IN THE [redacted] COURT OF THE [redacted]
IN AND FOR [redacted] COUNTY, [redacted]

IN RE: GUARDIANSHIP ADVOCACY OF [redacted]

PROBATE DIVISION
CASE NO. [redacted]

_____/

PETITION FOR APPOINTMENT OF GUARDIAN ADVOCATE OF THE PERSON

Petitioner, [redacted], files this Petition for Appointment as Guardian Advocate of [redacted], pursuant to section 393.12, Florida Statutes, and Fla. Prob. R. 5.649, and alleges:

I. FACTUAL BACKGROUND

* * *

Respondent requires the appointment of his mother as his guardian advocate due to his diagnosis of autism spectrum disorder, which manifested before the age of eighteen and constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

* * *

II. PETITIONER'S CRIMINAL HISTORY

Petitioner has had limited involvement with the criminal justice system: twice in 2004 and once in 2007. Still, for the reasons detailed below, Petitioner respectfully asks this Court to consider the facts and circumstances concerning each incident and, in its discretion, grant Petitioner's request to be appointed as Respondent's guardian advocate.

* * *

A. Petitioner's January 2004 Offense.

As sworn to in her affidavit, in 2004, Petitioner faced daunting challenges. *See* Ex. A ¶¶ 2–4. At the time, Petitioner was a twenty-four-year-old single mother. *Id.* ¶ 2. Her son, Respondent, was diagnosed with Autism, and the boy's father had abandoned his disabled son and Petitioner, leaving them without support of any kind. *Id.* ¶ 4. Until the January 2004 charge, Petitioner had led a law-

abiding life for over twenty-four years. *Id.* ¶ 2. She has never abused her son nor put him at risk of abuse. In her affidavit, Petitioner stated that on one occasion, she spanked her son, causing him to bruise. *Id.* But Petitioner clarified and qualified her statement when she explained that "[Respondent] is very light-skinned; the bruise did not look good." *Id.*

Petitioner brought her son to daycare the next day. *Id.* But because Respondent is non-verbal, when the daycare staff questioned him about the discoloration, he was unable to articulate how easily his skin bruises. *Id.* Petitioner was charged with child abuse. *Id.* The court ordered Petitioner to be placed on probation and prevented her from seeing her son. *Id.* ¶ 3. As a result of being on probation, Petitioner struggled to find employment and eventually fell months behind in rent. *Id.* In her affidavit, Petitioner describes the state of her affairs as "total desperation." *Id.*

B. Petitioner's October 2004 Offense.

It was under the circumstances described above when, in October 2004, Petitioner made a poor choice and violated the conditions of her probation: she printed money orders to pay the past-due rent. *Id.* Petitioner immediately admitted regretting her decision, and she chose to turn herself over to her employer *before* ever cashing in the money orders. *Id.* Yet despite Petitioner's scruples, her employer called the police. *Id.* And although the police officers asked Petitioner's employer not to press charges—as Petitioner returned the unused money orders—her employer went ahead anyhow. *Id.* As a result, and for the same reasons noted above, Petitioner could not post the monetary bail set by the court, causing her to remain detained pretrial for over nine months. *Id.* ¶¶ 3–4. Ultimately, the court sentenced Petitioner to four years' probation. *Id.* ¶ 4.

ARGUMENT

Section 393.12 of the Florida guardian advocacy statute is silent as to criminal history disqualifications in appointing guardian advocates. The statute's disqualifications provision does not apply to applicants for guardian advocacy—a distinct proceeding governed by a separate statute. And the distinction is *not* without a difference. Such a misinterpretation creates a blanket prohibition against petitioners for both guardianship and guardian advocacy with any felony conviction or offenses in general, which is unsupported by the plain reading of the statute—a codification of the Legislature's intent. Therefore, for the reasons detailed below, Petitioner urges this Court to exercise its discretion on this genuine legal distinction, consider the totality of the circumstances, and appoint her as Respondent's guardian advocate.

A. Because section 744.309(3) of the Florida guardianship statute provides criminal history disqualifications for only proposed guardians, this Court should not assume those disqualifications equally apply to proposed guardian advocates and decline to adopt language the legislature omitted from the guardian advocacy statute.

On its face, section 393.12, Florida Statutes (2023), does not specify criminal history disqualifications for proposed guardian advocates; it only governs guardian advocacy proceedings. *See* §§ 393.12(3)(a)–(b), Fla. Stat. (2023). Although some Florida courts have applied the felony restriction in section 744.309(3) to guardian advocacy cases, no case law, statute, or regulation requires such application. *See* § 744.309(3), Fla. Stat. ("No person who has been convicted of a felony . . . shall be appointed to act as guardian."). Thus, it does not follow that courts should assume that the guardianship restrictions apply *ipso facto* to guardian advocacy. On the contrary, the statute's plain language provides no direction that a court must employ the restriction on guardian advocates. *Id.* (providing for disqualified persons only in the context of guardianship); *see GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007) (citing *Holly v. Auld*, 450 So. 2d 217, 217 (Fla.

1984)) ("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.").

Section 393.12, Florida Statutes, the Florida Guardian Advocacy Statute, and Chapter 744, Florida Statutes, which houses the Florida guardianship provisions, can be read such that the disqualifications listed under section 744.309(3) do not apply in cases of guardian advocacy. *Compare* § 393.12, Fla. Stat. ("[A]ppointment of guardian advocate.—"), *with* § 744.1012(1) ("Who may be appointed guardian of a resident ward.—"). Because chapter 744 refers to guardianship—not appointing guardian advocates, which is controlled by chapter 393—this Court should exercise its discretion and decline to subject Petitioner's guardian advocacy petition to the criminal conviction disqualification that applies to only guardians. Note, however, that even in guardianship, a court may exercise its discretion in the context of criminal background investigations. *See* § 744.3135(1), Fla. Stat. ("On petition by any interested person or on the court's own motion, the court may waive the requirement of a credit history investigation or a level 2 background screening, or both.").

Undeniably, then, the Florida legislature enacted guardian advocacy as a less restrictive alternative to guardianship:

> (1) Adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that *such deprivation may be unnecessary*.
>
> (2) It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that *alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed*.

§§ 744.1012(1)–(2) Fla. Stat. (emphasis added).

Likewise, section 744.3085, Florida Statutes, provides: "In accordance with the legislative intent in this chapter, courts are encouraged to consider appointing a guardian advocate, when appropriate, as a less restrictive form of guardianship." § 744.3085, Fla. Stat. If the legislature wanted courts to apply guardianship disqualifications to guardian advocates, it would have so said. ***Expressio unius est exclusio alterius*.**

The legislative intent, described above in section 744.1012, ossifies the importance of exploring alternatives to plenary guardianship: it recognizes that total incapacitation and deprivation of all civil and legal rights might be unnecessary. § 744.1012(1), Fla. Stat. That is, the statute underscores the principle of imposing the least restrictions on individuals who may be only partially incapable of caring for their own needs. § 744.1012(2), Fla. Stat. In *Smith v. Smith*, 224 So. 3d 740 (Fla. 2017), for example, the Florida Supreme Court explained: "Prior to 1989, guardianship laws in Florida took an 'all-or-nothing' approach that assumed a person is either competent and capable of exercising all civil rights, or incompetent and thus incapable of making any significant personal decision." *Id.* at 748 (quoting Ch. 89–96, Preamble, at 176, Laws of Fla.). Notably, "the Legislature found this approach to be intrusive and demeaning to a person whose loss of capacity is only partial." *Id.* Thus, while *Smith* referred to limited guardianships, the same logic applies *a fortiori* in the guardian advocacy context: the Legislature's findings confirm the value placed on meaningfully differentiating between plenary guardianship on the one hand and its less restrictive alternatives on the other. Indeed, the legislature thereby recognized the need for a more nuanced and flexible framework, one that respected the rights and autonomy of individuals with disabilities while still providing them with necessary protection and support.

What is more, the legislative purpose for providing a less restrictive form of guardianship is to guarantee parents of adult children with developmental and intellectual disabilities, like Petitioner,

with the ability to make necessary legal provisions for her son. "[A]pplying the plain language of the statute," *GTC Inc.*, 967 So. 2d at 785, will therefore not only fulfill the legislative intent that gave rise to guardian advocacy but also grant Petitioner the ability to serve as her son's guardian advocate.

Practical distinctions in the operation of guardian advocacies and guardianships further support the legislature's intent to maintain the two as distinct and separate. One stark example is that the guardian advocacy provisions are located within a separate statute from guardianship. *Compare* Ch. 744, Fla. Stat., Part III ("Types of Guardianship"), § 744.3085, Fla. Stat. ("Guardian advocates"), *with* Ch. 744, Fla. Stat., Part IV ("Guardians"), § 744.309 ("Who may be appointed guardian of a resident ward.–"). Another major distinction is that a person petitioning for guardian advocacy of the person only does not need to be represented by an attorney. That is, unless the court requires it or if the guardian advocate is delegated any rights regarding property other than the right to be the representative payee for government benefits. *See* § 393.12(2)(b), Fla. Stat.; Fla. Prob. R. 5.030. This distinction further supports Petitioner's argument as property rights pursuant to section 744.3215, such as to contract, to sue and defend lawsuits, to manage property, or to make any gift or disposition of property, are not being requested by Petitioner. Therefore, it would be more appropriate for this Court to impose less restrictive qualifications and preclude more stringent ones on proposed guardian advocates in general and, as detailed below, for Petitioner in particular.

* * *

B. Petitioner urges this Court to exercise its discretion and appoint Petitioner as her son's guardian advocate.

This Court has the "limited" discretion to appoint Petitioner as guardian advocate for Respondent, notwithstanding Petitioner's twenty-year-old non-violent felony conviction. *See Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 572 (Fla. 4th DCA 2000) (quoting *In re Castro*,

344 So. 2d 270, 271 (Fla. 4th DCA 1977)). In *Wilson v. Robinson*, 917 So. 2d 312 (Fla. 5th DCA 2005), the court explained that "in guardianship cases, as in other cases, discretionary acts are subject to the test of reasonableness, i.e., they must be supported by logic and justification for the result and founded on substantial, competent evidence." *Id.* at 313 (quoting *In re Guardianship of Sapp*, 868 So. 2d 687, 693 (Fla. 2d DCA 2004)) (internal quotation marks omitted). *Wilson* also states that a court abuses its discretion "when no reasonable person would take the view adopted by the trial court." *Id.* (citing *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)). "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable . . . ." *Canakaris*, 382 So. 2d at 1203.

By applying this test to the facts of Petitioner's case, a reasonable person would recognize that a mother who has cared for her son throughout his entire life—unaffected by her felony conviction, which occurred almost two decades ago—can serve as her disabled child's guardian advocate. Because Petitioner is the only suitable individual to care for Respondent's needs, no reasonable person would adopt the view that Respondent's mother should be denied the right to be appointed as her son's guardian advocate.

As discussed in Part II.B. *supra*, Petitioner's felony conviction resulted from her parole violation. Petitioner thus encourages this Court to carefully consider the circumstances that preceded the October 2004 charge. Still, even if this Court focuses on Petitioner's sole conviction, she encourages this Court to consider the facts and circumstances, specifically, how Petitioner tried to resolve the matter before her employer realized any financial loss. Presented in that light, Petitioner maintains that her 2004 conviction is not germane to this petition: that is, this case is precisely the type that warrants a court to exercise its discretion in favor of appointing Petitioner as Respondent's guardian advocate.

Lastly, Petitioner has not been involved with the criminal justice system in almost two decades, during which period she has cared for Respondent's needs. Therefore, it is logical for this Court to appoint her as Petitioner's guardian advocate. In that way, Petitioner could continue providing the necessary care that her son requires. Because Petitioner can effectively serve as Respondent's guardian advocate, this Court would be justified in granting Petitioner's request and thereby fulfill the purpose of guardian advocacy.

C. The totality of the circumstances weighs in favor of appointing Petitioner as Respondent's guardian advocate, and this Court should apply the qualification discretion on a case-by-case basis rather than taking a disqualification-fits-all approach.

Notwithstanding the above arguments, to the extent this Court applies the law governing guardianship to guardian advocates—which it should not—it would still be appropriate for the Court to exercise its discretion here and appoint Petitioner as Respondent's guardian advocate. There is no case law or regulation addressing the less restrictive means of guardian advocacy. But if this Court determines that the disqualifications set forth in section 744.309(3) should be applied to guardian advocacy cases as well, then it should be considered on a case-by-case basis.

The guardianship statute, which prohibits not only felony convictions but also those who have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any specific offenses, is overbroad: it precludes more activity than necessary to achieve its purpose. The current non-binding "application" for guardian advocates' criminal history disqualification derives from section 744.309(3), Florida Statutes, and reads:

> (3) DISQUALIFIED PERSONS.—No person who has been convicted of a felony . . . or who is otherwise *unsuitable to perform the duties of a guardian*, shall be appointed to act as guardian. Further, no person who has been judicially determined to have committed abuse, abandonment, or neglect against a child . . . or *who has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense*

> *prohibited under s. 435.04 or similar statute of another jurisdiction*, shall be appointed to act as a guardian.

§ 744.309(3), Fla. Stat. (2023) (emphasis added).

In a 2003 per curiam decision, the Fourth District Court of Appeal discussed the guardian felony restriction provided under section 744.309(3), Florida Statutes (2000). *See Levy v. Levy*, 861 So. 2d 99, 100 (Fla. 4th DCA 2003). The *Levy* court held that "the [district] court *shall consider the totality of the circumstances* to decide whether [petitioner] is '*otherwise unsuitable to perform the duties of a guardian*.'" *Id.* (quoting § 744.309(3), Fla. Stat. (2000)) (emphasis added). So even if this Court is inclined to apply the *guardianship* felony-conviction restriction to Petitioner, it still possesses the statutory authority to consider the totality of the circumstances.

Here, the facts support Petitioner's request because she is more than suitable to perform the duties that guardian advocacy requires. The facts also show why the guardianship statute's felony conviction disqualification is overbroad and inapposite to guardian advocacy. In the case of guardian advocacy, not only may the most qualified person for appointment be a parent with a felony conviction or record, but that individual may be the *only* appropriate or willing applicant. To that end, where the conviction or offense is decades old and influenced by extenuating circumstances, as here, this Court should consider its relative insignificance in determining the fitness of a petitioner seeking guardian advocacy.

* * *

Based on the points raised above, Petitioner can effectively serve as her son's guardian advocate, and this Court would be justified in exercising its discretion by granting her request.