

By: Smithee

H.B. No. 39

A BILL TO BE ENTITLED

AN ACT

relating to guardianships for incapacitated persons.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 1001.001(b), Estates Code, is amended to read as follows:

(b) In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence.

SECTION 2. Chapter 1002, Estates Code, is amended by adding Sections 1002.0015 and 1002.031 to read as follows:

Sec. 1002.0015. ALTERNATIVES TO GUARDIANSHIP.

"Alternatives to guardianship" includes the:

(1) execution of a medical power of attorney under Chapter 166, Health and Safety Code;

(2) appointment of an attorney in fact or agent under a durable power of attorney as provided by Subtitle P, Title 2;

(3) execution of a declaration for mental health treatment under Chapter 137, Civil Practices and Remedies Code;

(4) appointment of a representative payee to manage public benefits;

- 1 (5) establishment of a joint bank account;
- 2 (6) creation of a management trust under Chapter 1301;
- 3 (7) creation of a special needs trust;
- 4 (8) designation of a guardian before the need arises
5 under Subchapter E, Chapter 1104; and
- 6 (9) establishment of alternate forms of
7 decision-making based on person-centered planning.

8 Sec. 1002.031. SUPPORTS AND SERVICES. "Supports and
9 services" means available formal and informal resources and
10 assistance that enable an individual to:

- 11 (1) meet the individual's needs for food, clothing, or
12 shelter;
- 13 (2) care for the individual's physical or mental
14 health;
- 15 (3) manage the individual's financial affairs; or
- 16 (4) make personal decisions regarding residence,
17 voting, operating a motor vehicle, and marriage.

18 SECTION 3. Section [1002.015](#), Estates Code, is amended to
19 read as follows:

20 Sec. 1002.015. GUARDIANSHIP PROCEEDING. The term
21 "guardianship proceeding" means a matter or proceeding related to a
22 guardianship or any other matter covered by this title, including:

- 23 (1) the appointment of a guardian of a minor or other
24 incapacitated person, including an incapacitated adult for whom
25 another court obtained continuing, exclusive jurisdiction in a suit
26 affecting the parent-child relationship when the person was a
27 child;

1 (2) an application, petition, or motion regarding
2 guardianship or a substitute for [~~an alternative to~~] guardianship
3 under this title;

4 (3) a mental health action; and

5 (4) an application, petition, or motion regarding a
6 trust created under Chapter 1301.

7 SECTION 4. Section 1054.004, Estates Code, is amended by
8 amending Subsection (a) and adding Subsection (c) to read as
9 follows:

10 (a) An attorney ad litem appointed under Section 1054.001
11 shall interview the proposed ward within a reasonable time before
12 the hearing in the proceeding for the appointment of a
13 guardian. To the greatest extent possible, the attorney shall
14 discuss with the proposed ward:

15 (1) the law and facts of the case;

16 (2) the proposed ward's legal options regarding
17 disposition of the case; [~~and~~]

18 (3) the grounds on which guardianship is sought; and

19 (4) whether alternatives to guardianship would meet
20 the needs of the proposed ward and avoid the need for the
21 appointment of a guardian.

22 (c) Before the hearing, the attorney ad litem shall discuss
23 with the proposed ward the attorney ad litem's opinion regarding:

24 (1) whether a guardianship is necessary for the
25 proposed ward; and

26 (2) if a guardianship is necessary, the specific
27 powers or duties of the guardian that should be limited if the

1 proposed ward receives supports and services.

2 SECTION 5. Section 1054.054, Estates Code, is amended by
3 adding Subsections (c) and (d) to read as follows:

4 (c) The guardian ad litem shall:

5 (1) investigate whether a guardianship is necessary
6 for the proposed ward; and

7 (2) evaluate alternatives to guardianship and
8 supports and services available to the proposed ward that would
9 avoid the need for appointment of a guardian.

10 (d) The information gathered by the guardian ad litem under
11 Subsection (c) is subject to examination by the court.

12 SECTION 6. Sections 1054.201(a) and (b), Estates Code, are
13 amended to read as follows:

14 (a) An attorney for an applicant for guardianship and a [A]
15 court-appointed attorney in a guardianship proceeding, including
16 an attorney ad litem, must be certified by the State Bar of Texas,
17 or a person or other entity designated by the state bar, as having
18 successfully completed a course of study in guardianship law and
19 procedure sponsored by the state bar or the state bar's designee.

20 (b) The State Bar of Texas shall require four [~~three~~] hours
21 of credit for certification under this subchapter, including one
22 hour on alternatives to guardianship and supports and services
23 available to proposed wards.

24 SECTION 7. Section 1101.001(b), Estates Code, is amended to
25 read as follows:

26 (b) The application must be sworn to by the applicant and
27 state:

1 (1) the proposed ward's name, sex, date of birth, and
2 address;

3 (2) the name, relationship, and address of the person
4 the applicant seeks to have appointed as guardian;

5 (3) whether guardianship of the person or estate, or
6 both, is sought;

7 (3-a) whether alternatives to guardianship and
8 available supports and services to avoid guardianship were
9 considered;

10 (3-b) whether any alternatives to guardianship and
11 supports and services available to the proposed ward considered are
12 feasible and would avoid the need for a guardianship;

13 (4) the nature and degree of the alleged incapacity,
14 the specific areas of protection and assistance requested, and the
15 limitation or termination of rights requested to be included in the
16 court's order of appointment, including a termination of:

17 (A) the right of a proposed ward who is 18 years
18 of age or older to vote in a public election; ~~and~~

19 (B) the proposed ward's eligibility to hold or
20 obtain a license to operate a motor vehicle under Chapter 521,
21 Transportation Code; and

22 (C) the right of a proposed ward to make personal
23 decisions regarding residence;

24 (5) the facts requiring the appointment of a guardian;

25 (6) the interest of the applicant in the appointment
26 of a guardian;

27 (7) the nature and description of any kind of

1 guardianship existing for the proposed ward in any other state;

2 (8) the name and address of any person or institution
3 having the care and custody of the proposed ward;

4 (9) the approximate value and description of the
5 proposed ward's property, including any compensation, pension,
6 insurance, or allowance to which the proposed ward may be entitled;

7 (10) the name and address of any person whom the
8 applicant knows to hold a power of attorney signed by the proposed
9 ward and a description of the type of power of attorney;

10 (11) for a proposed ward who is a minor, the following
11 information if known by the applicant:

12 (A) the name of each of the proposed ward's
13 parents and either the parent's address or that the parent is
14 deceased;

15 (B) the name and age of each of the proposed
16 ward's siblings, if any, and either the sibling's address or that
17 the sibling is deceased; and

18 (C) if each of the proposed ward's parents and
19 adult siblings are deceased, the names and addresses of the
20 proposed ward's other living relatives who are related to the
21 proposed ward within the third degree by consanguinity and who are
22 adults;

23 (12) for a proposed ward who is a minor, whether the
24 minor was the subject of a legal or conservatorship proceeding in
25 the preceding two years and, if so:

26 (A) the court involved;

27 (B) the nature of the proceeding; and

1 (C) any final disposition of the proceeding;

2 (13) for a proposed ward who is an adult, the following
3 information if known by the applicant:

4 (A) the name of the proposed ward's spouse, if
5 any, and either the spouse's address or that the spouse is deceased;

6 (B) the name of each of the proposed ward's
7 parents and either the parent's address or that the parent is
8 deceased;

9 (C) the name and age of each of the proposed
10 ward's siblings, if any, and either the sibling's address or that
11 the sibling is deceased;

12 (D) the name and age of each of the proposed
13 ward's children, if any, and either the child's address or that the
14 child is deceased; and

15 (E) if there is no living spouse, parent, adult
16 sibling, or adult child of the proposed ward, the names and
17 addresses of the proposed ward's other living relatives who are
18 related to the proposed ward within the third degree by
19 consanguinity and who are adults;

20 (14) facts showing that the court has venue of the
21 proceeding; and

22 (15) if applicable, that the person whom the applicant
23 seeks to have appointed as a guardian is a private professional
24 guardian who is certified under Subchapter C, Chapter 155,
25 Government Code, and has complied with the requirements of
26 Subchapter G, Chapter 1104.

27 SECTION 8. Section [1101.101](#), Estates Code, is amended by

1 amending Subsection (a) and adding Subsection (c) to read as
2 follows:

3 (a) Before appointing a guardian for a proposed ward, the
4 court must:

5 (1) find by clear and convincing evidence that:

6 (A) the proposed ward is an incapacitated person;

7 (B) it is in the proposed ward's best interest to
8 have the court appoint a person as the proposed ward's guardian;
9 ~~and~~

10 (C) the proposed ward's rights or property will
11 be protected by the appointment of a guardian;

12 (D) alternatives to guardianship that would
13 avoid the need for the appointment of a guardian have been
14 considered and determined not to be feasible; and

15 (E) supports and services available to the
16 proposed ward that would avoid the need for the appointment of a
17 guardian have been considered and determined not to be feasible;
18 and

19 (2) find by a preponderance of the evidence that:

20 (A) the court has venue of the case;

21 (B) the person to be appointed guardian is
22 eligible to act as guardian and is entitled to appointment, or, if
23 no eligible person entitled to appointment applies, the person
24 appointed is a proper person to act as guardian;

25 (C) if a guardian is appointed for a minor, the
26 guardianship is not created for the primary purpose of enabling the
27 minor to establish residency for enrollment in a school or school

1 district for which the minor is not otherwise eligible for
2 enrollment; and

3 (D) the proposed ward:

4 (i) is totally without capacity as provided
5 by this title to care for himself or herself and to manage his or her
6 property; or

7 (ii) lacks the capacity to do some, but not
8 all, of the tasks necessary to care for himself or herself or to
9 manage his or her property.

10 (c) A finding under Subsection (a)(2)(D)(ii) must
11 specifically state whether the proposed ward lacks the capacity, or
12 lacks sufficient capacity with supports and services, to make
13 personal decisions regarding residence, voting, operating a motor
14 vehicle, and marriage.

15 SECTION 9. Section 1101.103(b), Estates Code, is amended to
16 read as follows:

17 (b) The letter or certificate must:

18 (1) describe the nature, degree, and severity of the
19 proposed ward's incapacity, including any functional deficits
20 regarding the proposed ward's ability to:

21 (A) handle business and managerial matters;

22 (B) manage financial matters;

23 (C) operate a motor vehicle;

24 (D) make personal decisions regarding residence,
25 voting, and marriage; and

26 (E) consent to medical, dental, psychological,
27 or psychiatric treatment;

1 (2) in providing a description under Subdivision (1)
2 regarding the proposed ward's ability to operate a motor vehicle
3 and make personal decisions regarding voting, state whether in the
4 physician's opinion the proposed ward:

5 (A) has the mental capacity to vote in a public
6 election; and

7 (B) has the ability to safely operate a motor
8 vehicle;

9 (3) provide an evaluation of the proposed ward's
10 physical condition and mental functioning [~~function~~] and summarize
11 the proposed ward's medical history if reasonably available;

12 (3-a) in providing an evaluation under Subdivision
13 (3), state whether improvement in the proposed ward's physical
14 condition and mental functioning is possible and, if so, state the
15 period after which the proposed ward should be reevaluated to
16 determine whether a guardianship continues to be necessary;

17 (4) state how or in what manner the proposed ward's
18 ability to make or communicate responsible decisions concerning
19 himself or herself is affected by the proposed ward's physical or
20 mental health, including the proposed ward's ability to:

21 (A) understand or communicate;

22 (B) recognize familiar objects and individuals;

23 (C) solve problems [~~perform simple~~
24 ~~calculations~~];

25 (D) reason logically; and

26 (E) administer to daily life activities with and
27 without supports and services;

1 (5) state whether any current medication affects the
2 proposed ward's demeanor or the proposed ward's ability to
3 participate fully in a court proceeding;

4 (6) describe the precise physical and mental
5 conditions underlying a diagnosis of a mental disability, and state
6 whether the proposed ward would benefit from supports and services
7 that would allow the individual to live in the least restrictive
8 setting;

9 (6-a) state whether a guardianship is necessary for
10 the proposed ward and, if so, whether specific powers or duties of
11 the guardian should be limited if the proposed ward receives
12 supports and services; and

13 (7) include any other information required by the
14 court.

15 SECTION 10. Sections 1101.151(a) and (b), Estates Code, are
16 amended to read as follows:

17 (a) If it is found that the proposed ward is totally without
18 capacity to care for himself or herself, manage his or her property,
19 operate a motor vehicle, make personal decisions regarding
20 residence, and vote in a public election, the court may appoint a
21 guardian of the proposed ward's person or estate, or both, with full
22 authority over the incapacitated person except as provided by law.

23 (b) An order appointing a guardian under this section must
24 contain findings of fact and specify:

25 (1) the information required by Section 1101.153(a);

26 (2) that the guardian has full authority over the
27 incapacitated person;

1 (3) if necessary, the amount of funds from the corpus
2 of the person's estate the court will allow the guardian to spend
3 for the education and maintenance of the person under Subchapter A,
4 Chapter 1156;

5 (4) whether the person is totally incapacitated
6 because of a mental condition;

7 (5) that the person does not have the capacity to
8 operate a motor vehicle, make personal decisions regarding
9 residence, and ~~to~~ vote in a public election; and

10 (6) if it is a guardianship of the person of the ward
11 or of both the person and the estate of the ward, the rights of the
12 guardian with respect to the person as specified in Section
13 [1151.051\(c\)\(1\)](#).

14 SECTION 11. Sections [1101.152\(a\)](#) and (b), Estates Code, are
15 amended to read as follows:

16 (a) If it is found that the proposed ward lacks the capacity
17 to do some, but not all, of the tasks necessary to care for himself
18 or herself or to manage his or her property with or without supports
19 and services, the court may appoint a guardian with limited powers
20 and permit the proposed ward to care for himself or herself,
21 including making personal decisions regarding residence, or to
22 manage his or her property commensurate with the proposed ward's
23 ability.

24 (b) An order appointing a guardian under this section must
25 contain findings of fact and specify:

26 (1) the information required by Section [1101.153\(a\)](#);

27 (2) the specific powers, limitations, or duties of the

1 guardian with respect to the person's care or the management of the
2 person's property by the guardian;

3 (2-a) the specific rights and powers retained by the
4 person:

5 (A) with the necessity for supports and services;
6 and

7 (B) without the necessity for supports and
8 services;

9 (3) if necessary, the amount of funds from the corpus
10 of the person's estate the court will allow the guardian to spend
11 for the education and maintenance of the person under Subchapter A,
12 Chapter 1156; and

13 (4) whether the person is incapacitated because of a
14 mental condition and, if so, whether the person:

15 (A) retains the right to make personal decisions
16 regarding residence or vote in a public election; or

17 (B) maintains eligibility to hold or obtain a
18 license to operate a motor vehicle under Chapter 521,
19 Transportation Code.

20 SECTION 12. Section 1101.153, Estates Code, is amended by
21 adding Subsection (a-1) to read as follows:

22 (a-1) If the letter or certificate under Section
23 1101.103(b)(3-a) stated that improvement in the ward's physical
24 condition or mental functioning is possible and specified a period
25 of less than a year after which the ward should be reevaluated to
26 determine continued necessity for the guardianship, an order
27 appointing a guardian must include the date by which the guardian

1 must submit to the court an updated letter or certificate
2 containing the requirements of Section 1101.103(b).

3 SECTION 13. Section 1104.002, Estates Code, is amended to
4 read as follows:

5 Sec. 1104.002. PREFERENCE OF INCAPACITATED PERSON. Before
6 appointing a guardian, the court shall make a reasonable effort to
7 consider the incapacitated person's preference of the person to be
8 appointed guardian and, to the extent consistent with other
9 provisions of this title, shall give due consideration to the
10 preference indicated by the incapacitated person, regardless of
11 whether the person has designated by declaration a guardian before
12 the need arises under Subchapter E.

13 SECTION 14. Section 1151.051, Estates Code, is amended by
14 adding Subsection (e) to read as follows:

15 (e) Notwithstanding Subsection (c)(1) and except in cases
16 of emergency, a guardian of the person of a ward may only place the
17 ward in a more restrictive care facility if the guardian provides
18 notice of the proposed placement to the court and any person who has
19 requested notice and after:

20 (1) the court orders the placement at a hearing on the
21 matter, if a person objects to the proposed placement before the
22 eighth business day after the person's receipt of the notice; or

23 (2) the seventh business day after the court's receipt
24 of the notice, if the court does not schedule a hearing, on its own
25 motion, on the proposed placement before that day.

26 SECTION 15. Sections 1202.001(b) and (c), Estates Code, are
27 amended to read as follows:

1 (b) A guardianship shall be settled and closed when the
2 ward:

3 (1) dies and, if the ward was married, the ward's
4 spouse qualifies as survivor in community;

5 (2) is found by the court to have full capacity, or
6 sufficient capacity with supports and services, to care for himself
7 or herself and to manage the ward's property;

8 (3) is no longer a minor; or

9 (4) no longer must have a guardian appointed to
10 receive funds due the ward from any governmental source.

11 (c) Except for an order issued under Section 1101.153(a-1),
12 an ~~An~~ order appointing a guardian or a successor guardian may
13 specify a period of not more than one year during which a petition
14 for adjudication that the ward no longer requires the guardianship
15 may not be filed without special leave.

16 SECTION 16. Section 1202.051, Estates Code, is amended to
17 read as follows:

18 Sec. 1202.051. APPLICATION AUTHORIZED. A ward or any
19 person interested in the ward's welfare may file a written
20 application with the court for an order:

21 (1) finding that the ward is no longer an
22 incapacitated person and ordering the settlement and closing of the
23 guardianship;

24 (2) finding that the ward lacks the capacity, or lacks
25 sufficient capacity with supports and services, to do some or all of
26 the tasks necessary to provide food, clothing, or shelter for
27 himself or herself, to care for the ward's own physical health, or

1 to manage the ward's own financial affairs and granting additional
2 powers or duties to the guardian; or

3 (3) finding that the ward has the capacity, or
4 sufficient capacity with supports and services, to do some, but not
5 all, of the tasks necessary to provide food, clothing, or shelter
6 for himself or herself, to care for the ward's own physical health,
7 or to manage the ward's own financial affairs and:

8 (A) limiting the guardian's powers or duties; and

9 (B) permitting the ward to care for himself or
10 herself, make personal decisions regarding residence, or [~~to~~]
11 manage the ward's own financial affairs commensurate with the
12 ward's ability, with or without supports and services.

13 SECTION 17. Section 1202.151(a), Estates Code, is amended
14 to read as follows:

15 (a) Except as provided by Section 1202.201, at a hearing on
16 an application filed under Section 1202.051, the court shall
17 consider only evidence regarding the ward's mental or physical
18 capacity at the time of the hearing that is relevant to the complete
19 restoration of the ward's capacity or modification of the ward's
20 guardianship, including whether:

21 (1) the guardianship is necessary; and

22 (2) specific powers or duties of the guardian should
23 be limited if the ward receives supports and services.

24 SECTION 18. Section 1202.152(b), Estates Code, is amended
25 to read as follows:

26 (b) A letter or certificate presented under Subsection (a)
27 must:

1 (1) describe the nature and degree of incapacity,
2 including the medical history if reasonably available, or state
3 that, in the physician's opinion, the ward has the capacity, or
4 sufficient capacity with supports and services, to:

5 (A) provide food, clothing, and shelter for
6 himself or herself;

7 (B) care for the ward's own physical health; and

8 (C) manage the ward's financial affairs;

9 (2) provide a medical prognosis specifying the
10 estimated severity of any incapacity;

11 (3) state how or in what manner the ward's ability to
12 make or communicate responsible decisions concerning himself or
13 herself is affected by the ward's physical or mental health;

14 (4) state whether any current medication affects the
15 ward's demeanor or the ward's ability to participate fully in a
16 court proceeding;

17 (5) describe the precise physical and mental
18 conditions underlying a diagnosis of senility, if applicable; and

19 (6) include any other information required by the
20 court.

21 SECTION 19. Section [1202.153](#)(c), Estates Code, is amended
22 to read as follows:

23 (c) Before limiting the powers granted to or duties required
24 to be performed by the guardian under an application filed under
25 Section [1202.051](#), the court must find by a preponderance of the
26 evidence that the current nature and degree of the ward's
27 incapacity, with or without supports and services, warrants a

1 modification of the guardianship and that some of the ward's rights
2 need to be restored, with or without supports and services.

3 SECTION 20. Section 1202.154(a), Estates Code, is amended
4 to read as follows:

5 (a) A court order entered with respect to an application
6 filed under Section 1202.051 to completely restore a ward's
7 capacity or modify a ward's guardianship must state:

8 (1) the guardian's name;

9 (2) the ward's name; [~~and~~]

10 (3) whether the type of guardianship being addressed
11 at the proceeding is a:

12 (A) guardianship of the person;

13 (B) guardianship of the estate; or

14 (C) guardianship of both the person and the
15 estate; and

16 (4) if applicable, any necessary supports and services
17 for the restoration of the ward's capacity or modification of the
18 guardianship.

19 SECTION 21. Section 1202.156, Estates Code, is amended to
20 read as follows:

21 Sec. 1202.156. ADDITIONAL REQUIREMENTS FOR ORDER MODIFYING
22 GUARDIANSHIP. If the court finds that a guardian's powers or
23 duties should be expanded or limited, the order modifying the
24 guardianship must contain findings of fact and specify, in addition
25 to the information required by Section 1202.154:

26 (1) the specific powers, limitations, or duties of the
27 guardian with respect to the care of the ward or the management of

1 the ward's property, as appropriate;

2 (2) the specific areas of protection and assistance to
3 be provided to the ward;

4 (3) any limitation of the ward's rights;

5 (4) if the ward's incapacity resulted from a mental
6 condition, whether the ward retains the right to vote and make
7 personal decisions regarding residence; and

8 (5) that the clerk shall modify the letters of
9 guardianship to the extent applicable to conform to the order.

10 SECTION 22. The heading to Subtitle I, Title 3, Estates
11 Code, is amended to read as follows:

12 SUBTITLE I. OTHER SPECIAL PROCEEDINGS AND SUBSTITUTES FOR
13 [~~ALTERNATIVES TO~~] GUARDIANSHIP

14 SECTION 23. (a) Except as otherwise provided by this
15 section, the changes in law made by this Act apply to:

16 (1) a guardianship created before, on, or after the
17 effective date of this Act; and

18 (2) an application for a guardianship pending on, or
19 filed on or after, the effective date of this Act.

20 (b) Sections 1054.004 and 1054.054, Estates Code, as
21 amended by this Act, apply only to a guardianship proceeding for
22 which a court has appointed a guardian ad litem or attorney ad litem
23 to represent the interests of a proposed ward on or after the
24 effective date of this Act.

25 (c) Sections 1054.201, 1101.101, 1101.103, 1101.151,
26 1101.152, and 1101.153, Estates Code, as amended by this Act, apply
27 only to a guardianship proceeding filed on or after the effective

1 date of this Act. A guardianship proceeding filed before the
2 effective date of this Act is governed by the law in effect on the
3 date the proceeding was filed, and the former law is continued in
4 effect for that purpose.

5 (d) Section 1101.001, Estates Code, as amended by this Act,
6 applies only to an application for the appointment of a guardian
7 filed on or after the effective date of this Act. An application
8 for the appointment of a guardian filed before the effective date of
9 this Act is governed by the law in effect on the date the
10 application was filed, and the former law is continued in effect for
11 that purpose.

12 (e) Section 1202.051, Estates Code, as amended by this Act,
13 applies only to an application for the restoration of a ward's
14 capacity or the modification of a ward's guardianship that is filed
15 on or after the effective date of this Act. An application for the
16 restoration of a ward's capacity or the modification of a ward's
17 guardianship that is filed before the effective date of this Act is
18 governed by the law in effect on the date the application was filed,
19 and the former law is continued in effect for that purpose.

20 (f) Sections 1202.151, 1202.152, 1202.153, 1202.154, and
21 1202.156, Estates Code, as amended by this Act, apply only to a
22 proceeding for the restoration of a ward's capacity or the
23 modification of a ward's guardianship that is filed on or after the
24 effective date of this Act. An application for the restoration of a
25 ward's capacity or the modification of a ward's guardianship that is
26 filed before the effective date of this Act is governed by the law
27 in effect on the date the application was filed, and the former law

1 is continued in effect for that purpose.

2 SECTION 24. This Act takes effect September 1, 2015.