HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	15 Y, 0 N	Lloyd	Brazzell
2) Civil Justice Subcommittee	17 Y, 0 N	Mathews	Jones
3) Health & Human Services Committee		Lloyd	Calamas

SUMMARY ANALYSIS

Supported decisionmaking authority (SDM) is a person-driven decisionmaking model that empowers a person with a disability (the decisionmaker) to make life choices with help from a supporter, while the values, priorities, and wishes of the decisionmaker drive the process. The supporter identified in the SDM agreement helps the person with a disability understand and explore options, to know risks and benefits associated with the options, to receive recommendations, and to independently exercise his or her rights with appropriate assistance based on his or her unique needs and abilities. The SDM agreement model does not provide the designated agent, advisor, or supporter the authority to bind or act on behalf of the adult with a disability on any subject matter.

HB 73 creates an SDM agreement under Florida's Power of Attorney chapter, chapter 709. The bill permits an adult with disabilities to seek an SDM agreement. Such an agreement authorizes an agent, advisor, or supporter to:

- Assist the decisionmaker in understanding the options, responsibilities, and consequences of life decisions.
- Assist the decisionmaker in accessing, collecting, and obtaining information and records relevant to a life decision including, but not limited to, medical, psychological, financial, educational, or treatment records, to which the decisionmaker is entitled, from any person or entity.
- Assist the decisionmaker in exercising his or her rights.
- Assist the decisionmaker in communicating his or her decisions.
- Access the decisionmaker's personal information, to the extent authorized by the SDM agreement.

HB 73 also requires the circuit court to consider the specific needs and abilities of a person with developmental disabilities when determining whether to approve a request for a guardian advocate. When a guardian advocate court order is issued, the order must address what other alternatives to the guardian advocate were considered and why such alternatives were not sufficient.

For petitions to determine incapacity, the bill adds a requirement to address whether the alleged incapacitated person needs assistance to exercise his or her rights, including through SDM, and whether or not this level of assistance is appropriate or insufficient for the situation. HB 73 also permits the examining committee, which determines incapacity, to allow another individual to assist in communications with the individual with a disability, when requested by the court-appointed counsel for the alleged incapacitated person.

HB 73 does not appear to have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Developmental Disabilities

A developmental disability is statutorily defined 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]

Guardianship

When a court deems an individual legally incompetent,[2] a third party or a guardian may be appointed to make decisions on that individual's behalf.[3] Current state law defines a "guardian" as a person who has been appointed by the court to act on behalf of a ward's person, property, or both.[4] The process to determine an individual's incapacity and the possible appointment of a guardian begins with a verified petition. The petition must provide detailed, factual information supporting the reasons the petitioner believes the individual to be incapacitated, including the specific rights or activities the alleged incapacitated person is incapable of managing on their own behalf.[5] Once a person has been found to be incapacitated, a specific guardianship order is issued with details on specific restrictions, the role of the guardian, and the name of the guardian.[6] The order must:

- Be consistent with the ward's welfare and safety;
- Clearly state the rights removed from the ward and delegated to the guardian;
- Be the least restrictive and appropriate alternative; and
- Reserve to the ward the right to make decisions in all matters commensurate with his or her ability to do so.[7]

Any resident of the state who is 18 years old and of sound mind is qualified to act as a guardian.[8] A nonresident of this state may act as a guardian of state resident if they are related to the person by blood, adoption, or law.[9] Individuals who are disqualified include those who have been convicted of felonies, those who are incapacitated by illness, or are otherwise unable to assist another with the execution of their duties.[10]

A guardian coordinates and monitors his or her ward's services and needs, including his or her funds, as directed by the guardianship court order.[11] The ward's funds and property belong to the ward and do not become the property of the guardian. These funds must be kept separate from and accounted for independently from any of the guardian's funds.

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[1] S. 393.063(9), F.S.
[2] Current state law defines an "incapacitated person" to mean 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. *See* s. 744.102(12), F.S.
[3] Martinis, J., *Supported decisionmaking: Protecting rights, ensuring choices*, BIFOCAL: A Journal of the ABA Commission on Law and Aging, 36(5), pgs. 107-110 (2015), available at Supported Decision-Making: Protecting Rights, Ensuring Choices (americanbar.org) (last visited December 2, 2023).
[4] S. 744.102(9), F.S.
[5] S. 744.3201, F.S.
[6] SS. 744.3371-.345, F.S.
[7] S. 744.2005, F.S.
[8] S. 744.309(1), F.S.
[9] S. 744.309(2), F.S.
[10] S. 744.309,(3), F.S.
[11] National Guardianship Association, *What is Guardianship?,* What Is Guardianship? | National Guardianship Association (last visited December 2, 2023).

Guardianships can be grouped into different types based on the level of authority granted to the guardian:

- *Limited or partial guardianship*[12] occurs when an individual has been deemed incapable of making decisions in only specific areas of life, and a guardian has the authority to decide for the individual in those specific areas only. The grants of legal authority granted or not granted to a guardian are specially noted in the court order.
- *Full or plenary guardianship*[13] occurs when the court has found that an individual lacks capacity to make all legal decisions, and the guardian is authorized to make all decisions for the ward.[14]

Once awarded guardianship, a guardian may be further categorized based on how he or she reaches decisions for his or her ward. A guardian may substitute his or her own understanding of the ward's wishes. These substitute decisionmakers generally follow one of two standards:

- *A substituted judgement standard* means the guardian makes decisions he or she believes the ward would have wanted, if capable.
- *A best interest judgement* standard means the guardian makes decisions based on what the guardian determines to be in the ward's best interest.[15]

In 1987, then-United States Congressman Claude Pepper likened the rights a ward has to that of a felon and posited that:

> *The typical ward has fewer rights than the typical convicted felon . . . . By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception . . . of the death penalty.*[16]

The guardian, as 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.[17]

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.[18] Should a guardian breach his or her fiduciary duty to the ward, the court is authorized to intervene.[19]

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[12] *See* S. 744.102(9)(a), F.S.: A "Limited guardian" means 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.

[13] *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.

[14] 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).

[15] Shalowitz, DI, et al., *The accuracy of surrogate decision makers: A systematic review*, Archives of Internal Medicine, 166(5), pgs. 493-497 (2006), available at The Accuracy of Surrogate Decision Makers: A Systematic Review | End of Life | JAMA Internal Medicine | JAMA Network (last visited December 2, 2023).

[16] *Id.*; Original citation of quote from H.R.Rep.No.100-641, at 1 (1987).

[17] S. 744.361(1), F.S.

[18] S.744.446, F.S.

[19] S. 744.446(4), F.S.

The following chart details some of the guardian's powers, either with or without court approval:

Examples of Powers That May Be Exercised by a Guardian	
Upon Court Approval[20]	**Without Court Approval[21]**
• 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.[22]

The best estimate of the total number of American adults living under a guardianship or conservatorship comes from a 2011 report which utilized limited data from participating states with centralized or computer-based accounting mechanisms for counting such documents. In this widely cited report, the authors claim that at least 1.3 million adults were living under either a guardianship or conservatorship, and courts controlled over $50 billion in assets of those under these same guardianships or conservatorships. Other researchers have estimated that approximately 1.5 million people in the United States are subject to guardianship at any one time.[23]

Alternatives to Guardianship

Historically, it has been the general intent in Florida to apply the least restrictive forms of guardianship to assist those who may be partially or fully incapacitated. In October 2016, Chief Justice Jorge Labarga of the Florida Supreme Court established a Guardianship Workgroup to better protect vulnerable people who are subject to guardianship and guardian advocacy. The workgroup was charged with examining "judicial procedures and best practices pertaining to guardianship," focusing on topics including, but not limited to, the use of least restrictive alternatives that address specific functional limitations.[24]

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[20] S. 744.441, F.S.
[21] S. 744.444, F.S.
[22] S. 744.3215, F.S.
[23] Van Duizend, R., *The Implications of an Aging Population on the State Courts, "NCSC, Future Trends in State Courts, p. 76 (Williamsburg, VA: NCSC, 2008* (2011), available at: http://www.guardianship.org/reports/Uekert_Van_Duizend_Adult_Guardianships.pdf, (last visited December 2, 2023).
[24] Judicial Management Council, Guardianship Workgroup Final Report, pg. 7 (June 2018) (on file with Health and Human Services Committee staff).

The workgroup recommended requiring the petition form for the appointment of a guardian include the description of these alternatives to guardianship and an explanation as to why one of these alternatives were insufficient options to this guardianship request as it pertained to the specific individual. The workgroup further recommended expanding the types of alternatives that must be addressed during a guardianship petition. The report offered alternatives to guardianship, including SDM, durable powers of attorney, trusts, banking services, advance directives, medical proxies, and representative payees.[25]

Additionally, the workgroup recommended the petitioner acknowledge the existence of a designation of a preneed guardian, if one exists, and to identify his or her efforts in determining whether a designation exists in the petition for appointment of a guardian.[26]

Current Florida law recognizes several types of guardianships which cover all areas of decisionmaking for both adults and minors.[27] For individuals with capacity,[28] an *Advance Directive* document can be written ahead of an expected need and express an individual's desires or provide decisionmaking authority to a trusted individual.[29] In either event, the individual making the advance directive must have the mental capacity to understand what he or she is doing at the time the directive is signed.

Durable Power of Attorney

Similar to an Advance Directive, a Durable Power of Attorney (POA) is a special type of written advance directive. An individual or grantor must demonstrate the capacity to understand the transfer of his or her decisionmaking rights to another individual or agent at the time of the document's execution. The rights granted can be as broad or as limited as the law allows and can include health care decisions. A POA is called "durable" when it is intended to continue even if the grantor becomes incapacitated.

Health Care Surrogate and Living Will

A health care surrogate arrangement identifies through a written document specifically one or more persons who represent another person in health care decisions if he or she becomes unable to make those decisions in the future. A living will is a document that specifies the maker's wishes for the withholding or withdrawal of life prolonging procedures in the event of a terminal condition and should be updated as an individual's health status changes.

Less Restrictive Alternatives to Guardianship

Medical Proxy

A medical proxy can make health care decisions for an incapacitated or developmentally disabled patient if there is no advance directive or, if there is an advanced directive, no surrogate is available to make health care decisions.[30] The statute does not require any legal action or documentation for appointment as proxy. Instead, there is a statutory priority, starting with a guardian, then moving to 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.

Client Advocate

[25] Id. at Appendix B.
[26] Id.
[27] *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.
[28] "Capacity" is defined for these purposes as the mental ability to make and understand important legal and other decisions.
[29] "Advanced Directives for health care decisions" is described and defined in s. 744.3115, F.S. An "advance directive" document, in general, is defined to mean a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter.
[30] S. 765.401, F.S.

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 the Agency for Persons with Disabilities.[31] This does not result in any legal authority, but allows the client advocate to participate in decisions related to services and provide an individual needed assistance as if he or she were the family member.

Co-signer of Bank Accounts

Requiring a second signature on an individual with disabilities' bank account, is a mechanism that may be used to 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 are flow in 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

Ordinarily, when a minor student in the public school system turns 18, parental rights for the management of the student's education are also automatically transferred to the now-adult student, including all of the rights which the student is entitled to as a disabled individual. . If the adult student does not have a named guardian and also does not have the ability to provide informed consent on his or her educational program, the parent can be appointed to represent the educational interests of the adult student.

Guardian Advocate

Guardian advocacy is a 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 decisionmaking ability to do some, but not all, of the decisionmaking tasks necessary to care for his or her person or property.[32] This status change can be accomplished without having to declare the person with a developmental disability incapacitated.

A petition to appoint a guardian advocate for a person with a developmental disability may be executed by an adult person who is a resident of this state, called "petitioner."[33] The petition must be verified by the petitioner and must state:

- The name, age, and present address of the petitioner and the petitioner's relationship to the person with a developmental disability;
- The name, age, county of residence, and present address of the person with a developmental disability;
- That the petitioner believes that the person needs a guardian advocate and the factual information on which such belief is based;
- The exact areas in which the person 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;
- The legal disabilities to which he or she is subject;
- If authority is sought over any property of the person, a description of that property and the reason why management or control of that property should be placed with a guardian advocate;
- The name of the proposed guardian advocate, the relationship of the proposed guardian advocate to the person with a developmental disability, the relationship of the proposed

[31] S. 393.0651, F.S.
[32] S. 393.12(2)(a), F.S.
[33] S. 393.12 (3), F.S.

guardian advocate with the providers of health care services, residential services, or other services to the person with developmental disabilities, and the reason why the proposed guardian advocate should be appointed. If a willing and qualified guardian advocate cannot be located, the petition must so state; and
- Whether the petitioner has knowledge, information, or belief that the person with a developmental disability has executed an advance directive or a durable power of attorney.[34]

Notice of the filing of the petition must be given to the person with a developmental disability, both verbally and in writing, in the language of the person and in English.[35] Notice must also be given to the person with a developmental disability's next of kin, any designated health care surrogate, an attorney-in-fact designated in a durable power of attorney, and such other persons as the court may direct.[36] A copy of the petition to appoint a guardian advocate must be served with the notice. The notice must state that a hearing will be held to inquire into the capacity of the person with a developmental disability to exercise the rights enumerated in the petition.[37] The notice must also state the date of the hearing on the petition.[38] The notice must state that the person with a developmental disability has the right to be represented by counsel of the person's own choice and the court must initially appoint counsel.[39]

Within three days after a petition has been filed, the court must appoint an attorney to represent a person with a developmental disability who is the subject of a petition to appoint a guardian advocate.[40] The person with a developmental disability may substitute his or her own attorney for the attorney appointed by the court.[41]

If the court finds the person with a developmental disability requires the appointment of a guardian advocate,[42] the order appointing the guardian advocate must contain findings of facts and conclusions of law:
- The nature and scope of the person's inability to make decisions;
- The exact areas in which the person 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 person 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 person;
- 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 person 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 person 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;
- If an advanced 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 person with a developmental disability is subject;
- The name of the person selected as guardian advocate; and

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[34] S. 393.12(3)(a)-(f), F.S.
[35] S. 393.12(4)(a), F.S.
[36] Id.
[37] S. 393.12(4)(b), F.S.
[38] Id.
[39] S. 393.12(4)(c), F.S.
[40] S. 393.12(5), F.S.
[41] Id.
[42] A "Guardian advocate" means a person appointed by a written order of the court to represent a person with developmental disabilities under s. 393.12, F.S. The term does not apply to a guardian advocate appointed for a person determined incompetent to consent to treatment under s. 394.4598, F.S.

- The powers, duties, and responsibilities of the guardian advocate, including bonding of the guardian advocate as provided by law.[43]

Generally, the difference between guardian advocacy and guardianship in Florida is the process to gain the authority. For guardian advocacy, the process does not include an adjudication of incapacity, while guardianship requires a finding of incapacity, at least in part. However, the duties and responsibilities are identical for guardian advocates and guardians.

Supported Decisionmaking

The integration mandate of Title II of the American with Disabilities Act[44] and subsequent federal court cases, such as *Olmstead v. L.C.,*[45] on how States' have delivered services to those individuals with disabilities are two sources used to support other decisionmaking policy models that are less restrictive than those currently available.[46] Supported decisionmaking (SDM) is another example of a person-driven decisionmaking model that empowers persons with disabilities to make life choices with help from a supporter or advisor.

The SDM process and procedure also 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 their 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 client has the necessary support to be successful, at the level the client has requested, to make recommendations and suggestions as needed, and generally advise but not act on behalf of the client.

The SDM model assumes all persons:

- 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
- That the choices of the individual should be honored.[47]

While SDM relationships can be of more or less formality and intensity ranging from informal support by people who speak with, rather than for, the individual with a disability[48] to more formalized micro boards and circles of support,[49] they share three common elements:

- Based on a set of guiding principles that emphasize the person with disability's autonomy, presumption of capacity, and right to make decisions on an equal basis with others;
- Recognize that a person'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 decisions, to help weigh options, to ensure that decisions are based on her own preferences, and, if

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[43] S. 393.12(8), F.S.

[44] 42 U.S.C. s.s. 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).*

[45] Olmstead v. L.C. *ex rel. Zimring*, 527 U.S. 581, 597–99 (1999).

[46] Martinis, J., *Making it happen: Strategies for supported decisionmaking*, Impact, 32(1), 45 (2019)..

[47] 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.

[48] 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).

[49] Id. at pgs. 10-11.

necessary, to interpret and/or communicate her decisions to other parties.[50]

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.[51] 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.[52]

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".[53] After that program ended, Texas passed new laws recognizing the availability and effectiveness of SDM and required courts to find that a person cannot make decisions using SDM before appointing a guardian.[54]

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 is given 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".[55] In 2015, the ABA published an article calling for the use of SDM as an 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".[56] In 2015, the ABA published an article calling for the use of SDM as an 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."[57]

In 2015, 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. It states 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." The NGA concluded "supported decisionmaking should be considered for the person before guardianship, and the SDM process should

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[50] Infra, FN 58, at pg. 306.
[51] 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).
[52] Supra, FN 33.
[53] Tex. Government Code Ann. § 531.02446 (2009), expired on Sept. 1, 2013.
[54] Tex. Est. Code s. 1101.101(a)(D) and (E).
[55] American Bar Association, *Beyond Guardianship: Supported Decisionmaking by Individuals with Intellectual Disabilities: A Short Summary from the 2012 National Roundtable*, available at http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/SDMRRoundtable_Summary.authcheckdam.pdf.
[56] Supra, FN 1.
[57] Supra, FN 1.

be incorporated as a part of the guardianship if guardianship is necessary".[58] 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.

Supported Decisionmaking Agreement

An SDM agreement is a written document evidencing an agreement between a person with disabilities 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.[59]

In general, all SDM relationships share three common features after varying for formality, types of support provided, or who provides the type of support. These commonalties are:

- The recognition that the person has the right to make his or her own decisions.
- The acknowledgement that the person can enter into a decision-making process or relationship without surrendering his or her right to make decisions; and
- The understanding that the person may need assistance in making or communicating decisions.[60]

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 education plan (IEP) team must begin the process of, and develop an IEP for, the identification of the need for transition services. The plan must be in place toto allow for implementation on the first day of the student's first year in high school.

As part of this process, when the student reaches age 17, the IEP team must provide information and instruction to the student and his or her parent on self-determination and the legal rights and responsibilities regarding the educational decisions that transfer to the student upon turning 18 years old. 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 Powers 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.

Effect of the Bill

HB 73 creates a new legal instrument for individuals, including those with 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.

A supported decisionmaking agreement,(SDM agreement), a new power of attorney form, provides information, recommendations, and assistance to the eligible individual through a "supporter". The

[58] National Guardianship Association, *"Position Statement on Guardianship, Surrogate Decision Making, and Supported Decision Making*," (2015), available at http://www.guardianship.org/documents/NGA_Policy_Statement_052016.pdf.
[59] Martinis, J., *Making it happen: Strategies for supported decisionmaking*, Impact, 32(1), 45 (2019).
[60] Martinis, J., *Supported Decision-Making: Protecting Rights, Ensuring Choices, available at* Supported Decision-Making: Protecting Rights, Ensuring Choices (americanbar.org), Impact, (Commission on Law and Aging, Vol. 36, No. 5, May-June 2015)(December 2, 2023).

"supporter" would assist the individual in making decisions and exercising his or her rights, but that supporter does not have any authority to make any binding decisions for or on behalf of the individual.

The SDM agreement limits the supporter's authority and only permits the 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.

To determine incapacity under ch. 744, F.S., the bill would require an inquiry whether the alleged incapacitated person uses assistance to exercise his or her own rights, including an SDM agreement, and as to whether this level of assistance is sufficient or too restrictive. HB 73 also permits the examining committee, which determines incapacity, to allow a supporter to assist with communication with the individual with a disability when requested by the court-appointed counsel for the alleged incapacitated person.

The bill further requires the circuit courts to consider the specific needs and abilities of a person with developmental disabilities when assigning a guardian or a guardian advocate, or when determining competency of the individual. The final order addressing the level of guardianship or decisionmaking selected must address why a particular, especially a less restrictive, level of care was not selected instead of a more-restrictive choice when less restrictive options were available..

The bill adds an SDM agreement to the list of alternative methods for parental involvement in the educational decisionmaking under s. 1003.5716, F.S., adds information what an IEP team must share with a parent during the transition development process plan for a student with a disability.

B. SECTION DIRECTORY:

Section 1: Amends s. 393.12, F.S., relating to capacity; appointment of guardian advocate.
Section 2: Amends s. 709.2201, F.S.; relating to authority of agent.
Section 3: Creates s. 702.2209, F.S.; relating to supported decisionmaking agreements.
Section 4: Amends s. 744.3201, F.S.; relating to petition to determine incapacity.
Section 5: Amends s. 744.331, F.S.; relating to procedures to determine incapacity.
Section 6: Amends s. 744.464, F.S.; relating to suggestion of capacity.
Section 7: Amends s. 1003.5716, F.S.; relating to transition to postsecondary education and career opportunities
Section 8: Provides an effective date of July 1, 2024.

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:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not require rulemaking to implement its provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES