

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 446

INTRODUCER: Senator Simon

SUBJECT: Supported Decisionmaking Authority

DATE: January 15, 2024

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Hall</u>	<u>Tuszynski</u>	<u>CF</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 446 explicitly incorporates the concepts of supported decision-making (SDM) and SDM agreements into state law. SDM is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices, instead of relying upon court-appointed guardians or guardian advocates to make choices for them.

In summary, the bill:

- Amends the statute governing the appointment of guardian advocates for persons with developmental disabilities to require:
  - Courts to consider the specific needs and abilities of individuals when delegating decision-making tasks.
  - Petitions and court orders to identify and assess the sufficiency of guardian advocacy alternatives like SDM.
- Amends the powers of attorney statute to authorize the granting of SDM agreements as a form of a power of attorney.
- Creates a statute defining, authorizing, and regulating SDM agreements.
- Amends statutes governing adjudications of incapacity and the appointment of guardians to:
  - Require petitions to state whether alleged incapacitated persons use assistance, including SDM, and if so, why it is insufficient for them to exercise their rights.
  - Authorize examining committee members to facilitate, when requested by appointed counsel, communication between supporters and allegedly incapacitated persons.
  - Clarify that suggestions of capacity must address whether the ward has the ability to exercise removed rights on his or her own or with appropriate assistance.
- Amends the statute regulating the development of an individual education plan (IEP) for the purpose of accommodating students with disabilities in public schools, to include SDM agreements as one method by which students may provide informed consent to allow his or her parents to continue to participate in educational decisions.

## II. Present Situation:

### Guardianship

If a court finds that a person does not have the ability to safely manage the things that belong to him or her, or the ability to meet his or her basic health, safety, and self-care needs, the court will rule that this person is incapacitated.<sup>1</sup> In many cases, after a court decides that a person is incapacitated, it will choose someone else to make some or all the decisions for the incapacitated person. This is called a guardianship.<sup>2</sup>

Being placed in a guardianship results in the loss of an individual's right to make his or her own life choices. The rights that a person can lose include the right to contract, vote, travel, marry, work, consent to treatment, sue or defend lawsuits, choose living arrangements, make decisions about their social life, have a driver's license, personally apply for benefits, and manage money or property.<sup>3</sup>

Guardianships must be specific to the abilities and needs of the individual and should not be any more restrictive than necessary.<sup>4</sup> Consequently, there are different types of guardianships under state law. They include:<sup>5</sup>

- Preneed guardian.<sup>6</sup>
- Voluntary guardianship.<sup>7</sup>
- Emergency temporary guardianship.<sup>8</sup>
- Limited guardianship.<sup>9</sup>
- Guardian advocate for individuals who have a developmental disability.<sup>10</sup>
- Guardian advocate for individuals receiving mental health treatment.<sup>11</sup>
- Full (*i.e.* plenary) guardianship.<sup>12</sup>

The powers and duties of a court-appointed guardian include, but are not limited to:

- Filing an initial plan and annual reports.<sup>13</sup>
- Making provision for the medical, mental, rehabilitative, and personal care of the person.<sup>14</sup>
- Making residential decisions on behalf of the person.<sup>15</sup>

<sup>1</sup> See generally Part V, Ch. 744, F.S.

<sup>2</sup> See *id.*

<sup>3</sup> See 744.1012(1), F.S.; see also Disability Rights Florida, *Types of Guardianship*, available at [https://disabilityrightsflorida.org/disability-topics/disability\\_topic\\_info/types\\_of\\_guardianship](https://disabilityrightsflorida.org/disability-topics/disability_topic_info/types_of_guardianship) (last visited Jan. 12, 2024).

<sup>4</sup> Section 744.1012(2), F.S.; see also Disability Rights Florida, *Types of Guardianship*, available at [https://disabilityrightsflorida.org/disability-topics/disability\\_topic\\_info/types\\_of\\_guardianship](https://disabilityrightsflorida.org/disability-topics/disability_topic_info/types_of_guardianship) (last visited Jan. 12, 2024).

<sup>5</sup> See generally Disability Rights Florida, *Types of Guardianship*, available at [https://disabilityrightsflorida.org/disability-topics/disability\\_topic\\_info/types\\_of\\_guardianship](https://disabilityrightsflorida.org/disability-topics/disability_topic_info/types_of_guardianship) (last visited Jan. 12, 2024).

<sup>6</sup> Sections 744.3045 and 744.3046, F.S.

<sup>7</sup> Section 744.341, F.S.

<sup>8</sup> Section 744.3031, F.S.

<sup>9</sup> Section 744.441, F.S.; see also s. 744.102(9)(a), F.S. (defining "limited guardian").

<sup>10</sup> Sections 744.3085 and 393.12, F.S.

<sup>11</sup> Sections 744.3085 and 394.4598, F.S.

<sup>12</sup> Section 744.441(1), F.S.; see also s. 744.102(9)(b), F.S. (defining "plenary guardian").

<sup>13</sup> Section 744.361(6)-(7), F.S.

<sup>14</sup> Section 744.361(13)(f), F.S.

<sup>15</sup> Section 744.361(13)(h), F.S.

- Advocating on behalf of the person in institutional and other residential settings.<sup>16</sup>
- Making financial decisions on behalf of the person.<sup>17</sup>

Any resident of the state who is 18 years old and of sound mind is qualified to act as a guardian.<sup>18</sup> Additionally, a non-resident may serve if he or she is related to the person with a developmental disability by blood, adoption, or law.<sup>19</sup> Certain individuals, however, cannot be appointed to act as a guardian.<sup>20</sup>

Guardians must file an initial guardianship report with the court within 60 days after appointment.<sup>21</sup> The initial guardianship report must consist of an initial guardianship plan,<sup>22</sup> which must include certain specified information for the person for whom the guardianship is being established. For example, the initial guardianship plan must include information regarding the provision of medical, mental, or personal care services for the welfare of the person, as well as the place and kind of residential setting best suited for the needs of the person.<sup>23</sup>

Guardians must also file an annual guardianship report with the court.<sup>24</sup> The annual guardianship report must be filed within 90 days after the last day of the anniversary month that the letters of guardianship were signed, and the plan must cover the coming fiscal year, ending on the last day in such anniversary month. The annual guardianship report must include an annual guardianship plan<sup>25</sup> containing information regarding the residence of the person for whom the guardianship has been established; the medical and mental health conditions, treatment, and rehabilitation needs of the person; the social condition of the person; and a list of any preexisting orders not to resuscitate, or preexisting advance directives.<sup>26</sup>

### **Incapacity**

The term “incapacitated person” means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.<sup>27</sup>

The process to determine incapacity and appoint a guardian begins with the filing of a petition in the appropriate circuit court. The petition must be served on, and read to, the alleged incapacitated person. Notice and copies of the petition must also be provided to the attorney for the alleged incapacitated person and served on all next of kin identified in the petition.<sup>28</sup>

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<sup>16</sup> Section 744.361(13)(i), F.S.

<sup>17</sup> Section 744.361(12), F.S.

<sup>18</sup> Section 744.309(1), F.S.

<sup>19</sup> Section 744.309(2), F.S.

<sup>20</sup> *See generally* ss. 744.309(3), (6), F.S.

<sup>21</sup> Sections 744.361(6) and 744.362(1), F.S.

<sup>22</sup> Section 744.362(1), F.S.

<sup>23</sup> *See* s. 744.363(1)(a)-(f), F.S.

<sup>24</sup> Section 744.367(1), F.S.

<sup>25</sup> Section 744.367(3)(a), F.S.

<sup>26</sup> *See generally* s. 744.3675, F.S.

<sup>27</sup> Section 744.102(12), F.S.

<sup>28</sup> Section 744.331(1), F.S.

At hearing, the partial or total incapacity of the person must be established by clear and convincing evidence.<sup>29</sup> After finding that a person is incapacitated with respect to the potential exercise of one or more rights, the court must enter a written order of incapacity. A person is deemed incapacitated only as to those rights specified in the court's order.<sup>30</sup> If the order provides that the person is incapable of exercising delegable rights (described below), the court must next consider whether there are any alternatives to guardianship which will sufficiently address the incapacitated person's problems. If not, a guardian will be appointed.<sup>31</sup>

### ***Rights of Incapacitated Persons***

A person who has been determined to be incapacitated retains certain rights, regardless of the determination of incapacity, including (among others) the right to be treated humanely and with dignity and respect; the right to be protected against abuse, neglect, and exploitation; the right to receive visitors and communicate with others; and the right to privacy.<sup>32</sup>

Certain rights may be removed from a person by an order determining incapacity, but not delegated to a guardian. They include the right to marry (if the right to enter into a contract has been removed, the right to marry is subject to court approval); the right to vote; the right to personally apply for government benefits; the right to have a driver license; the right to travel; and the right to seek or retain employment.<sup>33</sup>

Additionally, certain other "delegable" rights may be removed from a person by an order determining incapacity, and also delegated to a guardian. They include the rights to:

- Contract.
- Sue and defend lawsuits.
- Apply for government benefits.
- Manage property or to make any gift or disposition of property.
- Determine his or her residence.
- Make health care decisions.
- Make decisions about his or her social environment or other social aspects of his or her life.<sup>34</sup>

### ***Advance Directives***

State law defines an advance directive as a witnessed, oral statement or written instruction that expresses a person's desires about any aspect of his or her future health care, including the designation of a health care surrogate, a living will, or an anatomical gift.<sup>35</sup> Designation of each of these can serve different purposes and have their own unique requirements and specifications under the law.<sup>36</sup>

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<sup>29</sup> Section 744.331(5)(c), F.S.

<sup>30</sup> Section 744.331(6), F.S.

<sup>31</sup> Section 744.331(6)(b), F.S.

<sup>32</sup> See s. 744.3215(1)(a)-(o), F.S. (specifying all retained rights).

<sup>33</sup> Section 744.3215(2)(a)-(f), F.S.

<sup>34</sup> Section 744.3215(3)(a)-(g), F.S.

<sup>35</sup> Section 765.101(1), F.S.

<sup>36</sup> See *id.*

One type of advance directive, an “order not to resuscitate” or a “do not resuscitate order,” results in the withholding of cardiopulmonary resuscitation from an individual if the order is presented to the health care professional treating the patient.<sup>37</sup> For the order to be valid, it must be on the yellow form adopted by the Department of Health, signed by the patient’s physician and by the patient, or if the patient is incapacitated, the patient’s health care surrogate or proxy, court-appointed guardian, or agent under a durable power of attorney.<sup>38</sup>

A power of attorney is a writing that grants authority to an agent to act in the place of the principal.<sup>39</sup> A “durable” power of attorney is a kind of power of attorney that is not terminated by the principal’s incapacity.<sup>40</sup> Among many other things, a durable power of attorney may be used to allow another person to make health care decisions on behalf of an incapacitated principal.<sup>41</sup>

### **Guardian Advocates**

A “guardian advocate” is a person appointed by a written order of the court to represent a person with developmental disabilities.<sup>42</sup> A “developmental disability” means a disorder or syndrome that is attributable to 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.<sup>43</sup>

Guardian advocacy is a circuit court process for family members, caregivers, or friends of individuals with a developmental disability to obtain the legal authority to act on their behalf if:

- The person lacks the decision-making ability to do some, but not all, of the decision-making tasks necessary to care for his or her person or property; or
- The person has voluntarily petitioned for the appointment of a guardian advocate.<sup>44</sup>

State law recognizes the appointment of a guardian advocate as a less restrictive alternative to guardianship.<sup>45</sup> A guardian advocate can be appointed without having to declare the person with a developmental disability incapacitated.<sup>46</sup> The process of becoming a guardian advocate of a person with a developmental disability does not require the hiring of an attorney, although during

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<sup>37</sup> See Fla. Admin. Code R. 64J-2.018(1).

<sup>38</sup> Section 401.45(3), F.S.; see also Fla. Admin. Code R. 64J-2.018(1)-(3).

<sup>39</sup> Section 709.2102(9), F.S.

<sup>40</sup> Section 709.2102(4), F.S.; see also s. 709.2104 (specifying that a power of attorney is durable if it contains the words: “This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes,” or similar words that show the principal’s intent that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity).

<sup>41</sup> See *id.*; see also The Florida Bar, *Consumer Pamphlet: Florida Power of Attorney, About the Power of Attorney*, available at <https://www.floridabar.org/public/consumer/pamphlet13/#about> (last visited Jan. 13, 2024).

<sup>42</sup> Sections 393.063(20), F.S.; see also s. 393.12, F.S. (regulating the appointment of guardian advocates for persons with developmental disabilities).

<sup>43</sup> Section 393.063(11), F.S.

<sup>44</sup> See s. 393.12(2)(a), F.S.; see also Eighteenth Judicial Circuit, Seminole County, Florida, *Florida Guardian Advocate Law and Information* (Jul. 2017), at 1, available at [https://flcourts18.org/docs/sem/Florida\\_Guardian\\_Advocacy\\_Law\\_and\\_information\\_Guide.pdf](https://flcourts18.org/docs/sem/Florida_Guardian_Advocacy_Law_and_information_Guide.pdf) (last visited Jan. 13, 2024).

<sup>45</sup> Section 744.3085, F.S.

<sup>46</sup> Section 393.12(2)(a), F.S.

the proceedings the court will appoint an attorney for the person with the developmental disability to ensure that his or her best interests are protected.<sup>47</sup>

If the person lacks the capacity to make any decisions about his or her care, it may be more appropriate for the court to appoint a plenary guardian who is authorized to act on the person's behalf in all matters. The process of appointing a plenary guardian requires the court to determine that the person is incapacitated. Additionally, the person petitioning to become a plenary guardian must have an attorney.<sup>48</sup>

A guardian advocate for a person with a developmental disability has the same powers, duties, and responsibilities required of a guardian under the guardianship statute or as defined by court order issued under the statute governing the appointment of guardian advocates.<sup>49</sup>

The qualifications to serve as a guardian advocate are the same as those required of any guardian under the guardianship statute.<sup>50</sup> The court will also consider the wishes expressed by a developmentally disabled person as to whom will be appointed as his or her guardian advocate.<sup>51</sup> A guardian advocate need not be the caregiver of the person with a disability.<sup>52</sup>

## Supported Decision-making

### *Generally*

Supported decision-making (SDM) is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices.<sup>53</sup> SDM assumes that people commonly seek advice and guidance with respect to decision-making and, so long as people have the ability to communicate, they should also have the ability and right to make choices, and to have those choices honored by third parties.<sup>54</sup>

A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters. The supporters then agree to help the person with a disability understand,

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<sup>47</sup> Section 393.12(2)(b), F.S.; *see also* Eighteenth Judicial Circuit, Seminole County, Florida, *Florida Guardian Advocate Law and Information* (Jul. 2017), at 2, available at [https://flcourts18.org/docs/sem/Florida\\_Guardian\\_Advocacy\\_Law\\_and\\_information\\_Guide.pdf](https://flcourts18.org/docs/sem/Florida_Guardian_Advocacy_Law_and_information_Guide.pdf) (last visited Jan. 13, 2024).

<sup>48</sup> Eighteenth Judicial Circuit, Seminole County, Florida, *Florida Guardian Advocate Law and Information* (Jul. 2017), at 1, available at [https://flcourts18.org/docs/sem/Florida\\_Guardian\\_Advocacy\\_Law\\_and\\_information\\_Guide.pdf](https://flcourts18.org/docs/sem/Florida_Guardian_Advocacy_Law_and_information_Guide.pdf) (last visited Dec. 22, 2023).

<sup>49</sup> Section 393.12(10), F.S.

<sup>50</sup> Fifth Judicial Circuit, Lake County, Florida, *Florida Law and Guardian Advocacy: A Guide for Families and Friends of Developmentally Disabled Individuals* (Oct. 2014), at 2, available at <https://www.lakecountyclerk.org/forms/Guardianship/DavisGuardianAdvocacyManual.pdf> (last visited Jan. 13, 2024).

<sup>51</sup> *Id.*

<sup>52</sup> Eighteenth Judicial Circuit, Seminole County, Florida, *Florida Guardian Advocate Law and Information* (Jul. 2017), at 2, available at [https://flcourts18.org/docs/sem/Florida\\_Guardian\\_Advocacy\\_Law\\_and\\_information\\_Guide.pdf](https://flcourts18.org/docs/sem/Florida_Guardian_Advocacy_Law_and_information_Guide.pdf) (last visited Jan. 13, 2024).

<sup>53</sup> American Civil Liberties Union, *Supported Decision-Making: Frequently Asked Questions*, available at [https://www.aclu.org/wp-content/uploads/legal-documents/faq\\_about\\_supported\\_decision\\_making.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/faq_about_supported_decision_making.pdf) (last visited Jan. 13, 2024).

<sup>54</sup> Blanck, P., and Martinis, J., *The Right to Make Choices: The National Resource Center for Supported Decisionmaking*, 3 INCLUSION 24 (2015), available at [www.bbi.syr.edu/publications/2015/SDM\\_Overview.pdf](http://www.bbi.syr.edu/publications/2015/SDM_Overview.pdf).

consider, and communicate decisions, giving the person with a disability the tools to make his or her own informed decisions.<sup>55</sup> For example, supporters can help a person using SDM by:

- Collecting and communicating information that is related to the decision.
- Helping to understand a problem and explore options.
- Explaining the risks and benefits of options.
- Giving guidance and recommendations.
- Assisting in communicating and carrying out decisions.<sup>56</sup>

Although there is a structure and a process to SDM, it is also flexible and can be adapted to meet an individual's situation and needs. While SDM can vary from place to place and from individual to individual, it generally follows a four-step process:<sup>57</sup>

- The individual identifies the areas where he or she needs decision-making assistance – e.g. health care, employment, relationships, finances, etc. – and the type of support he or she needs.
- The individual chooses supporters he or she trusts.
- Supporters commit to providing information to the individual so that he or she can make his or her own decisions, and honoring the individual's decisions.
- The individual and supporters execute an SDM agreement.<sup>58</sup>

### *SDM Agreements*

An SDM agreement is a written document evidencing an agreement between a disabled person and at least one supporter that describes, in detail, the type of help the person 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. Although signed writings are not necessarily required, SDM agreements can be beneficial in helping doctors, bankers, lawyers, and other third parties to feel confident in accepting the decisions of people with disabilities without fearing lawsuits or malpractice claims.<sup>59</sup>

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<sup>55</sup> Disability Rights Florida, *What is Supported Decision-Making?*, <https://disabilityrightsflorida.org/disability-topics/disability-topic-info/what-is-supported-decision-making> (last visited Jan. 13, 2024).

<sup>56</sup> *Id.*

<sup>57</sup> Center for Public Representation, *About Supported Decision-Making: Does Supported Decision-Making work?*, <https://supporteddecisions.org/about-supported-decision-making/> (last visited Jan. 13, 2024).

<sup>58</sup> *Id.*

<sup>59</sup> Disability Rights Florida, *What is Supported Decision-Making?*, available at <https://disabilityrightsflorida.org/disability-topics/disability-topic-info/what-is-supported-decision-making> (last visited Jan. 13, 2024); American Civil Liberties Union, *Supported Decision-Making: Frequently Asked Questions*, available at [https://www.aclu.org/wp-content/uploads/legal-documents/faq\\_about\\_supported\\_decision\\_making.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/faq_about_supported_decision_making.pdf) (last visited Jan. 13, 2024); see also National Resource Center for Supported Decision-Making, *Supported Decision-Making Model Agreements*, available at [https://supporteddecisionmaking.org/resource\\_library/sdm-model-agreements/](https://supporteddecisionmaking.org/resource_library/sdm-model-agreements/) (last visited Jan. 13, 2024) (providing model agreements from various jurisdictions).

### *State Legislation*

SDM is gaining support at both state and federal levels of government. As of June 2023, 27 states and the District of Columbia have adopted some kind of SDM legislation.<sup>60</sup> SDM has also been recognized and endorsed by the Administration for Community Living of the U.S. Department of Health and Human Services, which funds the National Resource Center for Supported Decision-Making,<sup>61</sup> and has gained international recognition, notably in the United Nations Convention on Rights of Persons with Disabilities.<sup>62</sup>

### **III. Effect of Proposed Changes:**

Although existing law already allows SDM,<sup>63</sup> it neither specifically regulates SDM agreements, nor expressly requires consideration of SDM in connection with the appointment of a guardian or guardian advocate. Accordingly, the bill amends several statutes, and also creates a new statute, in order to explicitly require consideration of SDM and SDM agreements as less restrictive alternatives to appointing a guardian or guardian advocate.

#### **Considering SDM in Connection with the Appointment of Guardian Advocates**

**Section 1** of the bill amends the developmental disabilities statute<sup>64</sup> in connection with the appointment of guardian advocates.

When determining whether to appoint a guardian advocate, the bill amends the statute to require circuit courts to:

- Consider the person’s unique needs and abilities, including, but not limited to, the person’s ability to independently exercise his or her rights with appropriate assistance.
- Only delegate decision-making tasks that the person lacks the decision-making ability to exercise.

With respect to petitions to appoint a guardian advocate for persons with developmental disabilities, the bill amends the statute to require petitions to:

- Identify any other type of guardian advocacy or alternatives to guardian advocacy that the person has designated, is in currently, or has been in previously and the reasons why alternatives to guardian advocacy are insufficient to meet the needs of the person.

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<sup>60</sup> American Bar Association, *Supported Decision-Making: A Statutory Chart*, Jun. 2023, available at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2022-sdm-lst-rstctd-altntvs.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-sdm-lst-rstctd-altntvs.pdf) (identifying the 27 states as Alabama, Alaska, Arkansas, Arizona, California, Colorado, Delaware, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

<sup>61</sup> The National Resource Center for Supported Decision-Making provides many resources on SDM including, among other things, tools, state-level information, and newsletters and webinars. *See generally* National Resource Center for Supported Decision-Making, *Home*, available at <https://supporteddecisionmaking.org/> (last visited Jan. 13, 2024).

<sup>62</sup> American Bar Association, *Less Restrictive Options*, Nov. 21, 2023, available at [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/supported-decision-making/](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/supported-decision-making/).

<sup>63</sup> *See, e.g.*, s. 765.523(1)(a), F.S. (identifying SDM services as one of several “auxiliary aids and services” for purposes of ensuring access to anatomical gifts and organ transplants).

<sup>64</sup> Section 393.12, F.S.



- State whether the person uses assistance to exercise his or her rights, including, but not limited to, SDM, and if so, why the assistance is inappropriate or insufficient to allow the person to independently exercise the person's rights.

The bill also amends the statute to require court orders appointing a guardian advocate to identify existing alternatives, and to include a finding as to the validity or sufficiency of such alternatives, to alleviate the need for the appointment of a guardian advocate.

### **Authorization and Regulation of SDM Agreements**

**Section 2** of the bill amends the powers of attorney statute<sup>65</sup> to include explicit authority to grant an SDM agreement as defined under the bill, if such authority is specifically limited.

**Section 3** of the bill creates s. 709.2209, F.S., entitled "Supported decisionmaking agreements," to authorize and regulate SDM agreements. Specifically, the new statute:

- Defines the term "supported decisionmaking agreement" to mean an agreement in which the power of attorney grants an agent the authority to receive information and to communicate on behalf of the principal without granting the agent the authority to bind or act on behalf of the principal on any subject matter.
- Provides that an SDM agreement is not a durable power of attorney under state law, and that any language of durability in an SDM agreement is of no effect.
- Provides that an SDM agreement may only include the authority to:
  - Obtain information on behalf of the principal, including, but not limited to, protected health information under the Health Insurance Portability and Accountability Act of 1996, as amended;<sup>66</sup> educational records under the Family Educational Rights and Privacy Act of 1974;<sup>67</sup> or information protected under certain provisions of federal law.<sup>68</sup>
  - 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.
- Provides that a communication made by the principal with the assistance of or through an agent under an SDM agreement that is within the authority granted to the agent may be recognized as a communication of the principal.

### **Considering SDM in Connection with the Adjudication of Incapacity and Appointment of Guardians**

**Section 4** of the bill amends s. 744.3201, F.S., which identifies the information that must be included in a petition to determine incapacity, to require the petition to state whether the alleged incapacitated person uses assistance to exercise his or her rights, including, but not limited to, SDM, and if so, why the assistance is inappropriate or insufficient to allow the person to independently exercise the person's rights.

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<sup>65</sup> Section 709.2201, F.S.

<sup>66</sup> 42 U.S.C. s. 1320d.

<sup>67</sup> 20 U.S.C. s. 1232g.

<sup>68</sup> 42 U.S.C. s. 290dd-2; 42 C.F.R. pt. 2.

**Section 5** of the bill amends s. 744.331, F.S., which identifies the procedures to determine incapacity, to provide that an examining committee member may allow a person to assist in communicating with the alleged incapacitated person when requested by the court-appointed counsel for the alleged incapacitated person. The examining committee member must identify the person who provided assistance and describe the nature and method of assistance provided in his or her report.

**Section 6** of the bill amends s. 744.464, F.S., which addresses how a ward may be restored from an adjudication of incapacity to capacity, to clarify that a suggestion of capacity must state that the ward is currently capable of exercising some or all of the rights which were removed, including the capability to independently exercise his or her rights with appropriate assistance.

### **Considering SDM in Connection with Accommodating Students with Disabilities in Public Schools**

**Section 7** of the bill amends s. 1003.5716, F.S., which regulates the development of an individual education plan for the purpose of accommodating students with disabilities in public schools, to include SDM agreements as one method by which students may provide informed consent to allow his or her parents to continue to participate in educational decisions.

### **Effective Date**

**Section 8** of the bill provides that it takes effect on July 1, 2024.

## **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Supported decision-making agreements will result in fewer expenditures relating to guardianships and guardian advocates to the extent that the SDM agreements substitute for the more costly arrangements.

**C. Government Sector Impact:**

The bill will reduce costs to the court system for guardianship and guardian advocate proceedings to the extent that those proceedings are replaced by supported decision-making agreements.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 393.12, 709.2201, 744.3201, 744.331, 744.464, and 1003.5716.

This bill creates section 709.2209 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.