

BILL ANALYSIS

H.B. 39
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Judiciary & Civil Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Demographers project that the segment of Texas' population over the age of 65 will more than double within the next 25 years. Interested parties note that many of these individuals may become incapacitated as they grow older, and, depending on the nature or degree of incapacity, may require the appointment of a guardian or other form of assistance. Other data indicates that the number of active guardianships in Texas already has increased significantly in the last four years. The parties contend that this dramatic increase, coupled with the potential for more guardianship needs in the future, suggests it is imperative that Texas take steps to ensure the guardianship system is not overburdened. The parties observe that the statutory policymaking body for the judicial branch has made certain recommendations for changes to the guardianship system to help prepare Texas for the expected increase in the need for guardianships. H.B. 39 seeks to address these recommendations.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

H.B. 39 amends the Estates Code to include allowing an incapacitated person to make personal decisions regarding the person's residence in the court's design of a guardianship that gives a guardian limited authority over an incapacitated person. The bill expands the matters an attorney ad litem is required to discuss, to the greatest extent possible, with a proposed ward to include whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. The bill defines "alternatives to guardianship" as including the execution of a medical power of attorney, appointment of an attorney in fact or agent under a durable power of attorney, execution of a declaration for mental health treatment, appointment of a representative payee to manage public benefits, establishment of a joint bank account, creation of a management trust, creation of a special needs trust, designation of a guardian before the need arises, and establishment of alternate forms of decision-making based on person-centered planning.

H.B. 39 requires an attorney ad litem, before a hearing in the proceeding for the appointment of a guardian, to investigate whether a guardianship is necessary for the proposed ward and, if the attorney ad litem determines that a guardianship is necessary, whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services. The bill defines "supports and services" as available formal and informal resources and assistance that

enable an individual to meet the individual's needs for food, clothing, or shelter; care for the individual's physical or mental health; manage the individual's financial affairs; or make personal decisions regarding residence, voting, operating a motor vehicle, and marriage. The bill requires the attorney ad litem, if the attorney determines that a guardianship is necessary, to certify to the court that the guardianship is necessary and reasonable efforts have been made to explore alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for the appointment of a guardian.

H.B. 39 requires the guardian ad litem to investigate whether a guardianship is necessary for the proposed ward and to evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian. The bill subjects such information gathered by the guardian ad litem to examination by the court.

H.B. 39 requires an attorney for an applicant for guardianship, like a court-appointed attorney or attorney ad litem in a guardianship proceeding, to be certified as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or the state bar's designee. The bill increases from three hours to four hours the required hours of credit for certification and requires one hour to be on the subject of alternatives to guardianship and supports and services available to proposed wards.

H.B. 39 requires a sworn application for guardianship to state, among other things, whether alternatives to guardianship and available supports and services to avoid guardianship were considered and whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for guardianship. The bill requires the necessary statement regarding the termination or limitation of rights requested for inclusion in the court's order of appointment to include, among other things, the termination of the right of the proposed ward to make personal decisions regarding residence.

H.B. 39 requires the court, before appointing a guardian for a proposed ward, to find by clear and convincing evidence, among other such findings, that alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible. The bill requires the finding that a court makes, before appointing a guardian for a proposed ward, by a preponderance of the evidence, and regarding the proposed ward's lack of capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property, to specifically state whether the proposed ward lacks the capacity, with or without supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

H.B. 39 requires the written letter or certificate presented to the court from a physician licensed in Texas for a determination of incapacity for certain adults to include, within the evaluation of the proposed ward's physical condition and mental functioning, a statement of whether improvement in the proposed ward's physical condition and mental functioning is possible and, if so, a statement of the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary. The bill requires the written letter or certificate to include a statement of whether a guardianship is necessary for the proposed ward and, if so, whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services. The bill requires an order appointing a guardian, if the letter or certificate stated that improvement in the ward's physical condition or mental functioning is possible and specified a period of less than a year after which the ward should be reevaluated to determine continued necessity for the guardianship, to include the date by which the guardian must submit to the court an updated letter or certificate containing the required information and statements. The bill excepts such an order from the statutory provision prohibiting a petition for adjudication that a ward no longer requires the guardianship from being filed during a period specified in the order appointing a guardian or a successor guardian without special leave. The bill requires the letter or certificate, in its statement of how or in what manner the proposed

ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward's physical or mental health, to include, among other information, the proposed ward's ability to solve problems. The bill removes from that statement the proposed ward's ability to perform simple calculations and adds the specification to the statement, in regard to the proposed ward's ability to administer to daily life activities, that the ward administer to those activities with and without supports and services.

H.B. 39 includes the condition that a proposed ward is totally without capacity to make personal decisions regarding residence among the conditions that must exist before a court may appoint a guardian of the proposed ward's person or estate, or both, with full authority over the incapacitated person and adds that condition to the findings of fact that must be included in an order appointing a guardian with full authority.

H.B. 39 adds the specification, for purposes of the provision authorizing a court to appoint a guardian with limited authority if a proposed ward lacks capacity to do some, but not all, of certain necessary tasks, that such capacity is with or without supports and services. The bill specifies that the court's authority to permit the proposed ward to care for himself or herself includes the authority to permit the proposed ward to make personal decisions regarding residence. The bill requires that an order appointing a guardian with limited authority specify the specific rights and powers retained by the person with the necessity for supports and services and the specific rights and powers retained by the person without the necessity for supports and services. The bill requires, for purposes of the findings of fact and specifications that must be included in an order appointing a guardian with limited authority, that an order specify whether the person retains the right to make personal decisions regarding residence if the person is incapacitated because of a mental condition.

H.B. 39 requires the court to give due consideration to the incapacitated person's preference of the person to be appointed guardian, regardless of whether the incapacitated person has designated by declaration a guardian before the need arises. The bill limits the authority of a guardian of the person of a ward to place the ward in a more restrictive care facility to cases of emergency but authorizes such placement if the guardian files an application with the court, the guardian provides notice to any persons who have requested notice, and the placement is authorized by court order.

H.B. 39 adds the specification to the requirement that a ward be found by the court to have full capacity to care for himself or herself and manage the ward's property as a condition for a guardianship to be settled and closed that such full capacity is with or without supports and services.

H.B. 39 specifies, for purposes of an application filed by a ward or any person interested in the ward's welfare for an order requesting certain specified findings, that a ward's capacity or lack of capacity to do some or all of certain tasks is a capacity that is with or without supports and services. The bill adds, in the requested finding for a ward who has the capacity to do some, but not all, of certain tasks, that the ward be permitted to make personal decisions regarding residence. The bill requires a hearing on such an application that requires the consideration only of evidence regarding the ward's mental or physical capacity at the time of the hearing that is relevant to the complete restoration of the ward's capacity or modification of the ward's guardianship to include whether the guardianship is necessary and whether the specific powers or duties of the guardian should be limited if the ward receives supports and services.

H.B. 39 requires the statement in a written letter or certificate presented to a court from a physician licensed in Texas regarding the restoration of a ward's capacity or the modification of a ward's guardianship that, in the physician's opinion, the ward has the capacity to provide food, clothing, and shelter for himself or herself, to care for the ward's own physical health, and to manage the ward's financial affairs to specify that the ward's capacity to do so is a capacity with or without supports and services.

H.B. 39 revises the provision requiring a court, before ordering the settlement and closing of a guardianship under an application filed with the court for complete restoration of a ward's capacity or for modification of the guardianship, to find by a preponderance of the evidence that the current nature and degree of the ward's incapacity warrants a modification and that some of the ward's rights need to be restored to add to that finding the specification that the ward's incapacity is with or without supports and services and to add to that finding the specification that some of the ward's rights that need to be restored are with or without supports or services. The bill requires a court order that completely restores a ward's capacity or modifies a ward's guardianship to include, among other required statements, a statement of, if applicable, any necessary supports and services for the restoration of the ward's capacity or modification of the guardianship. The bill requires an order modifying a guardianship to specify, in addition to the general requirements for such an order and if the ward's incapacity resulted from a mental condition, whether the ward retains the right to make personal decisions regarding residence.

EFFECTIVE DATE

September 1, 2015.