionmaking for both adults and minors.[52]These alternatives differ in several respects, such as the situations in which they may be used (such as regarding financial transactions or medical decisions); whether the individual being assisted must have capacity when executing governing documents; the level of court involvement in appointing the party who will make, or assist in making, decisions; and who can serve as that party and what associated role and authority entails.

[51] S. 744.464(3), F.S.

[52] *See* Part III, Ch. 744, F.S.; other guardian relationships include natural guardians, guardians of minors, emergency temporary guardians, standby guardians, pre-need guardian for a minor; and foreign guardian.

Power of Attorney

A Power of Attorney (POA) is a legal document which delegates authority to another person or entity. The authority to act on another individual's behalf is detailed in the POA.[53] The individual, known as the "principal," signing the POA delegates only those rights and responsibilities specified in the POA and must demonstrate the legal capacity to understand the transfer of his or her decisionmaking rights to another person or entity, who is known as the "agent" at the time of the document's execution.

A POA is effective upon execution of the document; this can allow the agent to exercise rights under the POA before the principal wants the agency to do so. To avoid such situations, a principal can sign the POA but arrange to not deliver or file the POA until after the principal is incapacitated.

A POA terminates when:

- The principal dies:
- The principal becomes incapacitated;
- The principal is adjudicated totally or partially incapacitated by a court unless the court determines that certain authority granted by the POA is to be exercised by the agent;
- The principal revokes the power of attorney;
- The POA provides that it terminates;
- The purpose of the POA is accomplished; or
- The agent's authority terminates and the POA does not provide for another agent to act under the POA.[54]

The rights granted can be as broad or as limited as the law allows and can include, but need not be limited to, health care decisions. A POA is called "durable" when it is intended to continue even if the grantor becomes incapacitated.[55]

Advance Directive

An advance directive is a witnessed oral statement or written document which expresses an individual's desires, or provides decisionmaking authority to a trusted person for a health care-related issue or any other aspect of the individual's health.[56] An advance directive may be used to designate a health care surrogate, establish a living will, or provide for an anatomical gift.[57] For example, an individual may make an advance directive when diagnosed with a life-threatening disease to ensure that if unable to make treatment decisions in the future, the individual has specifically designated a trusted individual to make those decisions on his or her behalf.

An individual may change or revoke an advance directive at any time through a signed, dated writing, destruction of the document, oral expression of an intent to amend, or the execution of another advance directive with materially different provisions.[58] A health care facility may not require a patient to execute a new advance directive using its own forms, and existing advance directives must travel as part of that patient's medical records.[59]

There are three common forms of advance directives: a living will, health care surrogates, and anatomical donations.

---

[53] The Florida Bar, *Consumer Pamphlet: Florida Power of Attorney,* available at https://www.floridabar.org/public/consumer/pamphlet13/#about (last visited March 21, 2024).
[54] S. 709.2109, F.S.
[55] S. 709.2104, F.S.
[56] S. 765.101, F.S.
[57] *Id.*
[58] S. 765.104, F.S.
[59] S. 765.110, F.S.

A living will is an oral statement or a document that specifies the maker's wishes for the withholding or withdrawal of life prolonging procedures in the event of a terminal condition. A living will can also express the maker's wishes on resuscitation, artificial feeding, and religious, spiritual or emotional support. A living will takes effect if its maker loses capacity or the ability to express a decision and the maker is in the end stage condition of a disease; has a terminal illness; or is in a persistent vegetative state.

A health care surrogate arrangement identifies one or more persons who, as surrogates, may make health care decisions on behalf of a patient if that patient becomes unable to make those decisions in the future. The health care surrogate designation must meet the requirements of s. 765.203, F.S., and be signed by the patient in front of two witnesses. The health care surrogate designation takes place in advance; however, it is not effective until the patient's health care practitioner determines the patient is incapacitated.

An anatomical donor documents the donor's intention to donate, at death, all or part of the donor's body for transplantation, therapy, research, or education.[60] Once an anatomical gift is given, it is irrevocable after the donor's death. A donor may make an anatomical gift through signing an organ and tissue donor card, registering online with the donor registry, signifying intent on driver's license or identification card, expressing intent in another advance directive document, executing a will with a provision, or expressing a wish to donate in a document other than a will which has been signed in the presence of at least two other witnesses in the donor's presence. A family member, guardian, representative ad litem, or health care surrogate may not modify, deny, or prevent a donor's wish or intent to make an anatomical gift after the donor's death.[61]

Medical Proxy

A medical proxy can make health care decisions for an incapacitated patient or a patient with developmental disabilities if there is no advance directive or, if there is an advance directive, no surrogate is available to make health care decisions.[62] The statute does not require any legal action or documentation for appointing a medical proxy. Instead, statute prioritizes potential proxies by relationship with the patient, in order beginning with the patient's guardian, spouse, adult child, parent, adult sibling, adult relative "who has exhibited special care and concern," close friend, and finally a social worker selected by a bioethics committee.[63]

Client Advocate

If a parent is unavailable, a family member or friend may be appointed as the client advocate for a person with developmental disabilities receiving services through APD.[64] This does not confer any legal authority on that family member or friend serving as client advocate but allows the client advocate to participate in decisionmaking related to services.

[60] S. 765.511(2), F.S.
[61] S.765.512(1)(b), F.S.
[62] S. 765.401, F.S.
[63] *Id.*
[64] S. 393.0651, F.S.

Co-signer of Bank Accounts

Requiring a second signature for bank transactions involving the account of an individual with disabilities may help an individual who is still learning financial and banking skills. The designation of a co-signer lends a second set of eyes to help monitor how funds flow into and out of an account and may also protect the individual with disabilities from unscrupulous actors.

Representative Payee

The Social Security Administration may appoint a representative payee to receive and manage benefits on behalf of an individual with disabilities. The designated "rep payee" must account to the federal Social Security Administration for any benefits received and managed on behalf of others annually.

Parent Representative

The federal Individuals with Disabilities Education Act (IDEA)[65] ensures students with disabilities receive a free and appropriate public education (FAPE) which is tailored to individual needs. One provision of IDEA is a requirement that each student with a disability have an individual education plan (IEP). An IEP is detailed, written legal document that includes the supports and services that an individual student with a disability will receive as part of his or her FAPE while in school. All students with an Independent Education Plan (IEP) may also remain in school until they receive a standard diploma or reach age 22.

Each IEP requires the identification of a diverse team to support the student which includes the student's parent or someone designated by the student's parent as the parent's designee, at least one of the student's general education teachers, a special education teacher, a school district representative, an individual who can interpret test results, and others whom the parent feels may be appropriate.[66] The student's IEP plan must be reviewed and updated at least annually; by age 16, the plan must also be updated to address transition services the student needs to be successful as an adult. Each local educational agency or state educational agency must ensure that the parents of each student with a disability are members of any group that makes decisions on that student's educational placement.[67]

At least a year before the student turns 18, the school district must inform both the student and his or her parent or guardian that the student's educational rights will be transferred to the student when the student turns 18.[68] The school district's notice must inform the student and the parent or guardian that, as an adult, the student will have the right to enter contracts and make his or her own decisions.

Students may also have a Section 504 Plan, which is a plan for students with disabilities who need accommodations but not specially-designed instruction. A student's 504 Plan details the steps or accommodations needed to give the student an equal chance to be educated.[69]

A student's educational records are private under the federal Family Educational Rights and Privacy Act (FERPA).[70] FERPA is applicable to any school which receives federal funding from an applicable education program of the United States Department of Education. Under FERPA, parents have certain rights to their children's educational records, and schools have the limited ability to release those records to third parties without the consent of the parent while the student is still a minor. However, the

[65] Individuals with Disabilities Education Act, 20 U.S.C. ch. 33 (2024).
[66] 33 U.S.C. §1414(d)(1)(B) and Rule 6A-6.03028, F.A.C.
[67] 33 U.S.C. §1414(e).
[68] Disability Rights Florida, *Education Transition Planning,* available at https://transition.disabilityrightsflorida.org/education-transition-planning/ (last visited March 19, 2024).
[69] Section 504 of the Rehabilitation Act of 1973(Pub. Law 93-112, as subsequently amended).
[70] U.S.C. 1232(g), as amended by P.L. 103-382, and accompanying regulations at 34 CFR Part 99.

privacy rights transfer from the parent to the student once the student reaches the age of 18 or the student attends a school beyond the high school level.[71] To continue to review a student's education record after the student reaches age 18, that student's parent must receive the consent of the student or obtain a guardianship.

Supported Decisionmaking

Both the integration mandate of Title II of the American with Disabilities Act[72] and subsequent federal court cases, such as *Olmstead v. L.C.,*[73] on how states have delivered services to those individuals with disabilities have encouraged the development and use of new, less restrictive models of individual decisionmaking for individuals with disabilities.[74] Supported decisionmaking (SDM) is an example of a person-driven decisionmaking model that empowers individuals with disabilities to make life choices.

The SDM process and procedure requires the assistance of a supporter, advisor, or agent to carry out each choice. Through an SDM agreement, the individual is empowered to ask for support from the supporter where, in what format, and when he or she needs help. The supporter, under this role, has an equal obligation to ensure that the individual has the necessary support to be successful, at the level the individual has requested, to make recommendations and suggestions as needed, and generally advise but not act on behalf of the individual.

The SDM model assumes all individuals:

- Will seek advice and guidance with making decisions;
- As long as they have the ability to communicate, have the ability and right to make choices; and
- Have the right to have their individual choices honored.[75]

While SDM relationships can vary in their formality and intensity-- ranging from informal support by people who speak with, rather than for, the individual with a developmental disability[76] to more formalized micro boards and circles of support--[77] they share three common elements in that they:

- Follow a set of guiding principles that emphasize the autonomy and presumption of capacity of the individual with a developmental disability, and that individual's right to make decisions on an equal basis with others;
- Recognize that an individual's intent can form the basis of a decisionmaking process that does not entail removal of the individual's decisionmaking rights; and
- Acknowledge that individuals with disabilities will often need assistance in decisionmaking through such means as interpreter assistance, facilitated communication, assistive technologies and plain language.

Through these relationships, an individual with limitations in decisionmaking abilities can receive support to understand relevant information, issues, and available choices, to focus attention in making

---

[71] U.S. Department of Education, *Family Educational Rights and Privacy Act (FERPA),* available at https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html (last visited March 19, 2024).
[72] 42 U.S.C. ss. 12101 – 12213 (2006). Congress enacted the American with Disabilities Act in 1990 to address the continuing exclusion and isolation of individual with disabilities, and thus created a comprehensive mandate to end disability-based discrimination in employment, public accommodations, public services, benefits, and programs. *Quoting FN 2 from:* Salzman, L., *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act, Working Paper 282 (November 2009), available at* Microsoft Word - Salzman FINAL TPE (supporteddecisionmaking.org) (last visited December 2, 2023).
[73] Olmstead v. L.C. *ex rel. Zimring*, 527 U.S. 581, 597–99 (1999).
[74] Martinis, J., *Making it happen: Strategies for supported decisionmaking*, Impact, 32(1), 45 (2019), available at: https://publications.ici.umn.edu/impact/32-1/making-it-happen-strategies-for-supported-decision-making (last visited March 22, 2024).
[75] Blanck, P., and Martinis, J., *The Right to Make Choices: The National Resource Center for Supported Decisionmaking*, 3 Inclusion 24 (2015), available at: https://supporteddecisionmaking.org/wp-content/uploads/2023/01/inclusion_blanck_maritinis_2015.pdf (last visited March 21, 2024).
[76] Dinerstein, R, *Implementing legal capacity under article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision making*, Human Rights Brief, 30, pgs. 8-12, 10 (2012), available at https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief (last visited on March 22, 2024).
[77] *Id.* at pgs. 10-11.

decisions, to help weigh options, to ensure that decisions are based on his or her own preferences, and, if necessary, to interpret and/or communicate his or her decisions to other parties.

Supported Decisionmaking Agreements

The SDM agreement is the written document evidencing the agreement between an individual with disabilities and at least one supporter that describes, in detail, the type of help the individual needs. The agreement outlines the terms and conditions of both parties and asks that third parties, including courts, recognize and respect the agreement.

In an SDM agreement, those who can help in making decisions are called supporters. Supporters agree to help explain information; answer questions; weigh options; and let others know about the decisions that are made. The supporter does not make the decisions.[78]

Growth in Interest in SDM

Initial promotion of SDM occurred in the early 1990s in British Columbia as a part of that country's disability rights' movement. This initial advocacy resulted in the first legislative recognition of the SDM agreement and option in the 1996 Representation Agreement Act in British Columbia. This act established a set of decisions regarding how individuals with cognitive disabilities may seek support, criteria for appointment of a supporter, and a mechanism by which decisions reached through SDM agreements would be legally recognized.[79] SDM achieved a significant breakthrough with the 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In a landmark statement, the UNCRPD declared that member states must assist individuals with disabilities so that they can exercise their right to legal capacity.

Furthermore, UNCRPD identified SDM as a crucial legal mechanism toward achieving this basic human right. Spurred by this development, several countries—including Canada, Ireland, Israel, the United Kingdom, Germany, Australia, and the United States—have begun to promote integration of SDM into their respective legal systems.[80]

In 2009, the Texas Legislature created a pilot program to "promote the provision of SDM services to persons with intellectual and developmental disabilities and persons with other cognitive disabilities who live in the community."[81] After that program ended, Texas passed new laws recognizing the availability and effectiveness of SDM and required courts to find, before appointing a guardian for an individual, that that individual is unable to use SDM to make decisions.[82]

In 2016, a similar law was passed and signed in Delaware. The Delaware law allows people with disabilities to designate a person as a supporter. The supporter receives legal status and authorization to assist the person in making life choices, including health, safety, and educational decisions, but is not allowed to make decisions on the individual's behalf.

Two private organizations have also endorsed the SDM option. In 2012, the American Bar Association (ABA) convened stakeholders "to explore concrete ways to move from a model of substituted decisionmaking, like guardianship, to one of supported decision making, consistent with the human right of legal capacity".[83] In 2015, the ABA published an article calling for the use of SDM as an

[78] *Supra,* note 76.
[79] Browning, M, et al., *Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice*, Research and Practice in Intellectual and Developmental Disabilities, 1(1), pgs. 34-45 (2014), available at https://www.tandfonline.com/doi/abs/10.1080/23297018.2014.902726 (last visited March 22, 2024).
[80] *Supra*, note 102.
[81] Tex. Government Code Ann. § 531.02446 (2009), expired on Sept. 1, 2013.
[82] Tex. Est. Code s. 1101.101(a)(D) and (E).
[83] *Beyond Guardianship: Supported Decisionmaking by Individuals with Intellectual Disabilities: A Short Summary from the 2012 National Roundtable*, American Bar Association, available at:

alternative to guardianship, stating, "In contrast to overbroad or undue guardianship, SDM can increase self-determination by ensuring that the person retains life control to the maximum extent possible".[84]

The National Guardianship Association (NGA), which represents over 1,000 guardians, conservators and fiduciaries from across the United States, also published a position paper on SDM. The NGA position stated that "modern day respect for individual rights dictates that we must allow each individual to make or participate to the extent possible in personal decisions. "Furthermore, the NGA statement said guardianship should be used only when lesser restrictive supports are not available. Alternatives to guardianship should be considered whenever possible and done so prior to proceeding with a guardianship".[85] The NGA's position is consistent with most state laws, which require that less restrictive alternatives be considered or attempted prior to placing a person under guardianship.

Educational Transitions

Section 1003.5716, F.S., governs the transition process for individuals with disabilities from public school. During the student's seventh grade year, or when the student attains the age of 12, whichever occurs first, an individual's education plan (IEP) team must begin the process of, and develop an IEP for, the identification of the individual's needs for services to ensure a smooth transition to adulthood. The plan must be in place to allow for implementation on the first day of the student's first year in high school.

As part of this process, the IEP team must provide information and instruction prior to the student's 18th birthday to the student and his or her parent on self-determination and the legal rights and responsibilities regarding the educational decisions that will soon transfer to the student on the student's 18th birthday. The information must address the ways in which the student may provide informed consent to allow the student's parent, legal guardian, or selected trusted adult to continue to participate in educational decisions, including:

- Provide informed consent to grant permission to access confidential records protected under the federal Family Educational Rights and Privacy Act (FERPA) as provided in s. 1002.22, F.S.
- Pursue a power of attorney as provided in chapter 709, F.S.
- Seek a guardian advocacy as provided in s. 393.12, F.S.
- Attain a guardianship as provided in chapter 744, F.S.

http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/SDMRRoundtable_Summary.authcheckdam.pdf

[84] Martinis, Johnathon, *Supported Decisionmaking: Protecting Rights, Ensuring Choices,* Bifocal, Vol. 36, Issue 5 (May – June 2015), available at https://www.americanbar.org/content/dam/aba/publications/bifocal/BIFOCALMay-June2015.pdf (last visited March 22, 2024).

[85] National Guardianship Association, *"Position Statement on Guardianship, Surrogate Decision Making, and Supported Decision Making*," (September 20, 2017), available at https://www.guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf (last visited March 19, 2024).

Effect of the Bill

Supported Decisionmaking

HB 73 creates a new legal instrument for individuals, including but not limited to those with developmental disabilities, who may need some assistance with decisionmaking and other activities of daily life but do not require more restrictive instruments such as guardianship or guardian advocacy. This new legal instrument is a "supported decisionmaking agreement" (SDM agreement).

Supported Decisionmaking (SDM) Agreements

The SDM agreement facilitates activity by "supporters" who provide information, make recommendations, and give assistance to another individual who is the subject of the form (the principal). A supporter would assist the principal in making decisions, reviewing options, completing tasks, and exercising the principal's rights but not have any authority to make any binding decisions for or on behalf of the principal.

The SDM agreement only permits a supporter to:

- Obtain information on behalf of the principal, and
- Assist the principal in communicating with third parties, including conveying the principal's communications, decisions, and directions to third parties on behalf of the principal.

The bill integrates SDM agreements into the broader guardianship system by allowing a petitioner for the principal to assert to the examining committee or reviewing physician whether the alleged incapacitated person currently uses assistance to exercise his or her own rights, including a different SDM agreement, and as to whether this level of assistance is sufficient or too restrictive. HB 73 also permits the examining committee to allow a supporter to assist with communication with the alleged incapacitated person when requested by the court-appointed counsel for the alleged incapacitated person.

The bill allows an SDM agreement to authorize a supporter to obtain protected educational records under FERPA and health information, mental health treatment information or substance abuse disorder under the Health Insurance Portability and Accountability Act of 1996.[86] Additionally, as part of the transition process for students with disabilities as they reach the age of majority, the bill adds an SDM agreement to the list of methods that a student with disabilities may use to provide consent for continued parental participation in his or her educational decisions.

Supported Decisionmaking and Guardianship Proceedings

The bill requires the examining committee or physician reviewer and the court to consider the specific needs and abilities of an individual with developmental disabilities when assigning a guardian or a guardian advocate, or when determining capacity of the individual. The final order issued by the court must address with specificity why a particular level of guardianship was selected, and especially if an available less restrictive level of care was not selected. Finding an individual partially or totally incapacitated deprives that individual of some or all of his or her civil and legal rights; therefore, the legislature has directed the courts to consider the least restrictive forms of guardianship before appointment of a plenary guardian.[87]

[86] Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191. Stat. 1936. Web 11 Aug. 2014. The Health Insurance Portability and Accountability Act included provisions relating to administrative simplification, privacy, security, and patient safety.
[87] S. 744.1012, F.S.

HB 73 expands the requirements for the statement in the petition for suggestion of capacity regarding the ward's capability to exercise some or all of the rights removed to include whether or not the ward can to independently exercise those rights with appropriate assistance.

Subject to the Governor's veto powers, the bill has an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

A. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that the supported decisionmaking agreements substitute for more costly guardianship arrangements, expanded use of SDM agreements will result in lower costs for individuals with disabilities and their families.

C. FISCAL COMMENTS:

None.